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COMMENTARY

Extraordinary Changes to 'Extraordinary Circumstances'

By Michael Brooke Fisher

Legal phrases have a certain meaning for years, then one day with a new interpretation, they don't. One such phrase, "extraordinary circumstances," was redefined on March 12 by the Supreme Court in *D.D. v. UMDNJ* in a 3-2 ruling.

The plaintiff was distressed because her health records were made public by Rutgers University and the University of Medicine and Dentistry of New Jersey. She retained an attorney and met with officials to remove her records from view.

But she was unaware of the 90-day notice requirement of the Tort Claims Act, and neither her attorney nor the school advised her about it.

Her original attorney failed to file a claim and ignored her efforts to contact him. Only after retaining a new lawyer was a late claim attempted and a motion immediately filed to allow it. The 90-day time period had barely expired and absolutely no prejudice to the defendant had been shown.

Nevertheless, the Supreme Court, with grammarian-like precision, determined that sufficient "extraordinary circumstances" did not exist to allow a late filing, leaving plaintiff to the cumbersome and difficult remedy of filing a malpractice claim against her first lawyer.

I invite every lawyer to read the opinion, if for no other reason than self-protection. When I read the majority opinion, the cold logic was seemingly impregnable. The trial court found such appropriate circumstances, as did two of the three appellate judges. Unfortunately three of the five justices found otherwise.

It is instructive to read Justice Jaynee Lavecchia's dissent, joined in by Justice Barry Albin. Rather bluntly, she calls the majority opinion "crabbed" and then shows that the majority analysis is flawed. It is ironic that the majority notes that the "harshness of the ninety day rule is alleviated by the statutory provision that allows the late filing of a claim under limited circumstances," and then determines that the compelling circumstances are insufficient.

Here we have a plaintiff who took immediate action, obtained a lawyer and met with the defendant, only to have her lawyer fail to properly represent and advise her, abandoning her in the process, with a subsequent attorney immediately filing the appropriate motion to allow a late submission.

With no prejudice shown by the defendant and the claim being fewer than 60 days late, the Supreme Court had the opportunity to find that "limited circumstances" exist to allow a late filing. Instead the justices eviscerated the exceptional circumstances standard almost into nonexistence, and cavalierly stated that "plaintiff's remedy and her avenue to secure a just result lies in an action against the attorney for malpractice."

As a judge, and now as a mediator, I have resolved legal malpractice matters. Plaintiffs are often saddled with the burden of proving a case within case and the now-defendant original plaintiff attorney attacks the bonafides of the case he or she originally championed. They are ugly cases to try and do not put our profession in an especially favorable light. If that were the only avenue to avail the plaintiff her day in court, so be it, but it wasn't.

Rather than requiring the plaintiff to go down a difficult road rutted with legal pitfalls, the analysis of the dissent should have prevailed. Parenthetically, what has the system gained? Just another suit with a different defendant.

LaVecchia said the majority's holding is overly restrictive, undervalues the totality of the circumstances analysis and misapplied the abuse of discretion standard of review. She also commented about the majority's "apparent overriding concern about opening the flood gates" to late claims. All the years I was in the Civil Part with a more forgiving interpretation being used than this new one, there was only an occasional late claim motion filed, more a trickle than a flood. Now, under this new interpretation, even the trickle may stop.

In addition to the substantive reasons to allow the late tort claim as noted by the dissent, the majority ignored that the abuse of discretion standard applies to a review of a trial court's decision on such a motion. The court should have upheld the lower court's proper exercise of discretion as affirmed by the Appellate Division.

The majority stated that it could not

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"permit sympathy" to be a factor or "follow the heartfelt call of our dissenting colleagues." Why not? Certainly sympathy for an innocent plaintiff should not be an impediment when valid reasons otherwise exist to grant her relief. Nor should a "heartfelt call" be ignored when buttressed by intellectual analysis. Since when did having a heart become a negative? ■