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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1431-16T1

PAMELA O'DONNELL, Individually,
as Administratrix Ad Prosequendum
for the ESTATE OF TIMOTHY O'DONNELL,
as Administratrix Ad Prosequendum
for the ESTATE OF B.O., a minor,
and as Guardian Ad Litem of A.O.,
a minor,

Plaintiffs-Respondents,

v.

NEW JERSEY TURNPIKE AUTHORITY,

Defendant-Appellant,

and

SERVICE MCCABE AMBULANCE,
ELISAR MORALES and SCOTT
HAHN,

Defendants.

Submitted October 31, 2017 – Decided January 23, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-5236-16.

Chiesa Shahinian & Giantomasi PC, attorneys
for appellant (Christopher R. Paldino, Mindy
P. Fox and Bisola A. Taiwo, on the briefs).

Hobbie, Corrigan & Bertucio, PC, attorneys for
respondent (Jacqueline DeCarlo, of counsel and
on the brief).

PER CURIAM

Defendant New Jersey Turnpike Authority appeals from a Law Division order denying its motion to dismiss plaintiffs' complaint for filing a late tort claim notice and granting plaintiffs' cross-motion to file a late notice of tort claim. Defendant contends the motion court abused its discretion in finding that plaintiffs established sufficient reasons to demonstrate extraordinary circumstances justifying the late filing. Having reviewed the record and applicable law, we agree and therefore reverse.

This dispute arises from a tragic multi-vehicle accident on the New Jersey Turnpike. On February 22, 2016, Timothy O'Donnell slowed his vehicle, with his five-year old daughter B.O.¹ in the rear passenger seat, to stop at the Exit 14C outbound toll booth. His vehicle was then struck from behind by a speeding vehicle and was propelled into the inbound side of the toll plaza, where it

¹ The child's name has been redacted in the record.

was struck head-on by an ambulance resulting in the deaths of Timothy and B.O.

On May 16, 2016, initial counsel for plaintiffs Pamela O'Donnell, Individually, as Administratrix Ad Prosequendum for the Estate of Timothy O'Donnell, as Administratrix Ad Prosequendum for the Estate of B.O., a minor, and as Guardian Ad Litem for A.O., a minor, served a notice of tort claim under N.J.S.A. 59:8-8 on the State of New Jersey at its Risk Management Office, alleging the deaths of Timothy and B.O. resulted from defendant's negligent "safety and maintenance" of the Turnpike.

On September 6, 2016, one hundred and ninety-seven days after the accident, plaintiffs' second and current counsel served an amended tort claim notice on defendant. Less than a week later, plaintiffs filed suit against defendant and others. Defendant, in turn, filed a Rule 4:6-1 motion to dismiss the complaint contending it was barred due to plaintiffs' failure to serve the initial tort claim notice within ninety days of the accident as prescribed by N.J.S.A. 59:8-8. The motion was supported by a certification from defendant's Claims Specialist attesting that while defendant received the amended tort claim notice, it did not receive plaintiffs' initial notice. Defendant argued that, under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, it is not an entity of the State of New Jersey because it is statutorily

authorized to sue or be sued. N.J.S.A. 27:23-5(d). Thus, in accordance with N.J.S.A. 59:8-7, plaintiffs' initial tort claim notice had to be timely served on defendant, and not the State of New Jersey as plaintiffs had done.

Plaintiff opposed defendant's motion and cross-moved for leave to file a late tort claim under N.J.S.A. 59:8-9, which states:

A claimant who fails to file notice of his claim within [ninety] days as provided in [N.J.S.A.] 59:8-8 . . . , may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by [N.J.S.A.] 59:8-8 . . . or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter; provided that in no event may any suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.

The court denied defendant's motion to dismiss and granted plaintiffs' cross-motion. The court found that plaintiff failed to timely serve their initial tort claim notice on defendant;

service on the State was not service upon defendant. Nonetheless, the court allowed plaintiffs to file a late tort claim notice, citing plaintiffs' first attorney's negligence in not serving a timely tort claim notice against defendant as an extraordinary circumstance. In its oral opinion, the court explained:

[A]nd again, if it's inadvertent or negligence of the attorney, to me it's not to be visited upon the next attorney who clearly – reconciles . . . and corrects what the mistake was in . . . enough of a fashion to do so under the statute. . . . [W]hy else would they have a provision for the late notice claim – but to find extraordinary circumstances.

. . . .

[T]his case is . . . a situation where the late notice was picked up immediately – that it was not properly done and corrected. And to me, that's the whole purpose of . . . the statute.

On appeal, defendant argues that, despite the court correctly determining the service of the tort claim notice on the State was not service upon defendant, the court abused its discretion in finding an extraordinary circumstance to permit filing of a late tort claim notice based upon their first attorney's negligence.

Our standard of review of an order granting or denying a motion for leave to file a late notice of claim under the TCA is abuse of discretion. McDade v. Siazon, 208 N.J. 463, 476-77 (2011) (citing Lamb v. Glob. Landfill Reclaiming, 111 N.J. 134, 146

(1988)). "Although deference will ordinarily be given to the factual findings that undergird the trial court's decision, the court's conclusions will be overturned if they were reached under a misconception of the law." D.D. v. Univ. of Med. and Dentistry of New Jersey, 213 N.J. 130, 147 (2013).

Similarly, when we review a court's decision on a Rule 4:6-2 motion, "our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "On appeal, review is plenary and we owe no deference to the trial judge's conclusions." State v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (App. Div. 2015) (citing Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011)).

In 1994, the Legislature added the "extraordinary circumstances" language to N.J.S.A. 59:8-9, to replace a "fairly permissive standard" with a "more demanding" one in allowing the filing of a late tort claim notice. Lowe v. Zarghami, 158 N.J. 606, 625-26 (1999); see also Beauchamp v. Amedio, 164 N.J. 111, 118 (2000).

In D.D., our Supreme Court held an attorney's failure to file a timely tort claim notice did not amount to an extraordinary

circumstance. D.D., 213 N.J. at 158. Similar to the situation here, the plaintiff's first attorney failed to notify the defendants of the plaintiff's claim within the ninety-day TCA notice period, and thereafter, the plaintiff's new counsel sent the defendant a letter in the form of a tort claim notice. Id. at 136-37. The plaintiff also claimed that she did not know she needed to file a tort claim notice and that she was suffering from increased stress and anxiety due to the defendant's negligence. Id. at 137-38. The Court held,

were we to conclude that inattention or even malpractice of an attorney can serve to vault the statutory threshold for relief, we would be replacing circumstances that rendered a plaintiff incapable of complying with the time frame with a standard more in the nature of inadvertence, negligence, inattentiveness or ignorance.

The Legislature's waiver of sovereign immunity remains a limited one and we are not free to expand that waiver beyond its statutorily-established boundaries. Nor can we permit sympathy for a particular plaintiff to obscure the statutory standard to the point of obliterating it. Yet, were we to agree with the trial court and the appellate court's majority, or were we to follow the heartfelt call of our dissenting colleagues, that would be the result. In an effort to secure justice for a single plaintiff, we would create a mechanism by which any plaintiff, merely by pointing to a lawyer's failings, could bypass the statutory test for timeliness. The Legislature has commanded that relief be granted only in circumstances that are extraordinary. We find no basis in the

statute to substitute for that command the sort of unlimited and unbounded approach that the Appellate Division's majority and our dissenting colleagues think appropriate.

We do not leave this plaintiff without a remedy nor does the application of the standard chosen by our Legislature deprive her of justice. To the extent that the claim is barred by the attorney's failing, however, plaintiff's remedy, and her avenue to secure a just result, lies in an action against the attorney for malpractice.


Applying this standard, we must conclude the trial court mistakenly exercised its discretion in finding extraordinary circumstances because of plaintiffs' first attorney's failure to serve a timely tort claim notice on defendant, and their second attorney's prompt service of an amended notice on defendant. The record is clear that defendant did nothing to impede timely service of the initial tort claim notice, which it never received. There was no obligation on the State to forward the wrongly filed tort claim notice to defendant as plaintiff contends. And there were no obstacles preventing the first attorney from identifying defendant as the proper entity to be served a tort claim notice for negligent safety and maintenance of the Turnpike. See *Feinberg v. N.J. Dep't of Env'tl. Prot.*, 137 N.J. 126, 134-35 (1994) (an unrecorded lease made it nearly impossible for the plaintiff to identify the State as the owner of a canal). We also discern no merit to plaintiff's extraordinary circumstance argument that the

attorney's mistake was because he primarily practiced outside this State.

Accordingly, the motion court should have granted defendant's motion to dismiss for failure to file a timely tort claim notice, and denied plaintiff's cross-motion to file a timely tort claim notice.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION