



## **LEGAL ARGUMENTS**

### **Motion to File Late Notice of Tort Claim**

#### *Plaintiff Certification*

Plaintiff is employed by East Brook Middle School as a fifth grade teacher. On May 17, 2018 on Route 80 West in Mount Olive, New Jersey, plaintiff was a passenger on a school bus which was returning to East Brook Middle School in Paramus, New Jersey from The Waterloo Village in Stanhope, New Jersey. The bus was on Route 80 West in Mount Olive when it was involved in a serious/fatal collision with a dump truck. Upon information and belief, Mr. Muldrow should not have been authorized to operate the bus based on his prior driving record and other prior incidents. Further, Mr. Muldrow recklessly made an illegal U-turn on Route 80 West prior to colliding with a dump truck.

Following the accident, plaintiff was transported to Morristown Memorial Hospital. She was admitted and discharged the same day. Following her discharge from the hospital, she did not initially experience any lingering symptoms from the accident.

In September 2018, plaintiff returned to work following the accident. At that time, she began to experience anxiety upon seeing the other teachers involved in the accident return to work.

In December 2018, her anxiety worsened tremendously. She started to experience other symptoms, including panic attacks when she thought about the accident and saw children and staff that were also passengers on the bus. She also experienced severe anxiety symptoms when observing a bus or others driving erratically on the road. Moreover, she travels on Route 80, the highway on which the accident occurred, every day to go to work, which causes her significant anxiety.

In January 2019, she began treating with Dr. Margaret Contillo, a psychologist, to address her severe anxiety and panic attacks. She treats with Dr. Contillo once per week.

Additionally, East Brook retained a grief counselor for all staff at the school who she sees once per week.

Since she started treating with Dr. Contillo, she has advised that the severe anxiety and panic attacks plaintiff has been suffering are from post-traumatic stress disorder with a delayed manifestation following the aforementioned bus accident. Plaintiff was not diagnosed with post-traumatic stress disorder until January 2019.

Following the accident, plaintiff was interviewed by the Morris County Prosecutor's Office ("MCPO"). The MCPO informed plaintiff of her rights under the Tort Claims Act and that civil action could not be pursued until the criminal prosecution against the driver concluded. Based on her understanding of the above information from the MCPO, and the delayed manifestation of the post-traumatic stress disorder symptoms, she did not file a timely notice of tort claim.

Once plaintiff was diagnosed with post-traumatic stress disorder, she promptly sought the advice of present counsel as to whether she could still file a claim due to the delayed manifestation of same.

### *Legal Argument*

Plaintiff argues that she should be permitted to file a late notice of tort claim pursuant to N.J.S.A. 59:8-9. A claimant who fails to file a notice of tort claim within ninety days pursuant to N.J.S.A. 59:8-8 to file such notice within one year after the accrual of the claim upon a showing by way of motion and supporting affidavits that the public entity or public employee has not been substantially prejudiced by the late notice tort claim and extraordinary circumstances exist for the failure to file the notice of tort claim within the ninety-day period. N.J.S.A. 59:8-9. "[T]he notice provisions of the Tort Claims Act were not intended as a trap for the unwary." Lowe v. Zarghami, 158 N.J. 606, 629 (1999). The Legislature has not defined the term "extraordinary circumstances." As such the Court analyzes the "extraordinary circumstances" standard "on a case-by-case basis." O'Donnell v. New Jersey Tpk. Auth., 236 N.J. 335, 347 (2019). "Generally, we examine more carefully cases in which permission to file a late claim has been denied than those in which it has been granted, to the end that wherever possible cases may be heard on their merits, and any doubts which may exist should be resolved in favor of the application." Id. An application for late filing is generally viewed with great liberality so that wherever possible, cases may be heard on their merits. Escalante v. Twp. of Cinnaminson, Cinnaminson Mem'l Park, 283 N.J. Super. 244, 249 (App. Div. 1995). Additionally, any doubt as to the sufficiency of the reasons to excuse the late filing should be resolved in favor of the claimant. Id.

Plaintiff states that defendants will not be substantially prejudiced if plaintiff is permitted to file a late notice of tort claim.<sup>1</sup> Plaintiff argues that the present matter, similar to O'Donnell, defendants cannot argue they were unaware of the accident and did not have an opportunity to timely investigate. Defendants were well aware of the accident since the time it occurred as it was widely covered by the media. Defendants received twenty-four tort claims notices from other passengers on the bus within ninety days of the accident. As such, defendants did, or had

---

<sup>1</sup> New Jersey courts "have construed the substantial prejudice prong of N.J.S.A. 59:8-9 as placing on the public entity the burdens of production and persuasion on the question of prejudice." Mendez v. S. Jersey Transp. Auth., 416 N.J. Super. 525, 535 (App. Div. 2010). "Substantial prejudice in this context means substantial prejudice in maintaining one's defense, such as the loss of witnesses, the loss of evidence, fading memories, and the like." Id.

In Mendez, a motorist was injured in collision with a snow removal truck and filed suit against the city and the emergency rescue squad. The plaintiffs' attorney waited until viewing the videotape of the motor vehicle accident, which they requested, before filing the notice of tort claim. Their sole argument on the issue of substantial prejudice was the passage of time and that they were "totally unaware of the accident" and "lost a critical opportunity to engage in a timely investigation." Mendez, 416 N.J. Super. at 535. Given same, the court permitted the plaintiff to file a late notice of tort claim.

In O'Donnell v. New Jersey Tpk. Auth., 236 N.J. 335, 342 (2019), the plaintiff was fatally injured in an accident on the New Jersey Turnpike when he collided with an ambulance vehicle. Following the accident, the ambulance driver timely filed his notice of tort claim with the appropriate entity. Id. The plaintiff, the deceased's widow, also filed a timely tort claim notice. However, the notice was filed with the wrong entity based on the advice of counsel. Id. at 341. The Court held that the defendant would not be prejudiced by a late notice of tort claim by Plaintiff because the defendant was already served with a notice of tort claim by the ambulance driver. As such, the defendant had notice of the accident and the surrounding circumstances, and was able to complete an investigation and prepare a defense without a timely notice of tort claim from the plaintiff. O'Donnell v. New Jersey Tpk. Auth., 236 N.J. 335, 343 (2019).

ample opportunity to, conduct a timely investigation of the accident. In fact, after a thorough investigation, the operator of the school bus is being prosecuted for criminal conduct. Loss of witnesses, loss of evidence, and fading memories are not a concern in this matter so as to constitute substantial prejudice against defendants given the number of victims that are pursuing claims as a result of the accident.

Plaintiff next argues that extraordinary circumstances exist to permit plaintiff to file a late notice of tort claim. The Tort Claims Act "does not define what circumstances are to be considered 'extraordinary' and necessarily leaves it for a case-by-case determination as to whether the reasons given rise to the level of 'extraordinary' on the facts presented." Lowe, 158 N.J. at 626.

In Ohlweiler v. Twp. of Chatham, 290 N.J. Super. 399 (App. Div. 1996), disapproved of by Beauchamp v. Amedio, 164 N.J. 111 (2000), the plaintiff, a public school teacher, fell into an uncovered manhole during a class field trip. Her injury was initially believed to be only a sprained knee and her attorney advised that there was no cause of action due to no permanent injuries. Ohlweiler, 290 N.J. Super. at 400-401.<sup>2</sup>

Plaintiff argues that the present matter is analogous to Ohlweiler. Here, on May 17, 2018, plaintiff was a passenger on a school bus which was heading back to East Brook Middle School. Plaintiff was employed by East Brook as a fifth grade teacher. Following the accident, plaintiff was transported to Morristown Memorial Hospital. She was admitted and discharged the same day. Plaintiff did not initially experience any lingering symptoms from the accident.

However, in September 2018, upon returning to work at East Brook, plaintiff began to experience anxiety upon seeing the other teachers involved in the accident also return to work. In December 2018, plaintiff's anxiety and panic attacks worsened tremendously. Plaintiff also now experiences severe anxiety symptoms when observing a bus or others driving erratically on the road. Moreover, plaintiff must travel on Route 80, the highway on which the accident occurred, each day to go to work, which exacerbates plaintiff's anxiety. Given the above, the delayed manifestation of plaintiff's panic attacks and anxiety symptoms constitutes an "unusual, unanticipated, and unexpected" change in plaintiff's condition, under the standard set forth by the court in Ohweiler.

Moreover, like the plaintiff in Ohweiler, plaintiff in this matter was "diligent and timely throughout in seeking both medical care and legal advice respecting her injury." Ohlweiler, 290 N.J. Super. at 405. Plaintiff did not experience lingering symptoms in the months immediately following the accident. Once plaintiff's anxiety symptoms fully manifested in December 2018, she promptly began treating with a psychologist and, after a diagnosis of post-traumatic stress disorder with delayed manifestations, she sought the advice of counsel to evaluate her rights and whether she had a viable claim. Plaintiff also began visiting a grief counselor once per week that was retained by East Brook for the staff at the school following the accident.

---

<sup>2</sup> After the ninety-day deadline to file the notice of tort claim lapsed, the plaintiff discovered torn cartilage in her knee and attempted to file a late notice of tort claim. Id. The court held that the plaintiff was "diligent and timely throughout in seeking both medical care and legal advice respecting her injury." Ohlweiler, 290 N.J. Super. at 405. Since a knee sprain is generally a transitory injury, and because she consulted both a doctor and attorney in a timely manner, the court also held that the "unusual, unanticipated, and unexpected" change in the plaintiffs condition constituted extraordinary circumstances. Ohlweiler, 290 N.J. Super. at 402, 405.

As noted above, the decision in Ohlweiler was disapproved by the Supreme Court in Beauchamp v. Amedio, 164 N.J. 111 (2000). However, this was only to the extent that it suggested that the plaintiff's claim did not accrue until she discovered the torn ligament. The Supreme Court in Beauchamp did not disapprove of the Ohlweiler court's analysis of the plaintiffs right to file a late notice of tort claim and, in fact, affirmed the trial court's decision to permit same. See Beauchamp, 164 N.J. at 122-23.

Moreover, in O'Donnell, the Court held that attorney error or ignorance of the law alone is not enough to meet the "extraordinary circumstances" standard. However, that, along with other proofs beyond such error "when considered in their totality, demonstrate extraordinary circumstances." O'Donnell, 236 N.J. at 350. As set forth above, plaintiff was informed by the MCPO of her rights under the Tort Claims Act and that civil action could not be pursued until the criminal prosecution against the driver concluded. Based on plaintiff's understanding of such information as a lay person with no legal experience, and the delayed manifestation of the post-traumatic stress disorder symptoms, plaintiff has set forth facts that, when considered in their totality, demonstrate extraordinary circumstances.

### **Opposition (defendant Borough of Paramus)**

Defendant Borough of Paramus ("Borough") opposes the instant motion and contends that while the events of the underlying claim are tragic, the court must focus on the lengthy delay that occurred between the date of the accident and strictly apply the limit standards under which the rigid time period in which to file a Tort Claim Action can be relaxed. Defendant Borough argues that plaintiff's motion should fail because plaintiff has failed to demonstrate extraordinary circumstances permitting the filing of a late notice of claim.

The New Jersey Tort Claims Act specifically requires that a Notice of Claim be filed within ninety days after the accrual of a cause of action; otherwise, the claim shall forever be barred. N.J.S.A. 59:8-8(a). The courts have routinely held that only under very limited circumstances would a late Notice of Claim be permitted pursuant to N.J.S.A. 59:8-9.<sup>3</sup> The Tort Claims Notice Act was amended on June 23, 1994, to include the provision that a late notice must meet a "strict standard" under the statute. Zois v. New Jersey Sports & Expo. Auth., 286 N.J. Super. 670, 673 (App. Div. 1996). A movant seeking leave to file a late Notice of Claim is required to make a two-part showing; first, that there are sufficient reasons constituting "extraordinary circumstances" to justify the failure to file a claim, and second, that a late filing would not substantially prejudice the public entity. Lamb v. Global Landfill Reclaiming, 111

---

<sup>3</sup> N.J.S.A. 59:8-9 states as follows:

A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, 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 section 59:8-8 of this act 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.

(Emphasis added.)

N.J. 134, 136 (1988); Ohlweiler v. Township of Chatham, 290 N.J. Super. 399, 403 (App. Div. 1996).

Both prongs of the standard must be satisfied before the motion can be granted. Ibid. As such, there is no need to consider the second prong of the test, that a late filing would not substantially prejudice the public entity, if the plaintiff is unable to establish sufficient reasons for the delay. Lutz v. Semcer, 126 N.J. Super. 288, 289 (Law. Div. 1974), superseded by statute on other grounds; see also Beauchamp, and Ohlweiler, 290 N.J. Super. at 404, where the court analyzed extraordinary circumstances at length even though the defendants conceded that it would suffer no prejudice.

As emphasized by the Court in Zois, the apparent intent of the New Jersey Legislature in amending the statute in 1994 was to change the routine practice of granting plaintiff leave to file a late notice of claim, thus signaling an "end to a rule of liberality." Id. at 675. The New Jersey Supreme Court later upheld this concept, stating that the Legislature added the extraordinary circumstances requirement to the statute in 1994 in order to, "raise the bar for the filing of late notice from a 'fairly permissive standard' to a 'more demanding' one." Beauchamp, 164 N.J. at 118; quoting Lowe v. Zarghami, 158 N.J. 606, 625 (1999).

Thus, in order to file a late claim notice under the amended version of N.J.S.A. 59:8-9, a claimant must now come forward with a particularly compelling justification that is out of the ordinary, not usual or common, and one which experience or prudence would not foresee, anticipate or provide for. Beauchamp, 164 N.J. at 118.

Further, the New Jersey Supreme Court held in D.D. v. University of Medicine and Dentistry of New Jersey, 213 N.J. 130 (2013), that a plaintiff who alleged that she suffered from shock, stress, anxiety, fatigue, depression, high blood pressure, insomnia, blurred vision, and lack of concentration caused by the disclosure of her confidential information, did not meet the extraordinary circumstances standard for leave to file a late tort claims notice. Id. at 150.<sup>4</sup>

In the instant matter, plaintiff cannot show that she has a compelling justification for her failure to file a timely notice of claim, which warrants this court to permit the late filing of a notice of claim. Plaintiff sets forth in her certification that while she was involved in the accident on May 17, 2018, she was discharged from the hospital on the same day, and suffered no permanent physical injuries that incapacitated her. Plaintiff stated in her certification that she was not incapacitated, hospitalized, or inhibited in any way, yet for no justifiable reason, plaintiff failed to file a Notice of Claim pursuant to N.J.S.A. 59:8-8(a). This is despite the fact that

---

<sup>4</sup> In D.D., a plaintiff who discovered that her confidential health information had been disclosed, contacted an attorney, retained said attorney, and further met with the defendants to discuss the potential for a claim. Ibid. Despite the Plaintiffs attorney's assurances that he would "take care of everything," counsel failed to file a timely notice of claim. Id. at 136. Further, the record in D.D. is replete with evidence that the Plaintiff called her attorney at least ten times to follow up, but the attorney never responded. Ibid. D.D. then hired new counsel, who filed a motion for leave to file a late notice of claim. Id. at 137.

Despite the fact that D.D. made a diligent effort to contact her attorney, hired new counsel, and suffered from a multitude of medical issues supported by medical records, the Supreme Court found that D.D., had not met the extraordinary circumstances standard for leave to file a late notice of claim. Id. at 160. Further, the Court held specifically that the severity of the Plaintiffs medical condition did not have an impact meeting the extraordinary circumstances standard. Id. at 136.

plaintiff was advised of her rights to file a tort claim under the Tort Claims Act immediately following the accident.

Moreover, plaintiff certified that she was diagnosed with PTSD January 2019, eight months after the accident, and promptly sought the advice of counsel. Notwithstanding this assertion, the evidence before the court indicates that plaintiff's counsel inquired as to the filing of a Tort Claims Notice against other entities on July 26, 2018, yet no claim was filed until April 2, 2019.<sup>5</sup>

The time to file a Notice of Claim expired on August 15, 2018, almost a month after the time that plaintiff was on notice of the duty to do so. At the time of the filing of this application, more than 320 days had passed since the event, and yet plaintiff has failed to file a Notice of Claim with the respective defendants, pursuant to the New Jersey Tort Claims Act. Plaintiff was, at all times prior to the expiration of time to file a Tort Claims Notice, in every position and absolutely capable of filing a timely Notice of Claim.

Plaintiff waited until more than ten months after the time for filing a timely notice of claims had expired to file motion for leave to file a late notice of claim. As set forth above, the courts have routinely denied plaintiffs the opportunity to file a late Notice of Claim, no matter if the filing is one day late or one hundred days late. As set forth by the New Jersey Supreme Court in D.D., plaintiff's ignorance of the law cannot be a compelling and extraordinary circumstance that should permit the late filing of a notice of claim.

As set forth in Beauchamp, the purpose of the notice requirement are, 1) to allow public entities prompt access to information so that a defense may be prepared, 2) an opportunity for both parties to settle early without litigation, 3) to afford the public entity the chance to correct the conditions or practices which gave rise to the claim, and 4) to inform the public entity in advance as to the liability or indebtedness that it may be expected to meet. Beauchamp v. Amedio, 164 N.J. 111, 121-22 (2000). Plaintiff's conduct in failing to file the timely notice of claim, defies the intent of the Legislature in passing the 1994 amendment and the subsequent case law that stems from said amendment. The law in this matter is strict, and it must be administered in a manner intended by the Legislature when they crafted our laws.

Furthermore, plaintiff alleges that she was advised of her rights under the Tort Claims Act following the accident when she was interviewed by the Morris County Prosecutor's Office. Plaintiff, by and through counsel, sought information on where to file the Notice of Claim on July 26, 2018. As the time to file the Notice of Claim would not have expired until August 15, 2018, plaintiff still had more than sufficient time to file her timely Notice of Claim. Notwithstanding, plaintiff waited 320 days following the accident to file this motion.

It is noted that ignorance of the law is not a basis upon which to grant the relief plaintiff seeks in their motion, and further, there is no obligation for a public entity to inform potential plaintiffs of the Tort Claims Act. D.D. v. Univ. of Med. & Dentistry of New Jersey, 213 N.J. 130, 156 (2013).<sup>6</sup>

---

<sup>5</sup> Plaintiff's Exhibits C & D

<sup>6</sup> See Zois, 286 N.J. Super. at 674 ( observing that attorney inattention might have sufficed under pre-1994 statute but could not meet extraordinary circumstances test as set forth in N.J.S.A. 59:8-9 as it stands today).

As in Beauchamp, plaintiff cannot establish a particularly compelling justification that is out of the ordinary, not usual or common, and one which experience or prudence would not foresee, anticipate or provide for. Here, plaintiff admits to being informed of her rights. There is no evidence that plaintiff was incapacitated following the May 17, 2018 accident. Plaintiff was discharged from the hospital on the same day. She returned to work. She worked for three months following the start of the school year.

It is well established that inattentiveness to the file, ignorance of the law, or malpractice does not constitute extraordinary circumstances to permit a late filing of a notice of claims act. Rogers v. Cape May Cnty. Office of the Pub. Defender, 208 N.J. 414, 428 (2011). Thus, plaintiff's failure to file a late Notice of Tort Claim does not rise to the level of an extraordinary circumstance which permits the late filing of a notice of claim. Simply put, plaintiff claims that her delay in diagnosis of PTSD led to her late claim.

In D.D., the Supreme Court found that the plaintiff's medical condition did not have an impact meeting the extraordinary circumstances standard. Id. at 136. While unfortunate, plaintiff's personal issues are not severe enough, nor is any documented proof offered to show that plaintiff meets the extraordinary circumstances threshold. There is nothing so severe proffered in the record that prevented plaintiff from filing a Notice of Claim.

What stands out is that on July 26, 2018, plaintiff sought information on how to file a claim and to whom the notice should be directed. Plaintiff failed to take any proactive measures to prosecute her claim for damages and as such, fails to set forth an extraordinary circumstance that would allow this court to permit the late filing of a Notice of Claim under Beauchamp and its progeny.

Defendant Borough next argues that plaintiff's motion must be denied as permitting a late notice of claim will result in substantial prejudice to opposing defendant.<sup>7</sup> In the instant matter, plaintiff has failed to meet the initial burden of showing an extraordinary circumstance to permit a late filing of a tort claims notice. Despite having failed to meet the initial burden, defendant Borough will have suffered prejudice as it has not been able to promptly investigate this particular claim or plan for any liability it may be expected to meet. It is alleged that the sheer volume of claims should have put the Borough on notice, however, the significantly late claim would prejudice the Borough as they now have an additional claim to defend that was unexpectedly filed more than three hundred and twenty days after this accident.

---

<sup>7</sup> To prevail on a motion for leave to file a late Notice of Claim, plaintiff must also show that there is no substantial prejudice to the public entity. Allen v. Krause, 306 N.J. Super. 448, 454 (App. Div. 1997); see also, Escalante v. Township of Cinnaminson, 283 N.J. Super. 244, 253 (App. Div. 1995). The granting or denial of leave to file a late Notice of Claim should take into account not only the plaintiffs interest by also the abiding purposes of the Notice of Claim requirement. Ibid. The prejudicial effect of a late notice forms the second part of a burden-shifting analysis. Ibid. The issue of prejudice due to the late notice is not even reached unless Plaintiff first meets the burden of showing extraordinary circumstances justifying a late notice. Blank v. City of Elizabeth, 318 N.J. Super. 106, 112 (App. Div. 1999).



## **Opposition (defendants Borough of Paramus Board of Education, East Brook Middle School, Hudy Muldrow, Sr., and Michele Robinson)**

Defendants (collectively “Board of Ed.”) opposes the instant motion and contend that plaintiff has failed to establish that exceptional circumstances were present ninety days after the accrual of her claim such that the motion to file a late notice of tort claim must be denied.

If a claimant fails to file a timely notice of claim as prescribed by N.J.S.A. 59:8-8(a), they may request permission to file a late Notice of Claim on motion asserting sufficient reasons constituting extraordinary circumstances for the failure to file within a reasonable time thereafter. N.J.S.A. 59:8-9. The phrase “extraordinary circumstances” was added to N.J.S.A. 59:8-9 in 1994, for the explicit purpose of raising the standard for the filing of late notice of claim to a “more demanding” standard. Lowe v. Zarghami, 158 N.J. 606, 625 (1999). The Lowe Court observed that the amendment may have signaled an “end to a rule of liberality” in the filing of late notice of claims. Id. at 626.

In determining whether a claim has been timely filed, a court must undertake a “sequential analysis.” Beauchamp v. Amedio, 164 N.J. 111, 118 (2000). First, the date of the accrual of the claim must be determined. Id. After the date of accrual is determined, the next task is to determine whether a notice of claim was filed within the statutory ninety day window. Id. If a notice of claim was not filed within ninety-day window, the court must decide whether “extraordinary circumstances” exist justifying the filing of a late notice of claim. Id. at 118-19. These steps are “distinct” and not to be overlooked. The Beauchamp Court noted that “[i]t is a common and regrettable occurrence for accrual and extraordinary circumstances to be treated as interchangeable and for courts and litigants to overlook the primary question of accrual and directly confront the ultimate question of extraordinary circumstances.” Id. at 119.

Defendants Board of Ed. first argue plaintiff’s claim accrued on the date in which she knew that she was injured. The Tort Claims Act “does not define the date of accrual in any significant way.” Beauchamp, at 116. Courts have recognized that under the Tort Claims Act, a cause of action accrues in accordance with existing law. Ordinarily, the cause of action accrues when some allegedly wrongful act or omission results in some form of injury. Id. at 117. One of the exceptions to the general rule of accrual is when a claimant is unaware of the injury altogether or is unaware of the responsible party, which could otherwise be referred to as the “discovery rule.” Id. The date of accrual in a case such as this would be the date which the plaintiff became aware of her injury at all, without regard to severity. Fuller v. Rutgers State University, 154 N.J. Super. 420, 421-23 (App. Div. 1977); see also Beauchamp, 164 N.J. at 119 (“The date of accrual of [plaintiff’s] cause of action was the date of the accident in which she knew she was injured and that a public entity was responsible.”).<sup>8</sup> Indeed, such a rule is based on equitable considerations, and “defers the accrual date of a negligence action from the date when the injury is actually sustained to the time when plaintiff becomes aware or is chargeable with

---

<sup>8</sup> In Beauchamp, the date of the accrual of the injury was disputed because the Plaintiff asserted that she did not possess evidence of the permanency of her injury until approximately six months after the subject bus accident. Beauchamp, 164 N.J. at 114, 119. The Court noted that the fact that the plaintiff did not have evidence of permanency of her injury “in no way affects the maintainability of the action itself,” it merely limits the extent of the recovery by eliminating one of the elements of damages. Id. (quoting Montag, 145 N.J. Super. at 149). In sum, the Court stated that “once an injury is known, even a minor one, the ninety day notice” and “worsening of that injury does not extend the time or otherwise alter the party’s obligation.” Id. at 122.

the knowledge that the injury has been sustained.” Montag v. Bergen Bluestone Co., 145 N.J. Super. 140, 149-50 (Law Div. 1976).

According to plaintiff’s Certification, she was not aware of any “lingering” symptoms as a result of the subject accident immediately thereafter. She began to experience anxiety, which is the basis of the notice of claim that the instant application requests to file, at some time in September 2018. Thus, it is clear that pursuant to the controlling case law, namely Beauchamp, the plaintiff’s claim accrued “once an injury [was] known,” without regard to the gradual worsening of her condition noted in her Certification. This would be at a date no later than some point in September 2018, as the “worsening of that injury does not extend the time” to file a notice of claim. Beauchamp, at 122.

It is noteworthy that plaintiff relies on Ohlweiler v. Twp. of Chatham, 290 N.J. Super. 399 (App. Div. 1996), and correctly notes that the Supreme Court in Beauchamp disapproved of the reasoning utilized by the Appellate Division. Nevertheless, plaintiff relies upon that very same reasoning. Specifically, plaintiff argues that like the plaintiff in Ohlweiler, she diligently sought both medical care and legal advice with regard to her injuries. However, the issues presented in Ohlweiler were with regard to the accrual of the claim based on the existence of an “objective permanent injury,” and the Beauchamp Court explicitly determined that whether the injury satisfies a required element to prove damages is irrelevant in determining the accrual of the claim. Beauchamp, at 121. Indeed, plaintiff asks the court to rely on the “unusual, unanticipated, and unexpected” “standard” announced in Ohlweiler that is specifically disapproved of by Beauchamp. Plaintiff does not choose a date at which accrual actually occurred in her case, which is crucial to any analysis of the motion at bar. However, given the above cited case law, it is absolutely clear that plaintiff’s claim, even if she were to be given every reasonable inference, accrued no later than September 2018, when she began to experience symptoms of the injury that she now wishes to file a claim for.

Defendant Board of Ed. states that plaintiff failed to file a notice of tort claim within ninety days of the accrual of her injury. Plaintiff has failed to provide a date at which her claim actually accrued. It could be argued that plaintiff’s claim accrued on the date of the subject accident as she certainly became aware of a potential injury as she was admitted to a hospital for some time. Even if the court was to determine that plaintiff’s injuries accrued when her anxiety symptoms manifested, plaintiff is still far outside the ninety-day limit. Utilizing the September 2018 date provided by plaintiff for which her anxiety symptoms began, a notice of claim would have to have been filed by end of December 2018 to be timely.

Plaintiff has not set forth extraordinary circumstances present after the accrual of her claim to permit a late notice of claim. As noted by the Beauchamp Court, it is “regrettable” that often arguments with regard to accrual and extraordinary circumstances are treated as interchangeable, and that is the case in the instant motion. Plaintiff primarily relies upon Ohlweiler v. Twp. of Chatham, 290 N.J. Super. 399 (App. Div. 1996) in making an argument with regard to the accrual of the claim at issue, under the guise of an argument about extraordinary circumstances. Plaintiff argues that she sought treatment as her symptoms worsened and sought counsel at that time as well. Further, plaintiff argues that the “delayed manifestation”, which could otherwise be referred to as “delayed accrual”, was an “unusual, unanticipated, and unexpected” change in her condition as discussed in Ohlweiler. Plaintiff correctly notes that the Beauchamp Court’s criticism of Ohlweiler rests on the fact that

“Ohlweiler’s claim accrued at the time of her accident when she sustained an injury” and “neither the fact that she viewed her injuries as transitory, nor her decision not to file a claim, tolled accrual.” Beauchamp, at 121. Indeed, the Beauchamp Court’s statement that accrual and extraordinary circumstances are regrettably treated as interchangeable is apparent in, and was stated just before the analysis of Ohlweiler. When viewed in the proper light, the plaintiff’s arguments with regard to Ohlweiler are in fact arguments about accrual, and not extraordinary circumstances. Indeed, referencing “unusual, unanticipated, and unexpected” “standard” is simply arguing for a later accrual of the cause of action, nothing more, as a new set of symptoms or a new injury altogether is merely an argument for equitable tolling of the accrual date.

Defendant Board of Ed. argues that that the only “exceptional circumstance” that is not clearly related to accrual of the claims is plaintiff’s reference to a statement or statements made to her by unnamed personnel employed by the Morris County Prosecutor’s Office which allegedly informed her that “civil action could not be pursued until the criminal prosecution against the driver concluded.” Further, plaintiff argues that she relied upon that information as a lay person, and that combined with the delayed accrual result in a “totality of the circumstances” that demonstrates extraordinary circumstances. As stated above, the argument with regard to the delayed manifestation has no bearing on any extraordinary circumstances, and merely tolls accrual. Moreover, there is no case law cited in support of plaintiff’s suggestion that allegedly being misled by a third party with regard to the right of any recovery constitutes extraordinary circumstances. To the contrary, there is controlling case law that such a circumstance would not qualify as extraordinary whatsoever. See Bayer v. Township of Union, 414 N.J. Super. 238, 260-61 (App. Div. 2010); see also Rogers v. Cape May County Office of Public Defender, 208 N.J. 414, 428 (2011) (“[A] plaintiff’s ignorance of the ninety-day deadline or counsel’s inattention or administrative shortcomings do not constitute extraordinary circumstances.”).

The Court in Bayer dealt with a plaintiff who relied on counsel that gave him incorrect advice with regard to the accrual of his cause of action. Bayer, at 259-61. The Appellate Division noted that the issue presented by the advice of counsel was more akin to claims of ignorance of the law and attorney negligence, “neither of which have been held to constitute extraordinary circumstances to justify a late filing.” Id. at 261. The Bayer Court differentiated the type of advice that plaintiff had received with the advice received by the plaintiff in Beauchamp. The plaintiff in Beauchamp received advice from counsel she sought out that followed the decision in Ohlweiler, which was then a published opinion not yet criticized by any other court. Beauchamp, 164 N.J. at 122. The Court noted that “[b]ecause [plaintiff] relied on legal advice that was derived from confusion surrounding this issue, we think she deserves to be granted relief from the ninety day filing requirement.” Id. at 122-23. In sum, the attorney in Beauchamp relied on the now disapproved Ohlweiler for “incorrect” advice when Ohlweiler was still controlling law; which is truly a unique circumstance. Id. at 122. Plaintiff in the instant matter cannot claim that her circumstance is like that in Beauchamp, and instead, the circumstance is far more like described in Bayer.

Plaintiff in this matter relied on an unidentified employee of the Morris County Prosecutor’s Office. She did not necessarily rely on an attorney-employee of the Morris County Prosecutor’s Office, but even assuming she did, as stated above, there is no case law to support that reliance on a third-party attorney, much less a lay person, for incorrect legal advice qualifies as an extraordinary circumstance. As a result, plaintiff has failed to identify a single fact that even suggests extraordinary circumstances are present here.

Defendant Borough next argues that the Workers' Compensation Act bars the claims asserted by the plaintiff against the Board of Education defendants. The Workers' Compensation Act, N.J.S.A. 34:15-1, ordinarily provides the exclusive remedy for an employee who sustains an injury in an accident that arises out of and in the course of his employment.<sup>9</sup> Under New Jersey law, it is well-settled that the workers' compensation remedy is an exclusive one and the elective provisions of the worker's compensation statute are intended to bar common law tort actions against an employer and fellow employees. See Laidlow v. Hariton Machinery, Co., 170 N.J. 602, 605-606 (2002); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 170 (1985). When the parties have accepted this provision of the Act by express or implied agreement and the employee qualifies for benefits under the conditions of the Act, the employee shall ordinarily be barred from the pursuit of other remedies. Millison, 101 N.J. at 169.

The workers' compensation system has been described as a historic "trade-off" whereby "employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries." Laidlow, 170 N.J. at 605 (citing Millison, 101 N.J. 174). However, certain types of conduct by the employer and the employees will render the workers' compensation exclusive remedy "a nullity." Laidlow, 170 N.J. at 606. Those nullifying circumstances involve intentional wrongful conduct committed either by the worker or the employer. For instance, where an employer "causes the death or injury of an employee by committing an 'intentional wrong' [the employer] will not be insulated from common-law suit." Id. citing N.J.S.A. 34:15-8, indicating that two conditions must be satisfied:

- (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial

---

<sup>9</sup> The Workers' Compensation Act provides:

When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury, and the question of whether the employees was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

N.J.S.A. 34:15-1

The Act further provides:

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee and for compensation for the employee's death shall bind the employee's personal representatives, surviving spouse and next of kin, as well as the employer, and those conducting the employer's business during bankruptcy or insolvency. If an injury is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

N.J.S.A. 34:15-8

employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.

Laidlow, 170 N.J. at 617.

In the instant matter, plaintiff merely alleges that "Mr. Muldrow, Sr., should not have been authorized to operate the bus based on his prior driving record and other prior incidents. Further, Mr. Hudy Muldrow, Sr., recklessly made in illegal U-turn on Route 80 West prior to colliding with a dump truck." Plaintiff has failed to allege any conduct that falls into the "intentional wrong" exception set forth in Laidlow. As a result, her claims against the Board of Education defendants are barred.

## Reply

Plaintiff's reply provides that the totality of the circumstances demonstrates extraordinary circumstances justifying a late notice of tort claim. The decision granting or denying permission to file a late notice of claim is a matter left to the sound discretion of the trial court." D.D. v. Univ. of Med. & Dentistry of New Jersey, 213 N.J. 130, 140-41 (2013). "Judicial discretion is the option which a judge may exercise between the doing and the not doing of a thing which cannot be demanded as an absolute legal right, guided by the spirit, principles and analogies of the law, and founded upon the reason and conscience of the judge, to a just result in the light of the particular circumstances of the case." Univ. of Med. & Dentistry of New Jersey, 213 N.J. at 169. In evaluating whether a late notice of tort claim should be permitted, "[i]t is the totality of the circumstances against which plaintiff[']s situation must be measured." Univ. of Med. & Dentistry of New Jersey, 213 N.J. at 165. "Moreover, in engaging in the analysis of extraordinary circumstances, the court's focus must be directed to the evidence that relates to plaintiff's circumstances as they were during the ninety-day time period, because that is the time during which the notice should have been filed." Univ. of Med. & Dentistry of New Jersey, 213 N.J. at 151.

First, defendant Borough of Paramus asserts in their papers that counsel for plaintiff inquired into the status of claims and the filing of a tort claim on July 26, 2018. However, this inquiry was in relation to another lawsuit we were retained on in connection with the subject accident. Our office was not even contacted by plaintiff Jessica Madonna as of July 26, 2018. As such, this argument made by the defendant Borough of Paramus is irrelevant and should not be considered in the court's analysis.

Contrary to Board of Education defendants' argument in their papers, plaintiff does not conflate the accrual of plaintiff's claim with the extraordinary circumstances standard. However, plaintiff's medical condition and the nature of the injuries suffered as a result of the subject accident necessarily requires some overlap of those concepts. With respect to the accrual of plaintiff's claims, a specific date for same is extraordinarily difficult to ascertain as the symptoms of post-traumatic stress disorder are transitory. It cannot be said that plaintiff's claim accrued on the date of the accident, as plaintiff did not experience any post-traumatic stress symptoms, the injuries which are the basis for plaintiff's claims, until December 2018, and was not diagnosed with same until January 2019.

In any event, the court's analysis should focus on whether, based on the totality of the circumstances, plaintiff has demonstrated extraordinary circumstances justifying the filing of a

late notice of tort claim in this matter. This has been the focus of the courts in the recent decisions on this issue. See O'Donnell v. New Jersey Tpk. Auth., 236 N.J. 335, 342 (2019).<sup>10</sup>

It is well known that this was an extremely horrific accident. Following same, plaintiff, along with the other victims involved in the accident, were interviewed by the Morris County Prosecutor's Office ("MCPO"). Although plaintiff's symptoms had not yet manifested, the MCPO advised her that a lawsuit could not be filed until after the criminal prosecution of defendant Muldrow concluded. When the new school year began in September 2018, the school was in significant disarray as students and teachers involved in the accident, including plaintiff, returned for the first time since the subject accident. Upon seeing and interacting with others involved in the accident, plaintiff began to experience some minor anxiety. However, given plaintiff's history of anxiety, and the fact that the anxiety was initially minor, plaintiff could not have properly filed a notice of tort claim at that time as the injuries would not have satisfied the personal injury threshold.

In late December 2018, plaintiff's post-traumatic stress disorder symptoms began to manifest, generally in the form of severe and debilitating panic attacks. In January 2019, plaintiff began treating with her psychologist, Dr. Contillo once per week, who diagnosed plaintiff with post-traumatic stress disorder with delayed manifestation as a result of the subject accident. Plaintiff did not sit on her rights as she promptly sought the advice of counsel as to protect her rights due to the delayed manifestation of the post-traumatic stress disorder.

In their papers, the Board of Education defendants attempt to characterize plaintiff's injuries as a worsening of her condition. However, plaintiff's initial anxiety upon returning to school and post-traumatic stress disorder are distinct injuries. Moreover, defendants' argument that plaintiff conflates the concepts of extraordinary circumstances and accrual of the claims ignores controlling case law requiring a totality of the circumstances analysis for whether a late notice of tort claim is permitted. The nature of plaintiff's injuries and the circumstances surrounding the manifestation of same in this matter are unique. For example, and as set forth above, a precise date for the accrual of plaintiff's claims cannot even be determined as plaintiff's post-traumatic stress disorder did not manifest until many months after the subject accident. Situations such as the case at bar are the precise reason the courts have left the decision of whether to allow a late notice of tort claim in the sound decision of the trial court and on a case-by-case basis. O'Donnell v. New Jersey Tpk. Auth., 236 N.J. 335, 347 (2019); see also D.D. v. Univ. of Med. & Dentistry of New Jersey, 213 N.J. 130, 140-41 (2013).

In the alternative, plaintiff submits that the Notice of Tort Claim served on defendants, along with the present motion on April 2, 2019, was timely. As set forth above, plaintiff was not diagnosed with post-traumatic stress disorder until January 2019. Arguably, her claims did not accrue until that time as this was the first time plaintiff became aware of what her specific injuries were as well as the cause of same. Montag v. Bergen Bluestone Co., 145 N.J. Super. 149-150. (Law. Div. 1976). As such, the ninety-day period to file a notice of tort claim did not lapse until the middle of April 2019. Given that defendants were served with same within ninety days of accrual of her claims, plaintiff's Notice of Tort Claim was timely.

---

<sup>10</sup> See also Marielle Kuczinski v. State of New Jersey, et. al., Docket No: A-3694-17T2 (court found extraordinary circumstances existed justifying a late notice of tort claim just based on the severity of the plaintiff's psychological injuries and where the plaintiff submitted no supporting medical documentation. Instead, the Court held a plenary hearing and was able to observe the plaintiff and make credibility determinations).

Plaintiff further argues that the workers' compensation act does not bar plaintiff's claims against her employer. The Board of Education defendants argue that the Workers' Compensation Act bars plaintiff's claims in this matter. However, defendants are essentially seeking summary judgment on a legal issue when a complaint has not even been filed and no discovery has been conducted in this case. This is a Motion to File a Late Notice of Tort Claim to protect plaintiff's rights. If or when plaintiff files a complaint and is permitted to request and receive discovery, then defendant can properly raise this argument.

Notwithstanding same, in their papers, the Board of Education defendants correctly cite the relevant portions of the Workers' Compensation Act and correctly state that the statute is intended to bar common law tort actions against an employer and fellow employees except when the employer commits an "intentional wrong." Van Dunk v. Reckson Associates Realty Corp., 210 N.J. 449 (2012). However, defendants misapply the "intentional wrong" standard in this matter. The courts employ a two-step analysis in deciding whether an employer's actions constitute an intentional wrong. As set forth by the Court in Van Dunk:

First, a court considers the conduct prong, examining the employer's conduct in the setting of the particular case. Second, a court analyzes the context prong, considering whether the resulting injury or disease, and the circumstances in which it is inflicted on the worker, [may] fairly be viewed as a fact of life of [the particular field of employment]," or whether it is plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act.

Van Dunk, 210 N.J. 449, 461 (internal citations omitted).

"[T]he same facts and circumstances generally will be relevant to both prongs, but the conduct prong ordinarily is to be determined by the jury, while the context prong is a question of law for the court." Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 408 (2003). "[A]n intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm." Id.

Plaintiff can satisfy the conduct prong. Defendant Muldrow swerved across three lanes of traffic and made an illegal U-turn on Route 80 West prior to colliding with a dump truck. Clearly, defendant Muldrow's conduct constitutes an intentional wrong as swerving across three lanes and making an illegal U-turn on a major highway that generally contains substantial traffic is substantially certain to result in injury or death. Moreover, the State of New Jersey has determined that defendant Muldrow's actions were egregious enough to warrant criminal charges.

The Board of Education defendants committed an intentional wrong by permitting defendant Muldrow to operate the bus given his prior driving record and other prior incidents, including fourteen prior license suspensions. Defendant Muldrow's driving history was known, or should have been known by defendants prior to allowing him to operate the bus. Allowing an

individual with defendant Muldrow's extensive prior record and suspensions to operate a bus carrying children every day was substantially certain to result in injury or death.

Plaintiff can also satisfy the context prong as the surrounding circumstances of this accident are unique and egregious and the resulting injuries are plainly beyond anything the legislature could have contemplated as entitling plaintiff to recover only under the Workers' Compensation Act. The Legislature surely could not have contemplated that a bus driver carrying school children would swerve across three lanes of traffic and make an illegal U-turn, causing a collision and severely injuring the passengers, when enacting the Workers' Compensation Act. Moreover, the Legislature could not have contemplated that a school/municipality would permit an individual with a driving record such as defendant Muldrow's to operate a bus carrying school children. The Legislature simply could not have contemplated such a willful violation of the law and basic safety measures in limiting employees' right to bring common law tort actions against their employers.

### **Opposition (State of New Jersey, the New Jersey Department of Transportation, and the New Jersey Department of Education)**

State defendants oppose the instant motion and joins in Point I of the Paramus defendants' opposition brief for the reasons stated therein.

### **DECISION**

This court's analysis begins with N.J.S.A. 59:8-3, which provides that no action shall be brought against a public entity under the Tort Claims Act unless the claim has been presented in accordance with the procedure set forth in the Act. N.J.S.A. 59:8-8 provides that notice to the public entity must be provided within ninety days of the accrual of the cause of action.

N.J.S.A. 59:8-9 governs applications for a late notice of claim and provides in pertinent part:

A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, 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 section 59:8-8 of this act...

Our Supreme Court, in an opinion authored by Justice Patterson, discussed how the date of accrual is affected by the discovery rule under the Tort Claims Act:

The discovery rule, upon which the trial court relied, may affect the timeliness of a notice of claim in appropriate cases, by tolling the date of accrual for purposes of computing the ninety-day period



set forth in N.J.S.A. 59:8-8(a). See, e.g., Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 145 (1988). In Beauchamp v. Amedio, 164 N.J. 111 (2000), this Court addressed the interplay between the discovery rule and the standard applied when a claimant has filed a motion for leave to file a late notice of claim under N.J.S.A. 59:8-9:

The first task is always to determine when the claim accrued. The discovery rule is part and parcel of such an inquiry because it can toll the date of accrual. Once the date of accrual is ascertained, the next task is to determine whether a notice of claim was filed within ninety days. If not, the third task is to decide whether extraordinary circumstances exist justifying a late notice. Although occasionally the facts of a case may cut across those issues, they are entirely distinct. [Beauchamp, 164 N.J. at 118-19.]

McDade v. Siazon, 208 N.J. 463, 474-75 (2011).

The discovery rule tolls the commencement of the ninety-day notice period only "[u]ntil the existence of an injury (or, knowledge of the fact that a third-party has caused it) is ascertained." McDade, 208 N.J. at 475 (citing Beauchamp, 164 N.J. at 122). The test for the application of the discovery rule is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio v. D'Agostini, 166 N.J. 237, 240 (2001); see also Roa v. Roa, 200 N.J. 555, 571 (2010); Lopez v. Swyer, 62 N.J. 267, 273-74 (1973). In determining the timeliness of a Tort Claims Act notice of claim, the trial court's inquiry thus begins with the date upon which the claim accrues. Beauchamp, 164 N.J. at 118-19.

Following the date of accrual, the statutory scheme affords an intentionally short period in which the claimant must conduct an investigation and give notice to the correct public entity. McDade, 208 N.J. at 475. N.J.S.A. 59:8-8(a) requires that a plaintiff seeking to file a claim against a public entity serve a notice of claim within ninety days of the accrual of the cause of action. That requirement is intended to achieve the Legislature's goals. Id.

Those goals are (1) "to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit"; (2) "to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense"; (3) "to afford the public entity a chance to correct the conditions or practices which gave rise to the claim"; and (4) to inform the State "in advance as to the indebtedness or liability that it may be expected to meet." McDade, 208 N.J. at 475-76 (citing Beauchamp, 164 N.J. at 121-22)

The Supreme Court has acknowledged the rationale for strict application of the Tort Claims Act:

The New Jersey Tort Claims Act is the statutory mechanism through which our Legislature effected a waiver of sovereign immunity. . . . Although the legislative declaration observes that part of the purpose for enacting the statute was to address the harsh consequences of strictly applying the common law contours of sovereign immunity, we have recognized that the 'guiding principle' of the Tort Claims Act is "that 'immunity from tort liability is the general rule and liability is the exception.' "

D.D. v. University of Medicine and Dentistry of New Jersey, 213 N.J. 130 (2013), citing Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998)).

A movant seeking leave to file a late Notice of Claim is required to make a two-part showing; first, that there are sufficient reasons constituting "extraordinary circumstances" to justify the failure to file a claim, and second, that a late filing would not substantially prejudice the public entity. Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 136 (1988); Ohlweiler v. Township of Chatham, 290 N.J. Super. 399,403 (App. Div. 1996).

The Supreme Court has held the granting or denial of permission to file a late claim within the one-year period is a matter left to the discretion of the trial judge. McDade v. Siazon, 208 N.J. at 476-477; Lamb v. Global Landfill Reclaiming, 111 N.J. at 136. However, the trial court must demonstrate a factual basis for the grant of permission to file a late notice of claim. See D.D. v. University of Medicine and Dentistry of New Jersey, 213 N.J. 130, 147 (2013); Beyer v. Sea Bright Borough, 440 N.J. Super. 424, 429-432 (App. Div. 2015). The factual findings must make it clear that "extraordinary circumstances" were or were not shown; and the trial court's discretion does not extend to ignoring the need for the plaintiff to make the showing as required by the statute. Blank v. City of Elizabeth, 318 N.J. Super. 106, 110-11 (App. Div.), aff'd as modified, 162 N.J. 150 (1999).

Case law is clear that the issue of whether or not to permit the filing of a late notice of claim falls within the discretion of the court and should be made on a case-by-case determination. In the present case, it is undisputed that plaintiff, along with the students and other adults on the bus, was a victim of a traumatic accident on May 17, 2018. It is uncontroverted that first responders from various municipalities and State agencies responded to the dramatic scene. There were two fatalities on the bus; and various injuries to adults and children. Plaintiff argues "it is well known that this was an extremely horrific accident." First responders transported the occupants on the bus to area hospitals. Plaintiff was transported to Morristown Memorial Hospital, admitted, treated, and released.<sup>11</sup>

As set forth above, the McDade Court held the discovery rule tolls the commencement of the ninety-day notice period only until the existence of an injury is ascertained. McDade, 208 N.J. at 475. The test for the application of the discovery rule is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured at the fault of another." Caravaggio v. D'Agostini, 166 N.J. 237, 240 (2001). The test is not

---

<sup>11</sup> Counsel for the Board of Education defendants provided a copy of plaintiff's "First Report of Injury or Illness" form dated May 22, 2018, wherein plaintiff lists her injury as a result of the bus accident as a contusion/bruise.

subjective; it is a reasonable person standard. Given the uncontroverted reality of what plaintiff endured on that day, a reasonable person, on a school bus hit and literally torn apart as a result of the collision, having sustained contusions and bruises, and having witnessed the injuries of other passengers, including injuries leading to the death of a fellow teacher and a student, would be alerted that she sustained physical and psychological personal injuries as a result of the event.

There is no argument or suggestion plaintiff Madonna blacked out or psychologically blocked the dramatic reality of the events of that day. Plaintiff's argument that she had not yet manifested symptoms serious enough to maintain a claim under the Tort Claims Act is not a satisfactory basis to avoid the strict notice of claim requirement of the statute. The notice of claim provision does not require (nor could it) the applicant predict the extent of the injuries, or the amount of eventual medical bills, or the eventual medical prognosis. Rather, the purpose is to notify the public entity that plaintiff has sustained personal injuries as a result of a tort committed by agents of the public entity. Therefore, the accrual date was May 17, 2018.

Since plaintiff failed to file a notice of claim within ninety days of the accrual date, the court must determine whether exceptional circumstances exist to permit a late filing of the tort claim notice.

The extraordinary circumstances requirement of the 1994 amendment raises the bar to a demanding standard. Beauchamp, 164 N.J. at 118. In the case at bar, plaintiff has not come forward with a particularly compelling justification that is out of the ordinary, and one which experience or prudence would foresee, anticipate or provide for. Beauchamp, 164 N.J. at 118.

Plaintiff's reliance on selective language in Beauchamp is misplaced. In Beauchamp, the Court addressed the implications of an attorney's advice about a tort claim arose in the context of a party who was injured in a motor vehicle accident caused by a New Jersey Transit bus. Beauchamp v. Amedio, 164 N.J. at 111. Within two weeks of her injury, plaintiff consulted a doctor who told her that he could not yet determine whether her injuries would be permanent ones. Id. at 114. Promptly thereafter, she consulted with an attorney, explaining what the doctor had told her. Based on that equivocal medical opinion, the attorney advised her not to file a tort claims notice. Id. After the ninety-day time period had expired, plaintiff learned that her injuries were serious and permanent. Her motion for leave to file a late notice was rejected by both the trial and appellate courts. Id. at 115.

The Supreme Court held that extraordinary circumstances were established under the notice of claims exception because plaintiff Beauchamp did all she could to protect her potential claim and because she relied on legal advice that was derived from the confusion on this issue, she deserved to be granted relief from the ninety-day filing requirement of the Tort Claims Act. Beauchamp v. Amedio, at N.J. 122-23. Significantly, the accident occurred on March 15, 1997; the Ohlweiler decision was approved for publication on May 17, 1996. The Court noted:

Because of the confusion surrounding the issue of accrual at the time that Beauchamp consulted her lawyer about this case, we think further inquiry is required. Beauchamp's lawyer, cognizant of Ohlweiler, advised Beauchamp that her claim was premature. That advice, though incorrect, was justified so as to warrant extension of the time for filing in this case under the extraordinary

circumstances doctrine. In reaching that conclusion, we note that Beauchamp did everything she could to protect a potential claim. She sought medical attention immediately and she sought legal advice. Because she relied on legal advice that was derived from the confusion surrounding this issue, we think she deserves to be granted relief from the ninety day filing requirement of the statute. Beauchamp v. Amedio, 164 N.J. at 122-23 (internal citations omitted).

Plaintiff in Beauchamp established extraordinary circumstances because of her attorney's misplaced understanding and reliance on recent case law. Here, plaintiff cannot establish similar grounds for relief. The case law to date is clear, including in Beauchamp, that once an injury is known, even a minor one, the ninety day notice is triggered. Beauchamp, at 122. Worsening of that injury does not extend the time or otherwise alter the party's obligation. Id.

In this case, plaintiff has failed to demonstrate any exceptional circumstances that would justify relaxing the strict notice of claim filing deadline. Plaintiff admits to being informed of her rights. There is no evidence that plaintiff was incapacitated following the May 17, 2018 accident. Plaintiff was discharged from the hospital on the same day. She returned to work. She worked for three months following the start of the school year.

In Bayer, the Appellate Division recognized that the reasoning of Beauchamp does not authorize a finding of extraordinary circumstances every time an attorney misperceives the date of accrual of a cause of action. Bayer v. Twp. Of Union, 414 N.J. Super. 238, 259 (App. Div. 2010). The Bayer court observed, the Supreme Court in Beauchamp specifically found that the state of the law concerning accrual for tort claims purposes was confused because of the language utilized in Ohlweiler. As a result, the Appellate Division recognized that in Beauchamp, the Supreme Court did not rely on the error of a particular attorney, but instead the Court found that general confusion about the law created sufficient reason for the attorney's ultimately inaccurate advice. Id. at 260-61. The Appellate Division in Bayer held that because there was no similar confusion about the time of accrual of a false arrest claim, the incorrect advice from an attorney concerning the date on which the tort claim accrued did not suffice to meet the extraordinary circumstances standard. Bayer, 414 N.J. Super. at 260-61.

In D.D. v. University of Medicine and Dentistry of New Jersey, the Supreme Court noted that although plaintiff pointed to the failures of her first attorney, the Court found no basis on which to read into the statute any requirement that plaintiff be advised of the technical requirements for pursuing a claim. An attorney's inattention to a file, or even ignorance of the law, does not equate with extraordinary circumstances for tort claims purposes. D.D., at N.J. 154-55. The Supreme Court reiterated:

Beauchamp was not based on the attorney's shortcoming, but rather on a reasonable, albeit ultimately mistaken, perception of the TCA's requirements derived from a published Appellate Division opinion. The Legislature raised the statutory bar from sufficient to extraordinary, sending a strong message that, consistent with the TCA's limited waiver of sovereign immunity and the Court's usual

strict construction of its requirements, the relief should be granted less frequently. Were the Court to agree with plaintiff, it would create an entirely new rule that would permit wide latitude to claimants and counsel to circumvent the Legislature's directive. The Court is not free to expand beyond the Legislature's statutorily-established boundaries.

D.D., at N.J. 130.

Ultimately, the court in D.D. held that attorney inattention or negligence does not constitute an extraordinary circumstance, as defined by N.J.S.A. 59:8-9, sufficient to excuse noncompliance with the ninety-day deadline for the service of a tort-claim notice imposed by N.J.S.A. 59:8-8. D.D., at N.J. 157-58.

As courts in Beauchamp, D.D., and Bayer, have held that the mistakes or negligence of **counsel who represents** the plaintiff are insufficient to overcome the strict notice of claim requirement, plaintiff's reliance on the purported incorrect legal guidance and or advice of the unidentified employee of the Morris County Prosecutor's Office does not create exceptional circumstances. Further, despite being a lay individual, ignorance of the law is not a basis upon which to grant the relief plaintiff seeks. See D.D. v. Univ. of Med. & Dentistry of New Jersey, 213 N.J. at 156.

Finally, plaintiff has presented no statutory or judicial support for its contention that the delayed diagnosis of PTSD tolls the notice of claim requirement or is considered exceptional circumstances. As set forth above, the underlying facts of the accident, including the physical injuries sustained by the movant, and the emotional/psychological trauma inherent in being involved in the awful circumstances of that day, trigger the statutory clock for the filing of the Notice of Claim.

For the above reasons, plaintiff's motion to file a late notice of tort claim against defendants is **DENIED**.<sup>12</sup>

---

<sup>12</sup> In light of this decision, the court need not address the purported "futility" argument raised by defendants relating to potential application of the workers' compensation bar to tort recovery.