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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-5268-14T3
A-5426-14T3

CHRISTOPHER SILVER, GENERAL
ADMINISTRATOR and ADMINISTRATOR
AD PROSEQUENDUM OF THE ESTATE
OF JENNIFER PEPLINSKI, CHRISTOPHER
SILVER, individually, and VICTORIA
ROOMS, individually,

Plaintiffs-Respondents,

v.

YUNLU WANG and COUNTY OF
MIDDLESEX,

Defendants,

and

STATE OF NEW JERSEY, STATE OF
NEW JERSEY DEPARTMENT OF
TRANSPORTATION and TOWNSHIP OF
NORTH BRUNSWICK,

Defendants-Appellants.

Argued December 7, 2016 – Decided February 24, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-1433-15.

Ashley Gagnon, Deputy Attorney General, argued the cause for appellants State of New Jersey and New Jersey Department of Transportation (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Ms. Gagnon, on the briefs).

Charles F. Holmgren argued the cause for appellant Township of New Brunswick (Capehart & Scatchard, P.A., attorneys; Betsy G. Ramos, of counsel; Mr. Holmgren, on the briefs).

John R. Gorman argued the cause for respondents (Lutz, Shafranski, Gorman & Mahoney, P.A., attorneys; Mr. Gorman, of counsel; Randi S. Greenberg, on the brief).

PER CURIAM

In these consolidated matters, defendants State of New Jersey, State of New Jersey Department of Transportation and Township of North Brunswick appeal from a May 29, 2015 order granting the motion of plaintiffs Christopher Silver, administrator ad prosequendum for the Estate of Jennifer Peplinski, and Victoria Rooms for leave to file a late notice of tort claim. Because plaintiffs' proofs failed to meet the statutory standard requiring there be extraordinary circumstances to excuse the late filing, we

reverse.¹

This case arises out of the tragic death of Jennifer Peplinski, who died when her car struck a utility pole along U.S. Route 130 in North Brunswick on April 11, 2014. In his affidavit in support of the late claim motion, plaintiff Silver conceded his "understanding of the accident before [his] family met with [their lawyer] on January 31, 2015 was that [his] mother's car left the roadway on [R]oute 130 in North Brunswick, striking a pole." He claimed, however, that because the Middlesex County Prosecutor's Office conducted an investigation into the fatal crash, "how the accident actually occurred" was not "made available" to his family until January 21, 2015.

When plaintiffs' family met with counsel on January 31, 2015, the lawyer explained to them that the State, the County or the Township could be liable for their mother's death based on "the pole's proximity to the roadway." Silver averred that

¹ While this appeal was pending, the trial court granted plaintiffs' motion to amend their complaint to name the State of New Jersey. Owing to the court's schedule, the motion was not heard until several days after the statute of limitations had run. The trial court subsequently denied the State's motion to dismiss the complaint on statute of limitations grounds. The State filed a motion for leave to appeal that order, on which we reserved decision pending our disposition of these consolidated appeals. As we have determined that plaintiffs' complaint against these defendants must be dismissed, we now deny the motion as moot.

"[f]rom January 21, 2015 [to] January 31, 2015, none of [his] family members had any idea that [his] mother or her estate may have a claim against anyone, let alone a public entity."

Silver also stated that counsel further explained that before they could retain his law firm to file a lawsuit, he or his sister needed to be appointed to represent the estate by the Middlesex County Surrogate, "because until such appointment was made, there was no entity that could file the notice of claim with those public entities."

The surrogate issued letters of administration ad prosequendum to Silver and appointed him the administrator of his mother's estate on February 23, 2015. He concluded his affidavit by saying:

Had anyone in my family known that any of the public entities [might] bear some fault for my mother's death, we likely would have consulted with a lawyer within 90 days of the accident. We simply did not realize that we even had a potential claim against anyone, let alone a public entity, for the accident until we received the [p]rosecutor's file.

Plaintiffs' aunt, the decedent's sister, filed her own affidavit in which she averred that because of the prosecutor's investigation of the accident, "the police report and related investigation materials were not made available to [her] family until January 21, 2015."

The public entity defendants opposed the motion, arguing plaintiffs had failed to show extraordinary circumstances to justify the late filing. Defendants pointed out the investigation materials documented the reports of witnesses that the decedent had been cut off in traffic and lost control of her car, and the efforts by police to locate and charge the other driver, which they did.

As to the utility pole, however, the report provided no information beyond what Silver conceded he knew at the time of the accident, namely that the decedent was killed when her car left the roadway and struck the pole. Defendants argued that plaintiffs had the necessary facts to assert their claim within the ninety days following the accident, that the report neither supplied nor augmented those facts, and that plaintiffs becoming aware of a theory of liability only upon meeting with counsel nine months after the accident did not constitute extraordinary circumstances.

The judge rejected defendants' arguments and granted plaintiffs' motion allowing the late claim. In a written opinion, the judge found that the investigation report of the accident "was not available until January 21, 2015." The judge further found that because the decedent died intestate, Silver had to be appointed "as the estate's administrator before the

estate existed as a legal entity." The judge found that "[u]ntil Plaintiff Silver was appointed, there was no representative to have brought a valid claim against Defendant Township."

The judge further found Silver's affidavit "demonstrates until the Peplinski family received the investigatory reports from the Middlesex County Prosecutor's Office, they were unaware of the fact that a claim against the Township of North Brunswick could have been brought." Based on "a totality of the circumstances," the judge concluded "the proofs meet the threshold as intended by the Legislature."

Defendants moved for reconsideration, contending plaintiffs had all the facts necessary to file a claim the day after the accident. They relied on newspaper accounts submitted with the motion, reporting the decedent died after her car struck a telephone pole. Counsel for the Township also argued the police report, as opposed to the prosecutor's investigation file, was available to plaintiffs and "[t]o whomever came and would ask for it" within a week of the accident.

Defendants reiterated that the report contained no additional information about the pole, such as any measurements documenting its location. Finally, counsel argued that the estate did not "need to exist" before a tort claim notice could

be filed on its behalf, and that Silver, in any event, could have petitioned to be appointed the administrator of decedent's estate ten days after her death.

Plaintiffs' counsel opposed the motion, arguing that in his thirty years' experience, "no investigation report, including a police report, is released until the prosecutor authorizes it." Counsel further argued there was no proof that Silver had seen the news accounts of his mother's death, and no reason for him to know that Title 3B permitted him to petition the surrogate to be appointed administrator within ten days of the decedent's death.

The judge denied the motion, finding no "basis in fact or law to reconsider the prior decision." This appeal as of right followed. See R. 2:2-3(a)(3).

N.J.S.A. 59:8-8 requires that claims for damages against public entities must be filed within ninety days of their accrual. See Beauchamp v. Amedio, 164 N.J. 111, 116 (2000) (discussing the procedural requirements of the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3). Although the period for filing is short, any harshness is alleviated by N.J.S.A. 59:8-9, which allows for the filing of late claims. Rogers v. Cape May Cnty. Office of Pub. Def., 208 N.J. 414, 420 (2011). That statute provides in pertinent part:

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

[N.J.S.A. 59:8-9.]

We review a decision granting or denying a motion for leave to file a notice of late claim for abuse of discretion. McDade v. Siazon, 208 N.J. 463, 476-77 (2011). We undertake that review, however, mindful that

[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. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 148 (2013).]

The Supreme Court has commanded that "[t]rial courts, in exercising their statutory authority, and appellate courts, in reviewing those decisions, must ensure that their decisions are faithful to the overall legislative framework in order that the statute's essential purposes be preserved and not eroded through excessive or inappropriate exceptions." Id. at 148-49.

Applying the Court's command here requires a reversal of the trial court's decision to grant the late claim motion. The trial court accepted Silver's claim that plaintiffs were without facts necessary to file a tort claim notice against the State and North Brunswick until the prosecutor's office² released its investigation report of the accident, which did not occur until after the ninety-day notice period had expired. The judge did not explain, however, what information he found plaintiffs gleaned from the report, and why it was not otherwise available to them within the ninety-day notice period.

Plaintiffs likewise have not identified the information in the report they needed to file the tort claim notice. Indeed, although Silver concluded his certification by avowing his family "simply did not realize that we even had a potential claim against anyone, let alone a public entity, . . . until we received the [p]rosecutor's file," he asserts in the same certification that "[f]rom January 21, 2015," the date the prosecutor's file was "made available" to him, until "January 31, 2015," the date he first met with a lawyer, "none of [his]

² Although the judge referred to "the investigatory reports from the Middlesex County Prosecutor's Office," no such reports are in the record. On the motion for reconsideration, the judge acknowledged the only report he reviewed was from the North Brunswick Police Department.

family members had any idea that [his] mother or her estate may have a claim against anyone, let alone a public entity."

The only reasonable inference to draw from those statements is that it was counsel who supplied plaintiffs with an understanding of their claim based on facts plaintiffs knew well before the release of the police report. But as the Court has explained in the context of the discovery rule, which plaintiffs newly raise as an alternative basis for permitting the late claim, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another, not when a lawyer advises her that the facts give rise to a legal cause of action." Baird v. Am. Med. Optics, 155 N.J. 54, 68 (1998). Plaintiffs, likewise, cannot establish extraordinary circumstances by asserting they only learned, upon consulting with a lawyer more than ninety days after the accident, that the utility pole that caused their mother's death might give rise to a cause of action against the public entities responsible for its placement. See Escalante v. Twp. of Cinnaminson, 283 N.J. Super. 244, 250-51 (App. Div. 1999) (holding under the less exacting "sufficient reasons" standard, that ignorance of one's rights will not excuse a late filing).

We reject plaintiffs' reliance on Mendez v. S. Jersey Transp. Auth., 416 N.J. Super. 525, 532 (App. Div. 2010), a case in which the late provision of a police report was held to present extraordinary circumstances. The plaintiffs in Mendez were seriously injured in a car accident in snowy conditions when Mendez's car struck a snow removal truck owned by the South Jersey Transportation Authority and parked on the shoulder in the Atlantic City Expressway/Brigantine Connector Tunnel. Id. at 529. Plaintiffs' injuries left them without any memory of the accident and there were no witnesses. Id. at 530. Plaintiffs filed timely tort claim notices against the Authority, Atlantic City, Atlantic County, and the State of New Jersey based on the Authority's ownership of the vehicle and its and the other entities' ownership or responsibility for the road and the tunnel. Id. at 529.

The accident report, released shortly after the collision, revealed the existence of cameras in the tunnel, which captured plaintiffs' car and a municipal ambulance entering the tunnel seconds before the crash. Id. at 530. Although the report included a narrative of the video footage, it did not suggest the ambulance played any part in the accident. Notwithstanding, plaintiffs diligently pursued obtaining the videotape, which was

not provided to them until after the notice period had run. Id. at 534-35.

When plaintiffs finally were able to review the video, they discovered that the ambulance, which had been traveling ahead and to the left of their car, moved to the right directly in front of them as it approached the snow plows parked on the left shoulder. Id. at 534. Theorizing that the ambulance's sudden move into plaintiffs' lane could have caused plaintiffs to take evasive action resulting in the accident, plaintiffs' counsel contended the videotape provided the first basis for a potential claim against Brigantine, the owner of the ambulance. Ibid. We agreed and affirmed the trial court's finding that extraordinary circumstances excused the late filing. Id. at 528.

Mendez provides no support for plaintiffs' position in this case. Unlike the camera footage in Mendez, which was available only from the defendant Authority and depicted something nowhere else revealed despite the plaintiffs' diligent investigation, here the police report contains nothing about the utility pole that plaintiff did not already know or that was not readily available elsewhere within the ninety-day notice period. Mendez would only apply here if the public entity owned the car that forced the decedent off the road. Instead, the car that allegedly caused the decedent's accident, as detailed in the

investigation report, was owned by a private citizen. The utility pole in this case is like the road or the tunnel in Mendez, a permanent structure owned or maintained by a public entity which contributed to the accident in a manner either obvious or discoverable within the ninety-day period allowed for filing a notice of claim.

As the Supreme Court has recently reiterated, "[t]he Legislature has commanded that relief be granted only in circumstances that are extraordinary." D.D., supra, 213 N.J. at 158. Here, plaintiff Silver concedes he knew the essential facts, that the decedent died when her car left the roadway and struck a utility pole, at the same time he learned of the accident. He does not, however, set forth any efforts he made during the ninety-day notice period to learn anything else. Blank v. City of Elizabeth, 162 N.J. 150, 152-53 (1999). He does not even say, for example, whether he ever asked for a copy of the police report before it was "made available" to him nine months after the accident.³

³ It was plaintiff's burden to demonstrate they were diligent and undertook reasonable efforts in a timely manner to ascertain ownership, maintenance or control of the utility pole or its placement off the roadway. See Leidy v. Cnty. of Ocean, 398 N.J. Super. 449, 461-62 (App. Div. 2008). Thus it was their active efforts the court needed to assess.

Plaintiffs' failure to set forth any efforts they made within the ninety-day notice period to determine the responsible parties and the absence of any proof that the subsequently provided investigation report contained information about the basis for liability of the public entities not available elsewhere, precluded the grant of their motion to file a late notice of tort claim. Ibid. ("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.").

We also reject the trial court's finding that Silver could not have filed a pre-suit tort claim notice on behalf of the estate until he had secured letters of general administration or administration ad prosequendum. N.J.S.A. 59:8-5 provides only that "[t]he claim shall be signed by the claimant or by some person on his behalf." Leaving aside that plaintiff has not presented any facts explaining why he could not have secured letters of administration within the ninety-day period, neither the plain language of the statute nor the cases interpreting it supports a finding that only the estate's duly appointed administrator could file the tort claim notice on its behalf. See S.E.W. Friel Co. v. N.J. Tpk. Auth., 73 N.J. 107, 121-22 (1977) (reversing the denial of a motion to permit a late claim

filed on behalf of the plaintiff by his employer's lawyer, although not expressly authorized by the plaintiff and before the plaintiff retained the lawyer, because the employer and its lawyer could not be considered, "under the circumstances, officious intermeddlers in presuming to make the [late claim] motion on [the plaintiff's] behalf"); see also N.J.S.A. 3B:10-19 (providing "[t]he powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter").

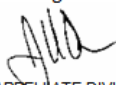
Indeed, plaintiffs' counsel purported to send a tort claim notice on behalf of the estate in this action on February 20, 2015, three days before plaintiff received letters of administration on February 23, 2015 and four days before the retainer agreement was executed on February 24, 2015. Accordingly, we reject the trial court's finding that Silver's need to petition the surrogate for letters of administration ad prosequendum was an extraordinary circumstance justifying relief from the ninety-day statutory notification requirement.

Although the circumstances are undeniably tragic, because plaintiffs did not show any reason, let alone an extraordinary one, for failing to file the statutorily mandated claim form within the time provided by N.J.S.A. 59:8-8, the alleged lack of

prejudice to the State and North Brunswick caused by the delay is irrelevant. See Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 146-47 (1988).

Reversed and remanded for entry of an order dismissing plaintiffs' complaint against the State and North Brunswick in conformity with this opinion.

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


CLERK OF THE APPELLATE DIVISION