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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2592-16T1

RUTH HALLETT,

Plaintiff-Respondent,

v.

LEITA HAMILL, COUNTY OF  
MERCER, and STATE OF NEW  
JERSEY,

Defendants,

and

TOWNSHIP OF EWING,

Defendant-Appellant.

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Submitted February 14, 2018 – Decided March 15, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Mercer County, Docket No. L-  
2074-16.

Capehart & Scatchard, PA, attorneys for  
appellant (Charles F. Holmgren, of counsel and  
on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant Township of Ewing appeals from a January 20, 2017 order granting plaintiff Ruth Hallett leave to file a late notice of claim under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3. We agree with defendant that the trial judge mistakenly exercised her discretion because the record does not support a finding of the "extraordinary circumstances" required for late filing by N.J.S.A. 59:8-9. Accordingly, we reverse.

The limited record in this matter reflects that on February 16, 2016, plaintiff allegedly slipped and fell on ice in front of a house located in Ewing Township. Plaintiff claims she slipped and fell due to the failure to warn of the allegedly dangerous condition. Plaintiff suffered a fractured femur and was purportedly hospitalized from the time of the accident until she passed away on July 23, 2016. Her injuries allegedly contributed to her death.

Plaintiff did not seek legal representation immediately after the incident and did not file a timely notice of her tort claim with any of the public entity defendants. The ninety-day period to provide notice of plaintiff's tort claim expired on May 16, 2016.

On August 8, 2016, plaintiff's daughter retained counsel to handle her mother's personal injury claim. On September 15, 2016, plaintiff filed a motion for leave to file a late tort claim notice

on defendants Mercer County, City of Trenton, and State of New Jersey. Although the motion was served on the other public entity defendants, it was not served on defendant Ewing Township.

Plaintiff's motion was supported by a certification of counsel. The certification did not state how long plaintiff was hospitalized, whether a doctor prescribed medication that would have affected her ability to concentrate, or whether she suffered any head injuries, mental impairment, or injuries other than a fractured leg. Nor did the certification indicate that plaintiff had difficulty determining the individual or entity which owned, controlled, or operated the premises where plaintiff fell.

On October 14, 2016, plaintiff filed a complaint naming Leita Hamill, Ewing Township, Mercer County, and the State of New Jersey as defendants. Shortly thereafter, Ewing Township filed a motion to dismiss plaintiff's complaint for failure to file a timely notice of her tort claim. On or about November 9, 2016, plaintiff filed a cross-motion for leave to file a late tort claim notice on Ewing Township, Mercer County, and the State of New Jersey. Plaintiff's cross-motion was supported by an identical certification of counsel which contained no additional information regarding plaintiff's injuries or disabilities. During oral argument, counsel argued plaintiff was incapacitated as a justification for the late notice. That argument was not based

on personal knowledge and was not supported by an expert report or objective medical documentation.

The trial court heard oral argument on January 20, 2017. Plaintiff's counsel indicated discovery was being conducted to determine the specific location of the accident and whether it occurred on private or public property. Plaintiff's counsel stated he had obtained plaintiff's hospital records after the motion was filed. He further argued plaintiff fractured her femur, was hospitalized for five months from the time of the accident until her death, and was of advanced age. He noted the ninety-day notice period expired "while she was still in the hospital fighting for her life."

Following oral argument, the trial court issued an oral decision granting plaintiff's cross-motion for leave to serve late notice on Ewing Township but dismissed the complaint without prejudice as to Mercer County and the State. In reaching that conclusion, the judge indicated that such motions are generally viewed with great liberality, with any doubt as to the sufficiency of the reasons to excuse the late filing being resolved in favor of the claimant, so that whenever possible, cases may be heard on their merits.

On appeal, defendant argues: (1) the trial court erred by viewing plaintiff's application with "great liberality" and by

applying the former "sufficient reasons" standard rather than the current "sufficient reasons constituting extraordinary circumstances" standard required by N.J.S.A. 59:8-9; and (2) the trial court abused its discretion in determining plaintiff's proofs met the extraordinary circumstances standard required by the statute.

Plaintiff filed her motion on November 9, 2016. Her cause of action against defendants accrued on February 16, 2016. The motion was therefore filed almost six months beyond the ninety-day period for filing claim notices prescribed by N.J.S.A. 59:8-8.<sup>1</sup> Plaintiff sought to avail herself of the late claim provision of N.J.S.A. 59:8-9, which authorizes courts to permit a claim notice to be filed within one year of accrual of the cause of action if the public entity or employee will not be substantially prejudiced. That section also requires that a motion to allow late filing must be

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

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<sup>1</sup> The filing of the complaint on October 14, 2016, does not serve as the filing of notice required by N.J.S.A. 59:8-8. Guzman v. Perth Amboy, 214 N.J. Super. 167, 171-72 (App. Div. 1986); Martin v. Twp. of Rochelle Park, 144 N.J. Super. 216, 221 (App. Div. 1976).

motion seeking leave to file a late notice of claim within a reasonable time thereafter[.]

[N.J.S.A. 59:8-9 (emphasis added).]

The quoted portion of N.J.S.A. 59:8-9 results from a 1994 amendment, L. 1994, c. 49, § 5, to the original version of that section, enacted in 1972, which had required that a motion to allow late filing be "based upon affidavits showing sufficient reasons for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act[,]" New Jersey Tort Claims Act, L. 1972, c. 45, § 59:8-9 (codified as amended at N.J.S.A. 59:8-9) (emphasis added).

The amendment made two significant changes. It replaced the general "sufficient reasons" standard with a more demanding "extraordinary circumstances" standard. It also required applicants to demonstrate extraordinary circumstances, not only for why they could not serve the notice of claim within ninety days, but also for why they could not have filed the late claim notice motion sooner after the running of the ninety-day period.

The grant or denial of a motion for leave to file a late notice of claim is "left to the sound discretion of the trial court, and will be sustained on appeal in the absence of a showing of an abuse thereof." McDade v. Siazon, 208 N.J. 463, 476-77 (2011) (quoting Lamb v. Global Landfill Reclaiming, 111 N.J. 134,

146 (1988)). The exercise of discretion, however, is limited to cases in which the claimant's affidavit or certification demonstrates extraordinary circumstances for the delay. Leidy v. Cty. of Ocean, 398 N.J. Super. 449, 456 (App. Div. 2008) (citing R.L. v. State-Operated Sch. Dist., 387 N.J. Super. 331, 340 (App. Div. 2006)). Judicial findings about the presence of extraordinary circumstances must be expressly made. Ibid. (citing Allen v. Krause, 306 N.J. Super. 448, 455-56 (App. Div. 1997)).

In Leidy, we explained the significance of the 1994 amendment:

The "extraordinary circumstances" requirement was not part of the original Act, and mere "sufficient reasons" sufficed to warrant relief from the statutory time bar. The "extraordinary circumstances" language was added by amendment in 1994 . . . to raise the bar for the filing of late notice from a fairly permissive standard to a more demanding one. [T]he amendment may have signaled the end to a rule of liberality in filing. Notably, the 1994 amendment 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.

[Ibid. (alteration in original) (citations omitted).]

Indeed, "the evident legislative purpose of this amendment was the abrogation of the liberal judicial construction of 'sufficient reasons' standing alone." Blank v. City of Elizabeth, 318 N.J. Super. 106, 110 (App. Div.), aff'd as modified, 162 N.J.

150 (1999). It signaled a clear legislative mandate for a "stricter interpretation of the amended act." Zois v. N.J. Sports & Exposition Auth., 286 N.J. Super. 670, 674 (App. Div. 1996).

The judge in this case relied on case law decided before the 1994 amendment when the original, liberal version of the statute was in effect. The standard was significantly elevated after those cases were decided.

Our case law recognizes that "medical conditions meet the extraordinary circumstances standard if they are severe or debilitating[,]" impacting "the claimant's very ability to pursue redress and attend to the filing of a claim." D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 149-50 (2013). We have previously addressed whether "severe or debilitating" medical conditions have met the extraordinary circumstances standard. See, e.g., Mendez v. So. Jersey Transp. Auth., 416 N.J. Super. 525, 533-36 (App. Div. 2010) (satisfying the test where the plaintiffs were unconscious at the accident scene, suffered from severe head trauma requiring ambulance transport to a nearby trauma center, spent considerable time in hospitals and rehabilitation facilities, and had no recollection of events occurring immediately before or after the accident); Maher v. Cty. of Mercer, 384 N.J. Super. 182, 189-90 (App. Div. 2006) (constituting sufficient extraordinary circumstances where a severe staph



infection was treated with an induced coma with little chance of survival). These cases illustrate the magnitude of what is meant by "severe or debilitating."

Here, counsel's certification falls short of making the kind of detailed showing, based on personal knowledge, required by our case law to establish extraordinary circumstances. See, e.g., O'Neill v. City of Newark, 304 N.J. Super. 543, 546-54 (App. Div. 1997) (disallowing the late claim by a seriously injured claimant who suffered a gunshot wound and underwent surgery in the months following his injury and who produced a psychologist's report; finding that report insufficient to establish that the claimant lacked the "mental capacity" to contact an attorney within ninety days); Keller v. Cty. of Somerset, 137 N.J. Super. 1, 7 n.4 (App. Div. 1975) (rejecting a generalized claim of debilitating emotional strain without detailing its scope and duration and uncorroborated by medical testimony causally relating it to the delay in filing).

Plaintiff did not provide an expert report or objective medical documentation establishing the nature and extent of her injuries or disability. Other than indicating she suffered a fractured femur, plaintiff provided no information regarding any other injuries she suffered. Notably, plaintiff did not claim to have suffered any head injuries or cognitive impairment. The

unsupported claim by counsel that she was "fighting for her life" while hospitalized is nothing more than a vague, conclusory, self-serving declaration, which was not based on personal knowledge.

If plaintiff's showing was deemed sufficient to establish extraordinary circumstances, the post-amendment version of N.J.S.A. 59:8-9, intended by the Legislature to raise the bar, would instead constitute a virtually meaningless standard. "Although deference will ordinarily be given to the factual findings that undergird the trial court's decision, the court's conclusions will be overturned if they were reached under a misconception of the law." D.D., 213 N.J. at 147 (citing McDade, 208 N.J. at 473-74). This is such a case. We are satisfied that the judge mistakenly exercised her discretion by employing the former statutory standard.

For the reasons we have stated, application of the controlling legal principles to the facts of this case precludes leave to file a late claim notice. Accordingly, the trial court should have granted defendant's motion to dismiss the complaint and denied plaintiff's cross-motion for leave to file a late claim notice.

Reversed.

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

  
CLERK OF THE APPELLATE DIVISION