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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0614-23**

**KATHRYN HUTCHINS,**

Plaintiff-Appellant,

v.

**NJ TRANSIT CORP.  
and THE STATE OF  
NEW JERSEY,**

Defendants-Respondents.

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Submitted October 30, 2024 – Decided January 2, 2025

Before Judges Marczyk and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1657-23.

The Law Office of Savio D. Figaro, LLC, attorney for appellant (Savio D. Figaro, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondents (Sookie Bae-Park, Assistant Attorney General, of counsel; Hilary Cohen, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Kathryn Hutchins appeals from the trial court's September 19, 2023 order denying her motion for leave to file a late notice of tort claim on defendants New Jersey Transit Corporation and the State of New Jersey. The court determined the tort claim was not timely filed under N.J.S.A. 59:8-8 to -9 and that plaintiff failed to demonstrate extraordinary circumstances to allow the late filing. Based on a review of the record and the applicable legal principles, we affirm.

## I.

On August 16, 2022, plaintiff alleges she was injured while a passenger on a NJ Transit bus when it collided with a moped. The bus made a sudden stop, which plaintiff claims caused her to strike the seat in front of her. She asserts she sustained injuries to her neck, lower back, right knee, and a small laceration on her lip. The Jersey City Police Department investigated the accident and prepared a report containing information regarding the accident, plaintiff's injuries, and the identity of three other passengers who alleged they were injured as well.

Shortly after the accident, plaintiff sought representation from an attorney, who declined to take the case. However, the attorney warned plaintiff of the strict ninety-day time limit to file her notice of tort claim. In mid-September,

plaintiff contacted a second attorney. Initial appointments were cancelled due to scheduling conflicts occasioned by plaintiff's attorney attending a medical appointment with his mother and plaintiff having "limited mobility[,] . . . ongoing pain, . . . dependence on public transportation and [counsel]'s limited office hours."

Plaintiff and counsel finally met on November 3, 2022, when she completed the notice of claim. A subsequent meeting was scheduled on November 7, so plaintiff could obtain a copy of her hospital bills. Notably, plaintiff executed the notice of tort claim during the November 7 meeting. However, counsel "miscalculated the expiration date" and did not file the notice of claim until November 15, 2022, ninety-one days after the August 16, 2022 accident.

Plaintiff filed a complaint on May 11, 2023. On August 9, 2023, plaintiff moved for leave to file a late notice of claim. The trial court, as discussed more fully below, denied the motion in a September 19, 2023 order and written decision. The trial court found that plaintiff did "not me[e]t the burden of extraordinary circumstances [to] justify a delay in filing the notice of claim."

## II.

Plaintiff argues the trial court erred in denying her motion to file a late notice of claim because she was diligent in pursuing her claim, and NJ Transit was aware of material information about the accident through other sources and was not substantially prejudiced by a late notice of claim. She further asserts the trial court erred in denying her motion to file a late notice of claim because the interests of justice requires that a one-day delay be considered a sufficient reason constituting an extraordinary circumstance.

"Pursuant to the express terms of the Tort Claims Act, we review a trial court's application of the extraordinary circumstances exception for abuse of discretion." O'Donnell v. N.J. Tpk. Auth., 236 N.J. 335, 344 (2019); see also N.J.S.A. 59:8-9 (leaving it to "the discretion of a judge of the Superior Court" when determining whether a late notice may be filed). "A court abuses its discretion when its 'decision is made without rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.,

423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

"The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to :12-3, is the statutory mechanism through which our Legislature effected a waiver of sovereign immunity." D.D. v. Univ. of Med. and Dentistry of N.J., 213 N.J. 130, 133 (2013). "The guiding principle of the Tort Claims Act is that 'immunity from tort liability is the general rule and liability is the exception . . .'" 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)). "Among the most important limitations that the Act imposes on would-be claimants are . . . the statutory provisions that govern a claimant's obligation to file a notice of tort claim as a prerequisite to initiating litigation." D.D., 213 N.J. at 134 (citing N.J.S.A. 59:8-1 to -11).

Under N.J.S.A. 59:8-8,

[a] claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the [ninetieth] day after accrual of the cause of action. . . . The claimant shall be forever barred from recovering against a public entity or public employee if:

- a. [t]he claimant failed to file the claim with the public entity within [ninety] days

of accrual of the claim except as otherwise provided in N.J.S.A. 59:8-9.

N.J.S.A. 59:8-9, in pertinent part, provides:

[a] claimant who fails to file a notice of his claim within [ninety] days . . . 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 . . . .

Thus, N.J.S.A. 59:8-9 provides that a claimant may "file an application for leave to serve a late notice of claim on a showing of extraordinary circumstances, so long as the application is filed within one year of the accrual of the claim and the public entity has not been substantially prejudiced by the delay." O'Donnell, 236 N.J. at 346.

"However, the Legislature left . . . 'extraordinary circumstances' undefined." Ibid. A determination of what constitutes "extraordinary circumstances" is determined "on a case-by-case basis," Rogers v. Cape May Cty. Off. of Pub. Def., 208 N.J. 414, 428 (2011), "with the outcome of each case depending 'on the facts presented.'" O'Donnell, 236 N.J. at 347 (quoting Ventola

v. N.J. Veteran's Mem'l Home, 164 N.J. 74, 77 (2000)). "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.'" Lowe v. Zarghami, 158 N.J. 606, 629 (1999) (quoting Feinberg v. State, Dep't of Env't Prot., 137 N.J. 126, 135 (1994)). However, "an attorney's inattention, or even an attorney's malpractice, [does not] constitute[] an extraordinary circumstance sufficient to excuse failure to comply with the ninety-day filing deadline." D.D., 213 N.J. at 156.

In discussing the Legislature's 1994 adoption of the "extraordinary circumstances" provision, the Court in O'Donnell noted:

Prior to N.J.S.A 59:8-9's enactment, a claimant needed only to show that "sufficient reasons"-rather than extraordinary circumstances-prevented the filing of a timely notice of claim. This change of language signaled the enactment of a "more demanding standard," Lowe, 158 N.J. at 625-26, and "raise[d] the bar for the filing of a late notice" of claim. Rogers, 208 N.J. at 428.

[236 N.J. at 346 (alteration in original) (internal citations omitted and reformatted).]

Given that legislative purpose, our courts have generally applied the exception in a stringent manner. See, e.g., D.D., 213 N.J. at 156-57 (noting that "an attorney's inattention to a [client's] file, or even ignorance of the law," does not

equate with "extraordinary circumstances" to justify a late filing); O'Neill v. City of Newark, 304 N.J. Super. 543, 552-54 (App. Div. 1997) (finding no extraordinary circumstances when a plaintiff failed to file a notice within ninety days after being hospitalized due to a gunshot injury to his leg). As the Supreme Court has instructed,

[t]he Legislature's grant of authority to trial courts to permit a late notice in the exercise of their discretion does not equate with a grant of authority to override the statute's declaration of purpose or to substitute a lesser standard of proofs for the extraordinary circumstances demanded by the 1994 amendment to the statute itself.

[D.D., 213 N.J. at 148.]

A.

Plaintiff principally relies on O'Donnell to assert that the trial court should have granted her "motion for leave to file a late notice of claim because . . . plaintiff diligently pursued [her] claim and, due to the detailed [Jersey City Police report], . . . defendants were aware of material information related to [her] claim." Plaintiff notes her mobility was limited after the accident and she had to use crutches. Plaintiff's counsel asserts his personal obligations caused a delay in his meeting with plaintiff, which in turn "contributed to [the] delay in filing the notice of claim." Plaintiff further contends the trial court improperly relied on D.D. and failed to "analyze the totality of unique facts and



circumstances present consistent[] with the Tort Claims Act, its legislative history, our precedent, and the interest of justice, as required by O'Donnell."

Defendants counter, citing D.D., that attorney inattention does not satisfy the extraordinary circumstances standard. 213 N.J. at 156. Defendants assert that O'Donnell affirmed this notion "and relaxed that rule only in the very peculiar circumstances of that case because: (1) [the plaintiff there] had submitted a timely notice, but to the wrong entity; and (2) the public entity [that the plaintiff] sued had received a timely tort claims notice for the same incident from another claimant." Defendants argue that neither of these unique factors in O'Donnell are involved here because plaintiff did not send a timely notice at all, and defendants did not receive a notice of claim from another claimant.

In O'Donnell, the plaintiff brought suit against the New Jersey Turnpike Authority (NJTA) for the wrongful death of her husband and daughter. 236 N.J. at 338. The plaintiff's attorney filed a notice of claim naming NJTA as the responsible party, but "served her notice of claim on the State, rather than the NJTA. However, another driver involved in the accident properly served the NJTA within the ninety-day window" and "cited the exact circumstances surrounding the collisions, named the involved parties, and alleged the same theory of liability against the NJTA." Id. at 338-39. The plaintiff, after missing

the ninety-day deadline but within one year of the accident, attempted to "file her notice of claim late pursuant to N.J.S.A. 59:8-9" alleging extraordinary circumstances. Id. at 339.

The O'Donnell Court noted, "[i]mportantly, it [was] apparent that [the plaintiff] did not sit on her rights. . . . [The plaintiff] diligently sought to pursue her claims[,] . . . retained an attorney[,] . . . . [and] [t]he notice [of claim] listed the NJTA as the responsible agency . . . ." Id. at 350. "Although the NJTA did not receive [the plaintiff]'s notice of claim within the ninety-day window, the NJTA timely received a nearly identical notice of claim from Morales," another party involved in the accident. Ibid. Morales's notice of claim included the same theory of liability and "[i]mportantly, . . . attached the police report . . . , which explicitly named" the other parties who died in the collision. Id. at 351.

Thus, in "[a]nalyzing [the plaintiff]'s and Morales's notices together, in combination with the circumstances surrounding [the] terrible accident," the Court found that "the NJTA was notified of its potential liability within ninety days of the accident[] [t]hrough Morales's notice of claim," and "was thus in a position to correct the defect" because it "was put on notice that other individuals involved in the collision . . . could bring claims against it under the same theory of liability." Ibid. The Court ultimately found extraordinary circumstances "in

light of the unique facts presented," including that "Morales served a timely notice of claim on the NJTA . . . listing the exact circumstances surrounding the accident and the same theory of liability against the NJTA" as the plaintiff. Id. at 351-52.

Conversely, the Court in D.D. refused to find extraordinary circumstances and held that "neither inattention nor incompetence of counsel meets the extraordinary circumstances test . . . . Therefore, in the absence of other sufficient evidence of extraordinary circumstances that prevent[] [a] plaintiff from pursuing a timely tort claim, . . . the court is not authorized to grant leave to file a late notice of tort claim . . . ." 213 N.J. at 135.

The plaintiff in D.D. disclosed confidential health information to a public entity and sued when the public entity publicized the information against her wishes. Id. at 135-36. The plaintiff hired an attorney who accompanied her to meetings with the defendants and told her he would take care of everything. Id. at 136. However, the attorney failed to communicate with the plaintiff after the meetings, and the plaintiff eventually had to hire new counsel. Id. at 136-37. Although the new counsel filed a notice of claim, it did so almost two months past the ninety-day deadline due to the late hiring. Id. at 137, 140. The plaintiff argued that her medical condition, "her diligent pursuit of her claim during the

ninety-day notice period," and her first lawyer's inattentiveness and ineffectiveness combined together, demonstrated extraordinary circumstances. Id. at 144.

The Court found that "an attorney's inattention, or even an attorney's malpractice, [does not] constitute[] an extraordinary circumstance." Id. at 156. See also Zois v. N.J. Sports and Expo. Auth., 286 N.J. Super. 670, 674 (App. Div. 1996) (refusing to find extraordinary circumstances where attorney's secretary misplaced the file and the attorney did not realize it for months); Bayer v. Twp. of Union, 414 N.J. Super. 238, 260-61 (App. Div. 2010) (finding an attorney's incorrect advice as to the accrual date of a tort claim was not an extraordinary circumstance).

Plaintiff's reliance on O'Donnell is misplaced, as is her attempt to distinguish her case from the plaintiff in D.D. Plaintiff argues that she was diligent in pursuing her claims. Although this may be the case, it is not enough alone to find extraordinary circumstances. As the trial court noted, "[h]ere, unlike in O'Donnell, [p]laintiff did not serve a timely notice of claim on [d]efendants, nor any other . . . party. This is a fundamental difference" between O'Donnell and plaintiff's case. Moreover, unlike O'Donnell, defendants did not

receive a notice of claim from another potential plaintiff to put it on notice of a pending claim.

We conclude the trial court did not misapply its discretion in denying plaintiff's application. Plaintiff's injury did not cause the late filing as she was able to consult with two attorneys prior to the ninety-day deadline and executed a notice of tort claim within the timeframe set forth in N.J.S.A. 59:8-9. Plaintiff's counsel conceded he had a signed notice of tort claim on November 7—well in advance of the November 14, 2022 filing deadline. Rather it was counsel's miscalculation of the deadline that led to the late filing. As noted, an attorney's inattention to a client's file or even ignorance of the law does not constitute extraordinary circumstances under N.J.S.A. 59:8-9. D.D., 213 N.J. at 135.

#### B.

Plaintiff asserts that defendants "were aware of material information related to the accident that put them on notice of claims from the injured passenger[s], which include[d] . . . plaintiff." Plaintiff points to the police report, which included plaintiff's name and other information related to the

accident.<sup>1</sup> Plaintiff further contends defendants would not be prejudiced by the late filing.

Although NJ Transit may have received notice of a police report concerning the accident, that does not put defendants on notice that a particular plaintiff is contemplating filing a claim against them. Unlike the defendants in O'Donnell, who were put on notice because another claimant filed a timely notice of claim regarding the same incident, defendants here received no such timely notice.

Furthermore, the potential prejudice to a public entity is only relevant after a court determines that a plaintiff has demonstrated extraordinary circumstances. Given our conclusion that plaintiff has not established extraordinary circumstances under N.J.S.A. 59:8-9, we need not address whether defendants were substantially prejudiced by the late filing. In short, we conclude the trial court did not err in rejecting these arguments.

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<sup>1</sup> Plaintiff also relies on NJ Transit's obligation under N.J.A.C. 16:51-7.1(a) to investigate any accident resulting from the operation of its vehicles. However, this code provision does not relieve plaintiff from the obligation to file a notice of claim under N.J.S.A. 59:8-8 to -9.

C.

Plaintiff cites Guzman v. City of Perth Amboy, 214 N.J. Super. 167, 172-76 (App. Div. 1986), for the proposition that "[n]otice is effective as of the date of mailing . . . so that even if it is not actually received by the entity until after the [ninety]-day period has run[,] it is in compliance with the Act if mailed within that period."<sup>2</sup> She asserts that because service by mail can result in a defendant receiving notice after the ninety-day time period in the statute, she should have been permitted to serve her notice after the ninety-day time period. Plaintiff asserts the one-day delay in filing her tort claim notice "is a rare, unique circumstance that is a sufficient reason constituting extraordinary circumstance[s]."

Plaintiff's arguments are unpersuasive. Although we held in Guzman that "a notice of claim which is . . . mailed . . . certified mail" within the time specified by statute "constitutes adequate notice," 214 N.J. Super. at 175, we did not create a general exception where a defendant could effectuate service beyond the timeframe set forth in the statute. Plaintiff never sent a notice of tort claim via mail within the ninety-day period, but only served the tort claim notice after

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<sup>2</sup> N.J.S.A 59:8-10(a) states that "[a] claim shall be presented to the public entity by delivering it to or mailing it certified mail to the office of the Attorney General or the office of the State agency allegedly involved in the action."

the deadline had passed. See, e.g., Epstein v. State, 311 N.J. Super. 350, 359-360 (App. Div. 1998) (holding that the plaintiff could not rely on the fact that Yom Kippur fell on the ninetieth day as extraordinary circumstances to justify a one-day late filing). Accordingly, we discern no reason to disturb the court's decision.

To the extent we have not addressed any remaining arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION