WILLIAM CANO AND RAYMOND BONELLI, ON THEIR OWN BEHALF AND ON BEHALF OF ALL SIMILARLY SITUATED EMPLOYEES Plaintiffs/Respondents, v. COUNTY CONCRETE CORPORATION, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000056-24 Civil Action **ON APPEAL FROM ORDER DATED:** **July 23, 2024** **DOCKET NO. MRS-L-1365-19** **SAT BELOW** **Hon. William J. McGovern III, J.S.C.**

BRIEF ON BEHALF OF DEFENDANT-APPELLANT COUNTY CONCRETE CORPORATION

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PRELIMINARY STATEMENT

This is a case of first impression involving New Jersey's Earned Sick Leave Law, N.J.S.A 34:11D-1 ("ESLL") and the outcome of this appeal will directly impact how employers interpret the ESLL and whether unionized employees will be left with an unintended recourse to strongarm employers into providing additional paid time off. The ESLL, enacted on October 29, 2018, mandates that employers provide qualifying employees with forty (40) hours of paid sick time during a calendar year. Significantly, there is no statutory requirement that employers provide additional sick time apart from existing vacation, PTO, or other paid time off policies. Critically, the intent of the ESLL is to ensure that all New Jersey employees are safeguarded from making the difficult decision to either work and get paid or take an unpaid day when sick or for other related reasons, e.g., to attend their child's school conference. The ESLL certainly was not enacted with the intent that it would be weaponized by unionized employees as a mechanism to manipulate stalled union contract negotiations, which is exactly what happened here, and resulted in the award of unproven damages for a class of union employees that was never certified prior to trial.

Approximately six months after the ESLL was enacted, and facing an impasse in negotiations over a new collective bargaining agreement between the

International Brotherhood of Teamsters, Local 863 (the "Union") and Defendant/Appellant County Concrete ("County Concrete"), Plaintiffs/Appellees William Cano and Raymond Bonelli ("Plaintiffs"), filed their Complaint, seeking damages and attorneys' fees related to allegedly unpaid sick days they claimed they were owed under the ESLL while employed by County Concrete. Plaintiffs argue that County Concrete instantly became subject to the ESLL when their Collective Bargaining Agreements ("CBA") expired, despite ongoing collective bargaining negotiations with County Concrete. Significantly, employees subject to a CBA do not qualify for paid time under ESLL, nor are their employers required to comply with any of the ESLL's requirements. In fact, had an agreement been reached through collective bargaining, the ESLL would never have been raised and this action would have never commenced.

Instead, Plaintiffs were approached and ultimately represented by the same attorneys who simultaneously represented the Union during contract negotiations. The impasse in negotiations enabled the CBAs to lapse, and while the benefits provided under the CBAs were still being honored, including paid time off which exceeded the ESLL's requirements, Plaintiffs argued that the statute was separately triggered and somehow afforded Plaintiffs with additional paid time off. While County Concrete is exempt from the ESLL, it nonetheless

complies with the ESLL's mandates as its employees are provided with paid time off that is equal to, or in excess of, the ESLL's requirements. The trial court disagreed, granting summary judgment for Plaintiffs on liability. The parties then participated in a bench trial for damages, after which the trial court ruled in Plaintiffs' favor, entering an Order finding County Concrete liable for violating the ESLL and directing County Concrete to make payments to Plaintiffs for lost sick pay. While County Concrete does not dispute the merits of the ESLL and recognizes the benefits of the true purpose behind the statute, the trial court's construction of the statute and application to County Concrete is incorrect and contrary to the legislative intent behind its promulgation. Further, despite Plaintiffs' failure to engage in any class discovery or make any attempts to certify a class prior to trial, the court ordered that County Concrete participate in post-judgment class discovery to assist Plaintiffs and the Court in identifying the class members and to make payments for damages, despite Plaintiffs' glaring failure to develop or even identify a "class" prior to or during the trial. Significantly, this court did not afford County Concrete with an opportunity to participate in complete class discovery, resulting in an unsupported and likely windfall award of damages to the alleged class, which should be reversed.

PROCEDURAL HISTORY

On June 27, 2019, Plaintiffs filed their Complaint against County Concrete, seeking damages and attorneys' fees related to alleged unpaid sick days they claimed were owed under the ESLL. (Da84). On August 23, 2019, County Concrete filed its Answer with Affirmative Defenses. (Da92). Collective Bargaining negotiations continued without an agreement as to paid time off and, on April 12, 2021, Plaintiffs filed an Amended Complaint adding Plaintiffs' claim under the Prevailing Wage Act ("PWA"). (Da103).

On January 7, 2022, Plaintiffs filed a Motion for Partial Summary Judgment, seeking a ruling that County Concrete was subject to and violated the ESLL. (Da136). On January 25, 2022, County Concrete filed a Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Partial Summary Judgment, seeking a ruling that the ESLL did not apply to County Concrete and, if applicable, County Concrete complied with its mandates or that questions of material fact existed for trial as to County Concrete's ESLL compliance. (Da567). On February 16, 2022, the trial court entered an Order granting Plaintiffs' Motion for Partial Summary Judgment and denying County Concrete's Cross-Motion for Summary Judgment, with a Statement of Reasons. (Da1). On May 2, 2022, the trial court denied County Concrete's Motion for Reconsideration of the February 16, 2022 Order. (Da17).

In preparation for the trial on damages, on August 31, 2022, County Concrete filed a Motion in Limine to preclude from trial any evidence, testimony, argument or reference to the alleged class, or any allegedly similarly situated employee, or alleged damages outside of Plaintiffs Bonelli and Cano. (Da919). On September 12, 2022, Plaintiffs filed their Opposition to County Concrete's motion. (Da923). On September 16, 2022, the trial court entered an Order denying County Concrete's motion. (Da27).

Thereafter, on September 19 through 21, 2022, a bench trial for damages took place.[1] On October 28, 2022, an Order was entered in Plaintiffs' favor, awarding damages to named Plaintiffs Bonelli and Cano, and further setting forth a manner in which for Plaintiffs to acquire the authority to obtain damages on behalf of "similarly situated" employees. (Da33). The trial court further declared that County Concrete was not excused from the provisions of the ESLL. (Da33).

Following the trial court's post-trial Order, on January 4, 2023, County Concrete filed a Motion for Clarification and Reconsideration of the trial court's October 28, 2022 Order. (Da924). On February 2, 2023, the trial court issued an Order further clarifying its October 28, 2022 Order. (Da69).

[1] Hereafter, the Trial Transcripts are cited as follows: T1 – September 19, 2022 Trial Transcript; T2 – September 20, 2022 Trial Transcript; and T3 – September 21, 2022 Trial Transcript.

On July 23, 2024, the trial court issued an Order and Final Judgment, awarding Plaintiffs attorneys' fees and costs, and declared all remaining issues in the case disposed. (Da71). Finally, on September 6, 2024, County Concrete filed a Notice of Appeal to this Court. (Da1007).

STATEMENT OF FACTS

County Concrete is a New Jersey business that operates as a material supplier of sand and gravel products as well as redi-mix concrete, from five different worksites in Kenvil, Morristown (with two worksites), East Orange, and Oxford (Da37). John Crimi has been the President and owner of County Concrete since 1978 (T3 4:14-21).

On June 27, 2019, Plaintiff Bonelli and Plaintiff Cano, Union Shop Stewards, filed their Complaint against County Concrete, seeking damages and attorneys' fees related to the alleged unpaid sick days they claimed they were owed under the ESLL. (Da84). On April 12, 2021, Plaintiffs filed an Amended Complaint adding Plaintiffs' claim under the Prevailing Wage Act (Da103).

County Concrete employs a unionized workforce of hourly employees represented by the International Brotherhood of Teamsters, Local 863, under five different CBAs. (Da37). During the relevant time period, Plaintiff Bonelli and Plaintiff Cano worked for County as drivers at County's Kenvil, New Jersey worksite. (T1 19:13-25; 20:19-25; 95:23-96:3; 98:9-10). Plaintiff Bonelli served

as shop steward for the Union, requiring him to attend union negotiations, including those that took place during 2019 surrounding the ESLL. (T1 21:13-22:20).

Under the ESLL, qualifying employers are required to provide qualifying employees with a minimum of forty (40) hours of paid time off to use for sick days or other qualifying reasons each calendar year. (Da793). Significantly, under the ESLL, an employer's existing vacation, personal time, or PTO policy, can satisfy the law's requirements. (Da793). In other words, an employer is not required to establish a separate paid sick leave policy so long as their current policy provides at least forty (40) hours of paid time off and permits employees to use the time for purposes under the ESLL. (Da793).

On February 16, 2022, the trial court granted Plaintiffs' Motion for Partial Summary Judgment and found that County Concrete was "liable for violating" the ESLL, and further ordered that "if the parties are unable to settle the issue, there shall be a trial on the remaining issue of damages for Defendant's violation of the Act." (Da1-Da2). The trial court also denied County Concrete's Cross Motion for Summary Judgement. (Da2). The trial court further ruled that County Concrete violated the ESLL's Notice and Recordkeeping requirements. (Da14). Regarding County Concrete's Cross Motion, the trial court ruled that the

Construction Industry Exemption did not apply to County Concrete. (Da14-Da15).

Accordingly, the parties moved forward with a trial on the issue of damages. (T1; T2; T3). However, though Plaintiffs filed their claims on behalf of themselves and similarly situated employees, Plaintiffs never moved to certify their class. (Da919; Da923). Thus, on August 31, 2022, County Concrete filed a Motion in Limine to preclude from trial any evidence, testimony, argument or reference to the alleged class, or any allegedly similarly situated employee, or alleged damages outside of Plaintiffs Bonelli and Cano based on Plaintiffs failure to seek class certification. (Da919). In their Opposition to County Concrete's motion, Plaintiffs argued, for the first time, that rather than a class action, Plaintiffs were bringing a collective action which did not require class certification. (Da923). On September 16, 2022, the trial court entered an Order denying County Concrete's Motion in Limine. (Da27).

On September 19 through September 21, 2022, a bench trial for damages took place. (T1; T2; T3). During trial, John Crimi testified that it is the policy and past practice of County Concrete to allow employees to use vacation time for "anything they want," including but not limited to for paid sick days. (T3 17:16 – 18:1). Former and current County Concrete employees corroborated this policy and practice at trial and testified they could use paid time off days

for any reason, including for a doctor's appointment or to visit a sick family member. (T2 8:20-9:3; 82:23-83:21). In short, County Concrete proffered clear evidence at trial that employees could use their paid vacation days for any reason. (T2 8:23-25). In contrast, throughout trial, Plaintiffs failed to present sufficient proof regarding their alleged similarly situated employees. (T3 38:3-20).

Despite this failure, on October 28, 2022, the trial court issued an Order and Judgment ordering County Concrete to pay Plaintiffs Cano and Bonelli 40 hours of pay in compensation for unpaid ESLL wages inclusive of liquidated damages. (Da33). Additionally, the trial court also ordered Plaintiffs to submit evidence as to the names of any/all similarly situated employees as identified on Schedule A to Plaintiffs' post-trial submissions who have designated Plaintiffs as their agent/representative, with verification of same, to seek compensation for unpaid ESLL wages and liquidated damages. (Da34). The Order further required County Concrete to disclose any and all hourly employees owed ESLL wages whose names were not identified on Schedule A; and to confirm payment of damages to those employees in the form of 40 hours of lost wages, or total number of ESLL hours accrued at the time of separation from employment. (Da34). The Order noted County Concrete could challenge Plaintiffs' submissions as to "similarly situated employees." (Da36).

Thereafter, on February 28, 2023, Plaintiffs submitted a schedule of damages allegedly sustained by the purported class members, totaling $883,092.80. (Da932). On May 30, 2023, County Concrete challenged Plaintiffs submission and argued Plaintiffs calculations were incorrect. (Da979) After multiple rounds of challenges, the parties agreed to a proposed damages figures for each represented employee totaling $758,898.38. (Da991).

Ultimately, on July 23, 2024, the trial court entered its final order, issuing an award to Plaintiffs totaling $1,368,322.29, inclusive of attorneys' fees and costs. (Da71-Da72).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE ESLL APPLIES TO COUNTY CONCRETE, AS COUNTY CONCRETE SATISFIES THE REQUIREMENTS OF THE LAW, AND THE APPLICATION OF THE ESLL TO COUNTY CONCRETE IS CONSISTENT WITH THE LEGISLATIVE INTENT OF THE LAW.

(Raised Below: Da1; Da17; Da19; Da21; Da23; Da25; Da27; Da29; Da31; Da33; Da69; Da71)

A. County Concrete Satisfied the Requirements of the ESLL because it Maintained a Compliant PTO Policy.

The trial court incorrectly held that County Concrete did not have a Paid Time Off policy that is compliant with the ESLL. The ESLL at § 34:11D-2, "Provision of earned sick leave by employer" provides that an employer subject to the ESLL must provide paid time off as follows:

> Each employer shall provide earned sick leave to each employee working for the employer in the State. For every 30 hours worked, the employee shall accrue one hour of earned sick leave, except that an employer may provide an employee with the full complement of earned sick leave for a benefit year, as required under this section, on the first day of each benefit year in accordance with subsection c. or subsection d. of section 3 of this act. The employer shall not be required to permit the employee to accrue or use in any benefit year, or carry forward from one benefit year to the next, more than 40 hours of earned sick leave. Unless the employee has accrued earned sick leave prior to the effective date of this act, the earned sick leave shall begin to accrue on the effective date of this act for any employee who is hired and commences employment before the effective date of this act and the employee shall be eligible to use the earned sick leave beginning on the 120th calendar day after the employee commences employment, and if the employment commences after the effective date of this act, the earned sick leave shall begin to accrue upon the date that employment commences and the employee shall be eligible to use the earned sick leave beginning on the 120th calendar day after the employee commences employment, unless the employer agrees to an earlier date. The employee may subsequently use earned sick leave as soon as it is accrued.

§ 34:11D-2(a).

The ESLL further provides that an employer "shall be in compliance with this section if the employer offers paid time off, which is fully paid and shall include, but is not limited to personal days, vacation days, and sick days, and may be used for the purposes of section 3 of this act in the manner provided by this act, and is accrued at a rate equal to or greater than the rate described in this section." § 34:11D-2(b).

During trial, County Concrete demonstrated that it is the policy and past practice of the company to allow employees to use vacation time for "anything they want," including but not limited to for paid sick days. County Concrete provides its employees with paid sick days and does not discipline employees for taking a sick day. (T3 5:3-10). County Concrete also permits its employees to take paid days off for, *inter alia*, family illness, or to attend an event at their child's school. (T3 5:16-22).

County Concrete President John Crimi ("Mr. Crimi") explained at trial that this has been the past practice of County Concrete since 1978. (See T3 17:16 – 18:1). Mr. Crimi personally verbally advised County Concrete employees of these policies many times during his 45-year tenure as president of County Concrete, and has provided employees with paid sick time even when they did not have the time approved. (T2 56:8-17; T3 6:17-20, 18:3-7). Both former and current County Concrete employees corroborated this policy and practice at trial. For example, Steven Parisi ("Mr. Parisi") testified that Concrete County employees could use paid time off days for any reason, not just those limited to travel for vacation. (T2 8:20-9:3). It was also current employee Victor Joyner's ("Mr. Joyner") understanding that employees could use vacation days for any reason they saw fit, including for a doctor's appointment or to visit a sick family member. (T2 82:23-83:21).

Despite this testimony, the trial court rejected County Concrete's past practice defense and noted that County Concrete did not raise this argument until trial and that "[t]he past practice defense was not raised until after testimony at trial demonstrated that there was no PTO policy in existence." (Da43).

The trial court's ruling was incorrect as a matter of law because the past practice argument is a principle of contract interpretation, rather than a waivable defense. "As a general principle, past practice is admissible to interpret a contract: 'Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.'" Quick v. N.L.R.B., 245 F.3d 231, 247 (3d Cir. 2001) (quoting Restatement (Second) of Contracts § 202(4)).

Though County Concrete maintains that past practice is not a waivable defense, County Concrete additionally did not waive the argument. The trial court incorrectly held that trial was the first time County Concrete raised the issue of County Concrete's past practice in this litigation. However, Mr. Crimi specifically testified on this issue at his deposition in this matter. At trial, Plaintiffs' counsel attempted to impeach Mr. Crimi with the relevant portion of Mr. Crimi's deposition during which he testified County Concrete's past

practice. Specifically, at his deposition, Mr. Crimi was asked: "And how do County Concrete employees know they are permitted to use vacation time for other uses, if they do know?" (T3 19:5 – 20:1). Mr. Crimi responded: "Because everyone in the Company knows that because that's been the custom and past practice of the company since 1978. They all know what's going on and they all know that." (T3 19:5 – 20:1)

Finally, the New Jersey Department of Labor "Earned Sick Leave FAQs" ("FAQs") – the only authority available on the ESLL – specially states that if an employer's PTO policy meets the requirements of the ESLL, it is *not* required to provide additional time designated for earned sick leave. (Da793-Da814). The FAQs provide:

> **1. Can other PTO policies satisfy the requirements of the earned sick leave law?**
>
> *Yes, so long as the PTO meets or exceeds all of the requirements of the earned sick leave law and may be used for the purposes listed within the earned sick leave law. For example, some employers allow employees PTO for other purposes, such as vacation or personal leave. The employer is not required to provide additional time designated for earned sick leave if the vacation or personal leave days may be used for earned sick leave and the employer's policy meets all requirements of the law.*

(Da809-Da810).

Because County Concrete sufficiently demonstrated its policy and past practice to allow employees to use vacation time for any reason is compliant

with the ESLL's mandates, the trial court's findings that County Concrete did not have a compliant paid time off policy and thereby violated the ESLL was incorrect and should be reversed.

B. The Court Erred By Ruling that County Concrete Failed to Comply With The ESLL's Recordkeeping Requirements.

As discussed above, it is, and has always been, County Concrete's policy to permit employees to use their "Vacation" time for any purpose, including those afforded under the ESLL. The FAQs addresses its mandates for record keeping when the employer, such as County Concrete, maintains a compliant vacation policy. (Da809-Da810). In relevant part, the FAQs state:

> **2. Is an employer with a compliant PTO policy required to retain records documenting hours worked, earned sick leave accrued, used, paid, paid out and carried over?**
>
> *The employer with a compliant PTO policy need not retain separate records documenting the accrual, use, payment, payout and carry over of leave taken for purposes covered under the Earned Sick Leave Law. That is, the employer is not required to keep such records separate from records documenting leave taken for other purpose under the PTO policy. However, an employer with a complaint PTO policy must for the five-year period specified in the law retain records of the accrual, use, payment, payout and carry over of their employees' PTO as to allow the Department during a possible inspection to confirm that the employer is continuing to comply with the requirements of the Earned Sick Leave Law relative to the PTO policy.*
>
> **3. The Earned Sick Leave Law states that an employer who offers a PTO policy, which is fully paid, (including by not limited to personal days, vacation days and sick days), where the PTO may be used for the purposes listed in the law and in the manner provided in the law and is accrued at a rate equal to or greater than the rate described in**

> **the law, that PTO policy is compliant with the law. If an employer has such a PTO policy, is the employer required to record hours of leave used for the purposes listed in the Earned Sick Leave Law separately from hours of leave used for other purposes under the PTO policy? For example, would the employer be required to record leave used by an employee for a typical vacation separate from leave used to care for an ill family member?**
>
> *No. The employer who has a compliant PTO policy is not required to record leave used for purposes covered under the Earned Sick Leave Law separate from leave used for other purposes. Thus, in the example cited above, both the vacation leave and the leave to care for an ill family member would simply be recorded as PTO.*

(Da810).

Mr. Parisi testified at length regarding County Concrete's employee pay records, confirming they detail an employee's paid time off, both used and available to date. County Concrete also maintains "Vacation Approval Reports" that track an employee's requests for paid time off, regardless of the reason. (See T2 64:15-65:25). Plaintiffs do not dispute the accuracy of their own Time Detail Reports, nor did they proffer any testimony at trial from any other County Concrete employee that their time records, which track paid time off, were inaccurate. Testimony at trial did reveal that various employees received paid time off for attending doctor's appointments and that all employees are paid out their full vacation allotment each year. (See T2 73:15-78:4 and T3 6:10-12).

Plaintiffs' focus on whether County Concrete's "Vacation Approval Reports" list the specific reason for each paid time off request is misguided. The

FAQs are clear that the ESLL does not require employers to designate the specific reason for paid time off, so long as the paid time off can be used for those purposes identified under the ESLL, such as Plaintiff Bonelli taking a paid day to attend a doctor's appointment on July 5, 2019. (See T1 72:15-19). As Mr. Joyner testified, "I don't have to keep track as to the reasons they're taking off" (See T2 65:12- 25) because County Concrete permits employees to use their paid vacation time for any purpose and properly tracks vacation time in compliance with the ESLL.

County Concrete's record-keeping was, therefore, compliant with the ESLL. Accordingly, the trial court's ruling should be reversed.

C. The Trial Court Erred By Holding as a Matter of Law that County Concrete is Subject to the ESLL.

According to the Decision of the trial court, County Concrete was subject to the ESLL commencing the date the CBAs expired as a matter of law. The trial court's holdings throughout the case ignored evidence provided that the legislative intent was to exempt redi-mix concrete companies under the construction industry exemption, including the sworn testimony of Mr. Crimi, and the letter of William J. Layton, Executive Director of the New Jersey Concrete and Aggregate Association, who had direct communications with New Jersey State Legislators involved with and/or knowledgeable of the intended

definitions of "Employee" and "construction industry" under the ESLL based on their positions in the Legislature. (Da117; Da763-Da769).

This evidence sufficiently demonstrated that the ESLL was never intended to apply to County Concrete and/or any company where union members are subject to a collective bargaining agreement with an expiration date, because this combination would do nothing more than to weaponize the union during contract negotiations. This is clearly recognized by the New Jersey Legislature's efforts to directly clarify the ESLL and its application. More specifically, there are currently fourteen pending bills in the New Jersey Legislature's 2024-2025 Session to clarify and for the most part limit the ESLL's application.[2] The two pending bills that directly impact this case and

[2] Pending Bills: A785 (prohibits local units of government from adopting increased minimum wage and mandatory paid sick leave for private employers); A786 (prohibits local governments from requiring private employers to provide paid sick leave); A794 (eliminates payments for unused sick leave earned after effective date; limits carry forward of unused vacation leave; requires suspension and forfeiture of certain payments; limits use of unused sick leave in year before retirement); A795 (restricts use of accumulated sick leave by public employees in year prior to retirement); A796 (limits certain unused sick leave pay and vacation leave carry-forward for public officers and employees); A945/S1661 (prohibits payment to public employees at retirement for certain unused sick leave, provides for forfeiture of payment for unused sick leave for certain criminal convictions, and requires documentation for use of sick leave); A1531/S2584 (requires employers whose employees are subject to contracts that are amendable and do not expire to provide earned sick leave); A1587 (limits certain payments for unused sick leave earned after effective date by public officers or employees; limits vacation leave carry-forward and requires suspension and forfeiture of certain supplemental compensation); A3444

demonstrate the nuances and ambiguities of the new and untested ESLL, A4309/S3249 and A1531/S2584, are currently introduced before both the Assembly and Senate. Specifically, Bill A4309/S3249 provides that employers whose employees are covered by a collective bargaining agreement that has an expiration date are compliant with the ESLL if they alternatively offer any type of vacation or paid time off, of forty (40) or more hours per year to their employees. Conversely, Bill A1531/S2584 clarifies that businesses with employees who are covered by a collective bargaining agreement that does not expire, but is or becomes amendable, are subject to the mandates of the ESLL. The enactment of the two complimentary statutes would simultaneously ensure that workers receive paid time off for sick purposes without weaponizing the ESLL for union negotiations. The pending bills are consistent with County Concrete's arguments concerning the application and interpretation of the

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(provides that earned sick leave law does not apply to certain workers in concrete industry); A4309/S3249 (establishes additional manner of employer compliance to provide earned sick leave for certain employees subject to collective bargaining agreements); S1661 (prohibits payment to public employees at retirement for certain unused sick leave, provides for forfeiture of payment for unused sick leave for certain criminal convictions, and requires documentation for use of sick leave); S694 (establishes Office of Leave Time Compliance in DCA to ensure municipal, county, and school district compliance with accumulated sick leave and vacation leave laws); S2584/A1531 (requires employers whose employees are subject to contracts that are amendable and do not expire to provide earned sick leave); and S2772 (allows long-term care facility employees to accrue paid sick leave).

FAQs, the only existing authority on the New Jersey ESLL. Significantly, Bill A4309/S3249 includes a retroactive component, demonstrating that the legislative intent was always to exclude companies like, and including, County Concrete, from the ESLL mandates, provided that they offer at least forty (40) hours of vacation or other paid time off per year. Plaintiffs do not dispute that all County Concrete employees received at least forty (40) hours of time off.

Under these statutes, County Concrete would be unequivocally exempt from the ESLL's requirements and Plaintiffs' entire cause of action would be moot. The basic principles of statutory interpretation recognize that not every statute is clear, and in case of ambiguity, the Court's "guiding light is the Legislature's intent." Correa v. Grossi, 458 N.J. Super. 571, 579 (App. Div. 2019). All evidence in this case indicates that the legislative intent is for County Concrete to be exempt from the ESLL's requirements; this will be confirmed once voting is complete on the proposed bill. Rather than speculate as to the intent of the exemption or substitute its own beliefs, the trial court should have deferred to the intentions of the New Jersey Legislature and its goals in promulgating the ESLL.

II. THE TRIAL COURT INCORRECTLY RULED THAT PLAINTIFFS HAD STANDING TO PURSUE CLAIMS UNDER THE ESLL ON BEHALF OF OTHER SIMILARLY SITUATED EMPLOYEES WHEN NO SIMILARLY SITUATED EMPLOYEES HAD DESIGNATED PLAINTIFFS TO BE THEIR REPRESENTATIVE PRIOR TO THE COURT'S OCTOBER 28, 2022 POST-TRIAL ORDER.

(Raised Below: Da27; Da33; Da69; Da71)

In its October 28, 2022 post-trial Order, the trial court directed County Concrete to pay damages to other employees who are "similarly situated" to Plaintiffs. While County Concrete recognizes that the ESLL allows for a New Jersey employee to pursue a wage claim on behalf of others who are similarly situated, Plaintiffs simply failed to take any of the required steps to pursue their claims on behalf of others during the course of litigation.[3] In fact, despite a lengthy litigation, Plaintiffs never attempted to certify a class either during discovery or at any point up to the time of trial. An award of class damages in the absence of any class discovery is inherently unfair to County Concrete and opens the door to a potential windfall of paid time off for which an employee would not otherwise be entitled had the necessary discovery been completed.

In order to certify a class, a plaintiff must demonstrate that the class must be so numerous that joinder of all parties is impracticable; there must be

[3] N.J.S.A. 34:11D-5 and 34:11-56a25 allows for plaintiffs to be designated by other similarly situated employees in order to pursue a wage action on their behalf.

questions of fact or law common to the class; the claims or defense of the representative must be typical of the claims or defenses of the class; and the representative must fairly and adequately protect the interests of the class. N.J. Ct. R. 4:32-1(a). Such a determination requires a **rigorous** analysis of the record to determine whether the requirements for class certification are met. Hearn v. Rite Aid Corp., No. A-2009-10T1, 2012 WL 996603, at *1 (N.J. Super. Ct. App. Div. Mar. 27, 2012) (citing Carroll v. Cellco P'ship, 313 N.J. Super. 488, 495 (App. Div. 1998) (emphasis added).

Despite these standards, the trial court permitted Plaintiffs to proceed and, after trial, reasoned that they were permitted to recover damages, not only on behalf of the named Plaintiffs, but also on behalf of all similarly situated individuals, "without the need or requirement that the case be certified as a class action," which the trial court recognized as a "more costly and burdensome procedure." (Da66). However, this finding ignores, and is directly contrary to R. 4:32-2(a) which states, "[w]hen a person sues or is sued as a representative of a class, **the court shall, at an early practicable time, determine by order whether to certify the action as a class action."** (emphasis added). Recent New Jersey precedent further supports the fact that wage and hour claims brought on behalf of similarly situated employees are subject to the class-certification process. See e.g. Morales v. V.M. Trucking, LLC, No. A-2898-16T4, 2019 WL

2932649, at *10 (N.J. Super. Ct. App. Div. July 9, 2019) (ordering the trial court to consider and decide plaintiffs' request for class certification under the New Jersey Wage Payment Law); Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 WL 3297297, at *2 (N.J. Super. Ct. App. Div. July 23, 2019) (noting that the trial court entered an order denying class certification as to plaintiffs' overtime claims New Jersey Wage and Hour Law); Maia v. IEW Constr. Grp., 257 N.J. 330, 338 (2024) (recognizing the necessity to seek class certification for alleged violations under the New Jersey Wage Payment Law and New Jersey Wage and Hour Law). Further, there is a glaring void of any applicable New Jersey authority addressing whether a plaintiff may seek damages on behalf of others – during or even after the time of trial - despite failing to certify a class. This void only cements the fact that such conduct is not permitted, and that class certification is required by the courts. In fact, in contrast, ample New Jersey case law tellingly exists regarding potential class disputes arising during the class certification process, a step Plaintiffs failed to take in this litigation. It is common parlance to describe this process as the "class-certification stage" and there are certain standards that courts must follow during it. See e.g., Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 566 (2010) ("at the class-certification stage, a court must 'accept as true all of the allegations in the complaint. . .and consider the remaining pleadings, discovery . . . and any other pertinent evidence

in a light favorable to plaintiff…'"). The existence of ample authority on class certification disputes over these requirements only exemplifies the point that a *de facto* class cannot simply be formed **after** trial, without any investigation by the court, and certainly not **after** a judgment has been entered.[4]

Not only did Plaintiffs fail to certify a class, but they also failed to make any showing in support of their purported class allegations. New Jersey courts have repeatedly held that the failure to move for class certification before discovery and trial essentially waives a plaintiff's ability to later seek recovery on behalf of possible class members. See Levine v. 9 Net Ave., Inc., No. A-1107-00T1, 2001 WL 34013297 (N.J. Super. Ct. App. Div. June 7, 2001) (affirming the trial court's denial of a class certification in part due to the fact that plaintiff failed to move for class certification); see also Serbio v. Metairie

[4] In their Opposition to County Concrete's Motion in Limine to preclude from trial evidence of any alleged similarly situated employees based on their failure to seek class certification, Plaintiffs argued, for the first time, that they were seeking a collective action, rather than a class action pursuant to R. 4:32-1(a). Regardless of whether Plaintiffs pursued a class or collective action, both mechanisms have a certification requirement that Plaintiffs blatantly failed to meet, the absence of such is prejudicial to County Concrete, for the reasons discussed in more detail below. See Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 85 (3d Cir. 2017) (describing the Third Circuit's two-step class certification process for FLSA collective actions); see also generally Branch v. Cream-O-Land Dairy, 244 N.J. 567 (2021) (confirming that a plaintiff seeking to recover damages for a collective group under the New Jersey Wage and Hour law is still required to seek class certification).

Corp., No. L-336-04, 2009 WL 2426341, at *1 (N.J. Super. Ct. App. Div. Aug. 10. 2009) (noting that "shortly before the trial date, the judge directed plaintiff to either move for class certification or be barred."); see also K.D. v. Bozarth, 713 A.2d 546 (N.J. Super. Ct. App. Div. June 29, 1998) (removing the "class action" designation from the caption since a class was never certified). Significantly, the "burden of satisfying the requirements of [class certification] remains upon the party seeking class certification," which "does not shift merely because that party has failed to move for class certification." Levine, 2001 WL 34013297, at *5.

Simply put, the trial court did not perform any assessment as to whether the class certification requirements were met nor did the court allow County Concrete an opportunity to provide any opposition. Therefore, given that Plaintiffs failed to move for certification, the trial court incorrectly determined that named Plaintiffs William Cano and Raymond Bonelli had standing to pursue claims on behalf of other similarly situated employees. See Lopez v. 5 De Mayo Bakery, Inc., No. A-2520-08T3, 2010 WL 2869484, at *1 (N.J. Super. Ct. App. Div. July 20, 2010) (filing for class certification after trial had been scheduled was "too late" and, further, certifying a class at this stage would require a re-opening of discovery as to the amount of each plaintiff's damages). By doing so, the trial court allowed Plaintiffs to pursue damages on behalf of other

employees, prejudicing County Concrete as it was left without the opportunity to conduct class discovery as to those individuals. As explained more fully below, this precluded County Concrete from confirming the true value of any potential damages for which each class member was entitled within the rules and requirements of the ESLL, resulting in a potential windfall to the alleged similarly situated employees.

Accordingly, the trial court's ruling that Country Concrete must pay damages to other employees who are "similarly situated" to Plaintiffs must be reversed. Failure to do so would set a precedent, signaling to other litigants that they could now avoid the necessary "class-certification stage" and fast forward straight to class damages.

III. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFFS TO INTRODUCE EVIDENCE OF ALLEGED CLASS DAMAGES WITHOUT PROPER FOUNDATION AND DESPITE THE ABSENCE OF CLASS CERTIFICATION AND FURTHER ERRED IN PERMITTING PLAINTIFFS TO ENGAGE IN POST-JUDGMENT CLASS DISCOVERY WHICH RESULTED IN THE IMPROPER AWARD OF DAMAGES

(Raised Below: Da27; Da33; Da69; Da71)

The trial court improperly awarded damages on behalf of the alleged similarly situated employees despite the glaring absence of any class certification. The absence of class discovery was only highlighted by the fact that the trial court erred in allowing Plaintiffs to proffer evidence in support of the alleged damages on behalf of similarly situated employees **after the trial**

for damages was already completed and a decision had been ordered. As a result, the lack of pre-trial class discovery prejudiced County Concrete insofar as it led to an unwarranted award of damages to Plaintiffs under the ESLL.

As discussed above, there is a noticeable absence of any New Jersey case law addressing whether a plaintiff may seek damages on behalf of others, either during or after the time of trial, despite failing to certify a class. This lack of authority is telling insofar as it only demonstrates the illogicality and harms of permitting an award of damages to a class that receives post-verdict certification. However, the law is clear that Plaintiffs bear the burden of proving damages, "which cannot be 'based on mere speculation.'" Chiofalo v. State, No. A-2349-16T1, 2020 WL 4748097, at *9 (N.J. Super. Ct. App. Div. Aug. 7, 2020) (quoting Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128 (App. Div. 2002) (internal quotations omitted)). Although "proof of damages need not be done with exactitude," Plaintiffs must "prove damages with such certainty as the nature of the case may permit.'" Chiofalo, 2020 WL 4748097, at *9 (citations omitted). Plaintiffs must provide courts with sufficient facts to enable a factfinder to make a fair and reasonable estimate. See Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420, 524 (App. Div. 1987) ("damages should be proved with 'such certainty as the nature of the case may permit, laying a

foundation which will enable the trier of facts to make a fair and reasonable estimate.'").

Here, the sole purpose of trial was to establish Plaintiffs' alleged damages. Significantly, the ESLL does not provide for an automatic award of paid time and only provides paid days off for particular reasons set forth in the statute. Specifically, paid time off under the ESLL is not automatic like other New Jersey wage and hour laws, e.g., minimum wage or overtime, and qualifying employers are only required to provide qualifying employees with forty (40) hours of paid time off for **qualifying reasons** each calendar year. See N.J.S.A 34:11D-3(a) (emphasis added). Further, under the ESLL, an employer's existing vacation, personal time, or PTO policy, can satisfy the statute's requirements. In other words, an employer is not required to establish a separate paid sick leave policy so long as their current policy provides at least forty (40) hours of paid time off and permits employees to use the time for purposes under the ESLL in addition to sick time, such as to attend their child's school conference or cope with domestic violence. This is undisputed because the ESLL was enacted with the intent to provide paid time off for workers who otherwise had none, i.e., to ensure that New Jersey workers are never tasked with making the decision as to whether they can afford, or are even permitted to, take unpaid time off for those ESLL reasons. As a result of the nuances of the ESLL, it is

very possible that an employee may not have a qualifying need to use any or all of their paid sick leave days available under the ESLL during any calendar year. The ESLL does not require the payout for those days under the statute. Therefore, an individualized factual examination is crucial in order to determine not only whether a worker was actually deprived of paid time off afforded under the ESLL, but the specific amount of time, and thus entitled to damages.

As discussed above, during trial, County Concrete proffered clear evidence that none of its employees were denied paid sick time, as it is County Concrete's policy and past practice to allow employees to use vacation time for any reason, including those under the ESLL. In contrast, throughout trial, Plaintiffs failed to present proof regarding their alleged similarly situated employees. More specifically, Plaintiffs failed to establish: (1) the exact number of employees working at any particular County Concrete location during any relevant time; (2) the number of hours worked by any employee other than named Plaintiffs; and, most significantly (3) whether any employee other than the named Plaintiffs received paid sick days at any relevant time, requested any paid sick days, or were denied paid sick days at any relevant time, for any of the reasons for which paid sick days are afforded under the ESLL. Simply put, Plaintiffs woefully failed to establish that those alleged similarly situated

employees suffered any damages, and further, whether they would be entitled to the full five (5) days of paid sick time under the ESLL. For example, Plaintiff Cano testified at trial that he was not familiar with any other employees requesting time off for sick purposes who were then denied the time. (T1 104:2-4). Additionally, though Plaintiff Bonelli initially testified to the number of employees working at each of County Concrete's worksites, he later conceded that he measured the employee count simply by looking at a "stack of union dues receipts" and acknowledged that his method did not result in accurate employee count. (T1 85:6;12; 90:13-22).

In fact, the only documentation relied upon by Plaintiffs regarding damages sustained by the purported class was improperly introduced into evidence during trial. Specifically, Plaintiffs primarily relied upon two payroll spreadsheets marked as exhibits at trial. (T1 130:13-131:14; 136:16-138:1). Yet, Plaintiffs failed to elicit any testimony at trial as to who prepared the spreadsheets, when they were prepared, or what they evidenced. (T1 130:13-134-16; 137:3-138:7). Therefore, Plaintiffs failed to lay the foundation necessary for this evidence, and the trial court erred when ruling to admit it at trial. (T1 139:9-143:21).

Despite Plaintiffs' failure to present any admissible evidence during trial in support of damages on behalf of similarly situated employees, the trial court

permitted Plaintiffs to submit the following evidence **after the damages trial was completed**:

> Within 60 days of this Judgment, Plaintiffs' counsel shall file and submit on eCourts satisfactory evidence as to the names of any/all similarly situated employees as identified on Schedule A to Plaintiffs' post-trial submissions who have designated Plaintiffs as their agent/representative, with verification of same, to seek compensation for unpaid ESLL wages and liquidated damages, to be paid in the amount and manner set forth on Schedule A as to that employee as verified by that employee to be accurate, or as modified by that employee

(Da34). Though County Concrete was permitted to "challenge" the accuracy of the list of similarly situated employees and/or the damages sought by Plaintiffs, County Concrete was severely prejudiced by its lack of class discovery that would have afforded it the opportunity to properly object to the damages sought by Plaintiffs. Had the trial court permitted discovery as to the alleged similarly situated employees prior to trial, County Concrete would have conducted the depositions of those individuals in order to make a fact intensive inquiry as to whether each individual: (1) had requested and been denied accrued, paid leave; or (2) had not requested paid sick leave because they knew they would not be paid; or (3) were not aware of their rights to paid sick time due to the lack of notification and posting, as alleged by Plaintiffs.

Further, the trial court's order included a de facto award of 40 hours for each similarly situated employee, despite no evidence that any of these employees were entitled to the full 40 hours under the ESLL. The Order stated:

> the Defendant shall also separately serve upon Plaintiffs' counsel a full and complete certification by a duly authorized representative of Defendant that: (1) discloses any and all Hourly employees owed ESLL wages consistent with this Order and Judgment whose names are not identified on Schedule A (including, but not limited to the East Orange Hourly employees); and (2) confirming payment of damages to those employees **in the form of 40 hours of lost wages, or total number of ESLL hours accrued at the time of separation from employment**, at their applicable wage rate at the time of the violation; and liquidated damages (200%) according to the same calculation. In making said Certification Defendant shall identify: (1) the name of each employee; (2) their dates of hiring and separation from employment; (3) their wage rate(s); (4) number of ESLL hours accrued per year; (5) the amount of lost wages paid; (6) the amount of liquidated damages paid; and (7) the date(s) of payment.

(Da34) (emphasis added). Again, the lack of class discovery prior to the parties' trial on damages precluded County Concrete from sufficiently challenging whether the similarly situated employees were entitled to any portion of 40 hours of paid time off made available under the ESLL.

Simply put, Plaintiffs failed to establish at trial that any similarly situated County Concrete employee had been denied paid time off under the ESLL, and therefore, suffered any actual damages. Because Plaintiffs were woefully deficient in providing proof of damages for each alleged similarly situated

employee, the trial court should have held that Plaintiffs did not meet their burden and denied any award of damages. Instead, the trial court's decision to allow Plaintiffs to submit evidence of class damages **after the completion of the damages trial,** and **in the absence of class discovery,** resulted in an unwarranted award and likely windfall of damages to those individuals. Accordingly, the trial court's Order must be reversed.

CONCLUSION

For the foregoing reasons, Defendant, County Concrete Corporation requests that this Court reverse all decisions made by the trial court against it. Should the trial court findings not be reversed in their entirety, the case should be remanded to the trial court for class discovery as to the issue of potential class damages.

Respectfully submitted,

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/s/ Katharine W. Fogarty
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EILEEN M. FICARO

Dated: December 19, 2024

WILLIAM CANO AND RAYMOND BONELLI, ON THEIR OWN BEHALF AND ON BEHALF OF ALL SIMILARLY SITUATED EMPLOYEES Plaintiffs/Respondents, v. COUNTY CONCRETE CORPORATION, Defendant/Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000056-24 Civil Action **ON APPEAL FROM ORDER DATED** **July 23, 2024** **DOCKET NO. MRS-L-1365-19** Sat Below: Hon. William J. McGovern III, J.S.C.

RESPONDENTS WILLIAM CANO AND RAYMOND BONELLI'S BRIEF

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PRELIMINARY STATEMENT

This case concerns the straightforward application of the New Jersey Earned Sick Leave Law ("ESLL"), whose purpose was to expand paid leave in the workplace. The term "sick leave" is a misnomer. The ESLL provides leave for an employee or family member's physical *and* mental illness, to respond to domestic or sexual violence, for child-related events, and other reasons set forth in the statute. Although the ESLL is new, this case is not novel because the ESLL's requirements are clear, and so was Defendant's deliberate violation of them.

Defendant chose to deny its employees ESLL leave. It took the spurious position that the employees' existing "Vacation" leave was sufficient, and left unchanged its policies that deny employees ESLL leave. Defendant's "Vacation" leave did not provide ESLL leave, because it required advanced scheduling and was subject to rescheduling for claimed business needs. But the ESLL requires leave for unforeseeable purposes that is not scheduled in advance.

Despite that obvious fact, and notice it was not ESLL compliant, Defendant litigated this matter through extensive pretrial discovery, motions, interlocutory appeal, and then trial. This was due to Defendant's unfounded belief that it is not subject to the ESLL. Defendant argued it was in the "construction industry" and ESLL-exempt, but without proof or explanation to support that proposition, despite legal precedent that shows it is not a construction industry employer.

Defendant also believes that, despite the language of the ESLL that universally applies to all employees, the ESLL is not for workers who have other forms of leave. That position is legally incorrect, and was correctly rejected by the Trial Court, as discussed within. But it also fails a common-sense examination. The ESLL requires employers to provide specific enumerated types of leave. The fact that an employer may give employees unrelated forms of leave is just not relevant if it fails to provide the types of leave mandated by law.

Plaintiffs and each and every of the 133 similarly situated employees joined to this action were employees working under five separate collective bargaining agreements ("CBAs") which all contained identical policies providing "Vacation" leave. They were also subject to an employee manual that only permitted an unpaid "excused" absence for an employee's personal illness. All were encouraged to take unpaid leave (if any) when seeking leave for personal illness and the purposes of the ESLL. There can be no doubt that they were "similarly situated." All employees covered by the CBAs, regardless of job duties or assignments, were subject to the same employer leave policy.

Moreover, this action was conducted on behalf of all similarly situated employees throughout the litigation, including taking discovery of all employee payroll records, and Plaintiffs' successful summary judgment motion for all employees. But Defendant did not challenge the status of the collective action

until the eve of trial, with an 11th hour argument that "class certification" was required. Defendant is wrong. The New Jersey Wage and Hour Law ("NJWHL") that provides for enforcement of the ESLL authorizes a "collective action," and is not subject to the class action Rule, which applies only when a class action is not authorized by statute. The ESLL also does not require any "certification" process like that provided for by the Fair Labor Standards Act ("FLSA").

Nevertheless, the Trial Court fashioned a certification procedure in an abundance of caution, to join the 133 similarly situated employees to this action. This went above and beyond the requirements of the NJWHL. Each of the employees, whose "similarly situated" status is not disputed, consented in writing to join this collective action. The employees' damages cannot be disputed by Defendant, since they flow from employees' accruals of ESLL leave and the finding they were deprived of all of that leave. The calculation was first estimated by Plaintiffs' review of the payroll records. Then, after months of meet and confer, and Defendant's objections to the accrual numbers, Defendant stipulated to the calculation. This renders its arguments against those damages specious.

Defendant is a contumacious violator of the ESLL law, shown in its words and deeds, especially owner John Crimi's philosophical position on paid leave: "we're not paying for unproductive time." The $758,898.38 in collective action damages is well established, and must not be overturned on this appeal.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

a. Further Procedural History

From the outset of this litigation on June 27, 2019, Defendant adopted the position that it was not subject to the ESLL, but also compliant with the same law. (Da352 - 356). Plaintiffs filed several motions in order to obtain some 27,000 pages of payroll records for all of Defendant's hourly workers, policy memoranda, and communications relating to Defendant's position in discovery. (Pa1103-04). Motion practice was required, including three discovery motions. (Pa1103-05). Although sought in discovery and motion practice, Defendant did not disclose any documents that evidenced a posting of ESLL notice in the workplace or any written PTO policy. (Da44, Findings of Fact # 26)

Defendant was found liable on summary judgment for failing to provide statutory notice under the ESLL, for failing to provide individual notice to each employee, and failing to post the workplace posting in a conspicuous location. (Da13). The Court also rejected Defendant's argument on summary judgment that it was exempt under the "construction industry" proviso of the ESLL. (Da15-16).

Following the Order for Partial Summary Judgment against Defendant, and with trial pending, Defendant brought a Motion for Reconsideration, in which it argued that it had posted notice at all of its worksites, relying on a certification from President John Crimi. (Da767 - 768). Plaintiffs opposed the motion,

arguing that Defendant had not raised any new evidence. (Da895 – 897, T 53:2 – 54:25, 56:1 -6). The Trial Court denied Defendant's Motion to Reconsider, noting Defendant's motion had been in part "duplicative." (Da18).

With trial still pending, Defendant thereafter filed an interlocutory appeal of the Trial Court's decision on summary judgment, repeating arguments concerning its exemption under the "construction industry" proviso of the ESLL, and also arguing that draft legislation would eventually exempt Defendant from the Act. (Pa1107, 1131 - 1137). Defendant's interlocutory appeal was denied on June 23, 2022. (Pa1251). Shortly prior to trial, in the course of the Motion *in Limine* proceedings, Defendant again raised "draft legislation," and made an oral motion that the trial be adjourned due to the existence of a pending bill that would exempt Defendant from the ESLL. (Pa46 - 48). Defendant's oral motion before trial was denied. (Pa48).

The Trial Court having found on summary judgment that Defendant was liable under the ESLL for failing provide statutory notice under N.J.S.A. 34:11D-7, Plaintiffs filed and were granted a Motion *in Limine* barring Defendant from introducing evidence to contest its liability for failing to post notice under the ESLL, confirming the trial was held as to damages only. (Da21-22). The Court was clear in its statements from the bench: "it is a damages-only trial, but there are facts, of course, that need to be adduced and presented to the Court in order for the

Court to assess what damages, if any, are proven and/or exist and […] to what extent." (Pa41).

b. This Action was Conducted as One on Behalf of Similarly Situated Employees, which Defendant did not Contest Until the Eve of Trial

Plaintiffs filed their action on behalf of themselves and all similarly situated employees, as permitted pursuant to the ESLL's N.J.S.A. 34:11-56a25 (as incorporated by way of N.J.S.A. 34:11D-5). (Da84 – Da90, at Count II). Plaintiffs' workplace, located at Defendant's Kenvil Plant, is unionized under a Collective Bargaining Agreement that covers that worksite, and Defendant's remaining four worksites are covered by identical CBAs whose terms and conditions are the same as to employee leave or vacation. (Da37 -Da39, Da49, Findings of Fact # 2 - 8, 44). Plaintiffs alleged that their similarly situated employees, those covered under Defendant's five identical CBAs, were deprived of leave mandated by the ESLL, upon the expiration of each CBA, with the Kevil facility expiring first, and the others thereafter. (Da84-90).[1]

From the outset of the litigation, Plaintiffs sought discovery on behalf of both themselves and all similarly situated workers, *and Defendant produced*

[1]The CBA expirations occurred as follows:

> Kenvil Sand & Gravel and Kenvil & Morristown Redi Mix: **January 15, 2019**
> Oxford and Susex Redi-Mix and Landi CBA: **January 15, 2020**
> East Orange and Flemington Redi Mix: **January 15, 2021**
> (Da37-39)

Damages were calculated for the employees based on the expiration date of their CBA.

records as to all of its worksites and employees, not just Plaintiffs Cano and Bonelli. See, e.g., (Da346 – Da349, Interrogatories Nos. 10 – 15, seeking and receiving interrogatory and document disclosures as to "Class Employees"). Defendant produced 27,412 pages of documents in discovery, mostly of payroll records from workers employed under each of its five CBAs. (Pa1103-04).

On summary judgment, Plaintiffs moved for relief on behalf of themselves and all similarly situated employees under the five CBAs, on the issue of Defendant's failure to provide statutory notice. (See Da13 -Da14, finding Defendant liable on Summary Judgment for failing to post ESLL notice "in each of its locations"). Defendant cross-moved for summary judgment, but did not seek dismissal of the collective action. (Da14 – Da16). Defendant did not claim in the summary judgment proceedings that class certification was required. (Id.)

On the eve of trial, among Defendant's several Motions *in Limine* was a motion arguing, for the first time, that Plaintiffs were barred from bringing a collective action. (Da27-28). The Court denied the motion, relying on the ESLL statute, but also holding it was an improper dispositive motion. (Pa54). At trial, the Court held that class certification was not specifically required by the statute. (Da66). It noted "no basis exists in the law to compel class certification." Ibid.

However, the Court also held that "it is readily apparent by logical deduction and procedural due process …[that] the plaintiffs in an action to enforce

compliance with the ESLL on behalf of others should be able to demonstrate that they have been, in fact designated to act on behalf of 'all employees similarly situated.'" (Da66). The Court fashioned a post-judgment certification process for the similarly situated employees. (Da66-67).

Plaintiffs provided certifications from December 27, 2022 through February 28, 2023 for 133 employees who designated Plaintiffs as their representatives in this action. (Pa659 – 1063, Da932 - 978). Thereafter, the parties met and conferred concerning collective damages through October 2023, wherein the parties stipulated to the figure of $758,898.38 (Da979, Da991-994). Defendant posed objections based on claims that workers had accrued less ESLL leave than estimated by Plaintiffs. (Pa1064 - 1100). Upon review of Defendant's objections, the Plaintiffs accepted the objections and stipulated to damages. (Pa1083).

Defendant did not argue at any time in this process that the joined employees were not similarly situated, or that their claims and defenses were not encompassed by the Court's October 28, 2022 judgment. The Court's Order and final judgment included this sum of $9,120.00, the damages awarded to Bonelli and Cano of $8,880.00 respectively, and an award of $591,423.91 as an award of reasonable attorneys' fees for Plaintiffs' attorneys. (Da71 – Da73).[2]

[2] The award of counsel's reasonable attorneys' fees, which was decided by separate motion, is not on appeal here. Bonelli and Cano's damages calculations are also not challenged.

COUNTERSTATEMENT OF FACTS

Defendant is a "material supplier" of sand and gravel products, owned by its President, John Crimi. (Da37, Findings of Fact # 1). Defendant employs a unionized workforce of hourly employees that work under five different Collective Bargaining Agreements ("CBAs") at five different worksites. (Da37 – Da39, Findings of Fact #2 -7). During the time relevant to this case, Plaintiffs were two hourly employees who worked at the Kenvil sand and gravel plant location. (Da49, at Finding of Fact # 44). In 2019, at a time when the ESLL applied to Defendant, both Cano and Bonelli requested paid sick days, having worked enough hours to accrue earned sick leave. (Da48-49, Findings of Fact #42 – 43). Both Plaintiffs were denied paid sick leave, and were provided only unpaid leave instead, prompting this lawsuit. Ibid.

Defendant has long maintained that it is not subject to the ESLL. Defendant argued at trial that the purpose of the ESLL was to "provide benefits to employees who had none, and not to expand on the scope of existing benefits." (Da55). That argument is repeated by Defendant in this appeal. (Db2-3).

At the outset, Defendant asserted its Affirmative Defense No. 7 that it was exempt under the "construction industry" exemption to the ESLL. (Da99). Simultaneously and inconsistently, the Defendant claimed that its existing

"Vacation" policy provided the leave required by the ESLL. Defendant set forth its position as follows:

> Plaintiffs cannot establish an ESSA [SIC] claim. Defendant engages in services for compensation in the construction industry and in light of the construction exemption and applicable collective bargaining agreements, Defendant is not obligated to comply with the ESSA. Assuming *arguendo*, Defendant is not exempt, Defendant nonetheless complies with the ESSA and permits employees to accrue and use, earned PTO for ESSA related purposes. […] (Da352 - 356).

As Defendant's labor counsel acknowledged before the suit was filed, when Defendant learned about the requirements of the ESLL law, it decided to rely instead on a pre-existing form of leave available to Defendant's hourly workers designated as Vacation. (Pa295 -96).

Defendant's five CBAs provided only one form of paid leave (aside from "Bereavement"), which is "Vacation," whose terms are identical in every workplace under the separate CBAs. (Da39, Finding of Fact # 9; see also, e.g., Pa77). Vacation was requested months in advance and is subject to rescheduling based on the needs of the employer. (Da39-40, Finding of Fact #11; and T1[3] 27:22 – 31:2). Vacation was also not available to employees with less than one year's tenure, i.e. to new hires. (Da39, Findings of Fact #10).

[3] As in Defendant's Appeal, citations to the Transcripts are as follows:
T1 = September 19, 2022 Trial Transcript
T2 = September 20, 2022 Trial Transcript
T3 = September 21, 2022 Trial Transcript

Defendant's other leave policies did not provide for any leave other than an unpaid leave for an employee's personal illness. Defendant's narrow policy on Attendance, embodied in an Employee Manual that all employees were required to sign, contained eight narrow categories of "excused," though unpaid absence. (Da40, at Findings of Fact #14). Those categories only "excused" an employee's personal illness, and no absence for the other purposes under the ESLL. (Da41, at Findings of Fact #15; Da206-07). The "excused" absence permitted the employee to avoid discipline for the absence, but, again, was unpaid. (T1 46:2 – 48:22, 49:6 -13). The policy also requires production of a doctor's note prior to three consecutive days of illness. (Da41, Findings of Fact #16, and T1 51:7 – 52:1). Far from being a dead letter, the policy was enforced, and employees could be disciplined for taking an absence for illness without producing a doctor's note. (Da41 – Da42, Findings of Fact #17 - #19; T2 49:18 – 50:11).

Defendant's President John Crimi did not want to grant his employees ESLL leave. His position on paid leave was that "We're not paying for unproductive time." (Da39, Findings of Fact # 9). Defendant's own employee, Human Resources Officer, Steve Parisi, testified that he was specifically directed to not grant ESLL leave:

> Early on when the ESLL was first implemented into the system our … payroll provider, uh through a proprietary system automatically entered all of ESLL into everyone's um, pay stub… When they started to

> accumulate, I brought it up to Mr. Crimi's attention that, um, they were accumulating the sick hours.
>
> He indicated to me that the hourly people [covered under CBAs] will not be getting paid ESLL time because we are a construction company, but we maintain using the salary-based people in the ESLL. (T2 31:10-24).

During litigation, Defendant claimed it had an ESLL compliant "PTO" program, but this referred only to its existing Vacation leave, not a new program. When Defendant claimed it had a PTO policy and that it had provided notice to its workers of the same, it referenced it's the prior labor counsel's emails stating that Defendant would rely on existing "Vacation" leave to satisfy the ESLL. See (Da347 – 48).

The Trial Court found that Defendant's claim to having a PTO policy may have been a ruse. The reasons included that Defendant published a memo in February 2020 that claimed to provide guidance from management to dispatchers regarding compliance with and recording of ESLL leave as part of a purported "PTO" program. (Da47, Finding of Fact # 37 -39; and Pa309). But the memo was not implemented – the only dispatcher to testify at trial confirmed he didn't read it and didn't follow it. (Da48, Finding of Fact # 40; T2 93:3 – 94:2). There is no evidence that the February 2020 memo was ever communicated to Defendant's employees. (Da56 -Da57, Da61-62). The Trial Court found it possible that "the Memo was prepared and circulated as part of…a ruse to create

something on paper, to make it appear that the defendant was complying with the ESLL." (Da62). The Court also noted that "there [was] no written PTO policy to be found anywhere, nor is there any other reference to PTO in any CBA or Employee Manual." (Da58).

At trial, Defendant rescinded its claim that it had "PTO" policy. (Da43 at Finding of Fact #24). It argued instead that it had an informal "past practice" of providing leave that resembled ESLL leave. Ibid. This claim relied on President Crimi's claim that that vacation time can be used "any time [employees] need." (Da43, at Finding of Fact #23). But this "practice," if it existed at all, was predicated on Crimi's discretion on a case-by-case basis to grant employees leave, not an actual practice articulated in any writing. (Da43, at Finding of Fact # 25, and T2 57:2 - 19). As the Court noted, "the results of such decisions could depend in part on whether the employee was liked or disliked by the front office." (Da59 and T2 57:24 – 58:2).

Defendant's liability was also established through its failure to inform its employees of the ESLL law as prescribed by that statute. The ESLL requires that employees be provided with two forms of statutory notice, including individualized notice and prominent workplace posting. Defendant did not provide these notices. (Da35–36). According to Plaintiff Bonelli, the only notice he saw posted was in an obscure spot, beneath the timeclock below waist height in

the Kenvil workplace. (Da8, D13, Da46 at Finding of Fact # 35 and T1 55:16 – 56:6). Defendant also did not provide individualized notice – for example, President Crimi certified on the Motion to Reconsider that "all non-union employees are given a copy of the Notice when they are onboarded," where "non-union" referred to workers who were not working under CBAs. (Da768 at ¶ 11). This admitted Defendant did not provide individualized notice to Plaintiffs and other employees working under the CBAs.

Defendant also could not provide any evidence that it complied with the workplace posting requirement, and Plaintiffs' testimony confirmed that it had not been done. At deposition, Crimi claimed to not have personal knowledge of whether workplace posting had occurred, but after liability was found on summary judgment, he later claimed that workplace posting occurred - without any evidence to support his claim. Compare (Da768) with (Da891 and 895 – Da897).

The failure to provide statutory notice itself established that every employee had been deprived of all of their ESLL leave. The Trial Court found the employees were "deprived of their respective ability and right to exercise their ESLL rights" because "employees cannot exercise rights of which they are not aware." (Da50, at Findings of Fact # 49). The Court noted it was "patently clear they were never advised [of their rights]." Ibid. This was particularly so since "many employees of Defendant do not speak any English at all, or fluently, and

may require assistance or [ ] translation" but "no evidence was presented…that Spanish speaking employees were ever advised of their ESLL rights in Spanish." (as required by the ESLL). (Da49-50, at Findings of Fact # 48 and T1 98:3 - 23).

Defendant's recordkeeping on ESLL subjects reflected the fact that those rights were not actually being offered to them. The ESLL requires employers keep records documenting employee's uses of ESLL leave, but Defendant did not: "The Defendant's payroll records and by extension, record keeping are in a state of confused chaos. The testimony offered at trial substantiates a finding that managers, supervisors and dispatchers entered or failed to enter and record sick leave data without rhyme or reason, pretty much at their whim." (Da64 and Pa333 – 379 and Da364 - 510).

For example, Defendant's primary method of recording reasons for a day off was through Paycom approval reports. (Da47-48, Finding of Fact #39 and Da 364 - 510). Those reports failed to record whether employees took leave covered by the ESLL. (Da47-48, Finding of Fact #39, Da49, Finding of Fact #46). Dispatcher Viktor Joyner testified that he "didn't read" the memo on recording time for purposes under the ESLL. (Da48 at Finding of Fact #40). Defendant produced documentation of unpaid leave taken by employees in the course of the litigation, and it showed employees took a high number of unpaid absences, despite having ESLL time accrued. (Da49, Findings of Fact #47 and Pa298 -

301). This showed employees were not aware of ESLL rights, or they would not be taking unpaid days. Ibid.

In short, after the ESLL came into effect in 2019, Defendant did not change its policies as to its hourly, i.e. unionized employees, to ensure that they were granted ESLL leave. Defendant chose instead to claim that its "Vacation" policy for those workers was adequate under the Act.

STANDARD OF REVIEW

This Appeal primarily concerns review of factual determinations, where Defendant seeks to overturn numerous factual findings reached on summary judgment and at trial, but does not dispute the applicable law. County Disputes the following factual findings:

- That it does not perform ESLL exempt construction industry work;
- That it did not provide notice to its workers of their ESLL rights;
- That its policies did not comply with the ESLL;
- That it did not have any PTO policy to comply with the ESLL;
- That it violated the recordkeeping requirements of the ESLL; and
- That it actually denied Plaintiffs and their similarly situated employees paid leave required under the ESLL.

Admittedly, "when deciding a purely legal issue, review is *de novo*." Kaye v. Rosefielde, 223 N.J. 218, 229 (2015). But that standard does not apply to the issues raised in Defendant's appeal, which are primarily factual. On appeal, this Court cannot "disturb a factual finding …'unless it is clearly erroneous or shows an abuse of discretion.'" Sipko v. Koger, Inc., 251 N.J. 162 (2022). Abuse of discretion refers to those instances where a finding "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." United States v. Scurry, 193 N.J. 492, 504 (2008)(citations

omitted). Nothing in the Trial Court's well-reasoned and thorough decision was in error, much less an abuse of discretion, and Defendant has not even argued in this appeal that abuse of discretion occurred. Defendant does not cite to anywhere in the transcripts or trial exhibits[4] to show an abuse of discretion.

Second, the standard of review of the certification process for the collective action is abuse of discretion. Although this was not a class action, even under the stricter requirements of that procedure, New Jersey courts "review a trial court's order on class certification for abuse of discretion." Dugan v. TGI Fridays, Inc., 445 N.J. Super. 59, 71 (App. Div. 2016). If class action certification is subject to abuse of discretion review, it stands to reason that a collective action certification process would as well. Defendant does not and cannot contend that the Trial Court's fashioning of a certification process in the absence of any clear precedent under the ESLL or procedure set forth in that statute was anything other than a case management decision to protect all parties' rights. The decision should be accorded respectful deference, especially where Defendant cannot point to any material issue with the manner in which certification occurred, and where there is no legal requirement under the ESLL to certify in the first place.

Applying the abuse of discretion standard to all of Defendant's claims, this appeal must be rejected.

[4] In fact, Defendant did not even include the trial exhibits in its appendix, pointing to its failure to meaningfully address the factual findings it seeks to overturn.

LEGAL ARGUMENT

POINT I.
BACKGROUND TO THE NEW JERSEY EARNED SICK LEAVE LAW

The ESLL deserves a brief introduction. In normal parlance, sick leave refers to the illness of an employee. The ESLL is groundbreaking not only in requiring employers to provide "sick days" for the illness of the employee themselves, but in its expansive application well beyond the employee's illness.

ESLL leave or "sick leave" may be taken the following purposes:

> **(1)** **[Personal Illness]** -- time needed for diagnosis, care, or treatment of, or recovery from, an employee's mental or physical illness, injury or other adverse health condition, or for preventive medical care for the employee;
>
> **(2)** **[To Care for Family Members]** -- time needed for the employee to aid or care for a family member of the employee during diagnosis, care, or treatment of, or recovery from, the family member's mental or physical illness, injury or other adverse health condition, or during preventive medical care for the family member;
>
> **(3)** **[Domestic Violence]** -- absence necessary due to circumstances resulting from the employee, or a family member of the employee, being a victim of domestic or sexual violence, if the leave is to allow the employee to obtain for the employee or the family member: medical attention needed to recover from physical or psychological injury or disability caused by domestic or sexual violence; services from a designated domestic violence agency or other victim services organization; psychological or other counseling; relocation; or legal services, including obtaining a restraining order or preparing for, or

participating in, any civil or criminal legal proceeding related to the domestic or sexual violence;

(4) **[States of Emergency]** -- time during which the employee is not able to work because of:

(a) a closure of the employee's workplace, or the school or place of care of a child of the employee by order of a public official or because of a state of emergency declared by the Governor, due to an epidemic or other public health emergency;

(b) the declaration of a state of emergency by the Governor, or the issuance by a health care provider or the Commissioner of Health or other public health authority of a determination that the presence in the community of the employee, or a member of the employee's family in need of care by the employee, would jeopardize the health of others;

(c) during a state of emergency declared by the Governor, or upon the recommendation, direction, or order of a healthcare provider or the Commissioner of Health or other authorized public official, the employee undergoes isolation or quarantine, or cares for a family member in quarantine, as a result of suspected exposure to a communicable disease and a finding by the provider or authority that the presence in the community of the employee or family member would jeopardize the health of others; or

(5) **[School Conferences and Meetings]** -- time needed by the employee in connection with a child of the employee to attend a school-related conference, meeting, function or other event requested or required by a school administrator, teacher, or other professional staff member responsible for the child's education, or to attend a meeting regarding care provided to the child in connection with the child's health conditions or disability.

N.J.S.A. 34:11D-3(a).

Under the ESLL, employees are entitled to take leave for a condition not foreseeable in advance, and an employer may not require the employee to produce a doctor's note until three consecutive days of absence. N.J.S.A. 34:11D-3(b). The leave is provided on an accrual basis, where the leave is provided based on hours worked, hence the term "earned sick leave." The ESLL time accrues at the rate of 1 hour of leave for every 30 hours worked, up to a maximum accrual of 40 ESLL hours per year. N.J.S.A. 34:11D-2.

An employer is required to provide notice to its employees of the rights under the ESLL in two different ways, both by providing an individualized copy of an NJDOL form outlining those rights to each employee, and by posting a copy of the NJDOL form in a "conspicuous" place in the workplace. N.J.S.A. 34:11D-7.

In addition, the employer is required to keep records for five years that show the "hours worked by the employee and earned sick leave taken by the employee." N.J.S.A. 34:11D-6. Failure to keep such records results in a rebuttable presumption such deprivation occurred. Ibid. The presumption can only be overcome only by clear and convincing evidence presented by the employer. Ibid.

Finally, an employer is permitted to satisfy the ESLL by offering "paid time off" ("PTO") "[including] but not limited to personal days, vacation days, and sick days," so long as it "may be used for the purposes [of the ESLL] in the manner provided by [the] act." N.J.S.A. 34:11D-2(b). But it is critical that a *bona fide* and compliant PTO policy must provide leave that can be used for all the purposes under the Act.

POINT II.

DEFENDANT'S APPEAL MUST BE REJECTED, WHERE IT DOES NOT CHALLENGE THE FINDING OF LIABILITY UNDER THE NOTICE REQUIREMENT OF THE ESLL

One of the unusual aspects of Defendant's appeal is that it does not challenge the primary basis for finding liability under the ESLL on summary judgment, which was the failure to satisfy the notice requirements at Defendant's five worksites. See Da13-14, establishing on summary judgment the violations of N.J.S.A. 34:11D-7 "in each of [Defendant's] locations." Liability having been established, the trial was one for *damages only*, and also as to the degree that the notice violation was established. Ibid. The other findings at trial regarding absence of a PTO policy and violation of the ESLL's recordkeeping requirements were separate and additional grounds establishing liability which additionally supported and established the damages flowing from a lack of statutory notice.

Because the Trial Court's ruling on damages rests on the violation of N.J.S.A. 34:11D-7 not challenged on this appeal, Defendant's appeal should be rejected on that basis alone.

The ESLL requires *two separate forms of notice*: a workplace posting as well as individualized notice to all employees in order to ensure that employees are cognizant of the rights provided by the Act, including parental leave and leave in connection to sexual and domestic violence. N.J.S.A. 34:11D-7. The notices must also be provided in the native language of non-English speaking workers, a critical issue in Defendant's workplace, where many Spanish speaking immigrants are employed. Id.; see also (Da49-50, Finding of Fact # 48). At trial, the Court expanded the summary judgment finding of at least a partial violation of the notice requirement, to find Defendant had fully violated the notice provisions at each and every of its work sites. (Da 46-47, Findings of Fact # 34-36). The Trial Court's judgment rested among other reasons on the failure to provide notice: "**It is clear that Defendant has not complied with the ESLL by virtue of its failure to post ESLL notices, failure to advise individual employees,** maintain adequate records, and its failure to provide paid ESLL benefits." (Da55) (emphasis added).

Defendant does not challenge these findings regarding its violation of N.J.S.A. 34:11D-7 on this appeal, and for that reason alone the decision below

must be affirmed. Simply put, workers could not have exercised a right of which they were not aware, as specifically found by the Trial Court. (Da50, Finding of Fact #49). Notably, the evidence was overwhelming that workers were neither aware of nor actually exercising their rights, and Defendant does not argue otherwise here. Therefore, the violation of N.J.S.A. 34:11D-7 was alone sufficient to sustain the judgment was entered below, without even considering Defendant's other violations.

POINT III.

DEFENDANT IS SUBJECT TO THE ESLL, AND NO COMPETENT EVIDENCE OR STATUTORY ARGUMENT SUPPORTS ITS CONCLUSORY POSITION THAT IT IS EXEMPT

Defendant's claim under Point I.(C) of its brief, that it is not subject to the ESLL, must be rejected. That argument was raised and rejected in Defendant's Motion for Summary Judgment, for Reconsideration of that Summary Judgment decision, and in an interlocutory appeal thereafter. Defendant has long maintained that it is not subject to the ESLL, which is why it made no true efforts to develop an ESLL compliance program for its workforce. But there is no factual or legal basis for Defendant's claim then or now, and it must be rejected.

From the outset of this litigation, Defendant claimed it was exempt under a "construction industry" exemption of the ESLL. But Defendant also argued in the

alternative, that "Vacation" time under its employees' CBAs was good enough to satisfy the ESLL. Defendant never could reconcile these two contradictory positions. Now Defendant raises the "construction industry" argument again, once again with little explanation and even less legal support. Therein lies the problem – Defendant's argument on this subject was rejected because it failed to meet its factual burden to support its affirmative defense. (Da14-15). See Roberts v. Rich Foods, 139 N.J. 365, 378 (1995); Branch v. Cream-O-Land Dairy, 459 N.J. Super. 529, 551 (App. Div. 2019), affirmed at 244 N.J. 567 (2021). Because Defendant did not meet its factual burden to show it was "construction industry," there is no reason for this Court to revisit this now. The factual finding that Defendant is not "construction industry" was no abuse of discretion, was legally correct and cannot be overturned.

Regardless, to be clear on the legal basis for why Defendant's argument must fail, even assuming *arguendo* facts had been raised to support this defense: Defendant delivers sand, gravel and concrete mixtures to worksites – it is what is known under long-established labor law doctrine as a non-construction industry "material supplier," as Defendant admits in this appeal. (Db6). As the Trial Court noted: "Defendant appears to the Court to be a maker or producer of concrete or concrete related materials…[and could be] a manufacturer in the manufacturing industry." (Da15 at fn3).

Defendant disagrees, but raises no competent evidence to support its position. The self-serving letter of William Layton of the New Jersey Concrete & Aggregate Association is irrelevant. See (Da117 and Da569). It is not authenticated and does not state anything helpful and carries no legal authority or evidentiary weight. Defendant's discussion of *potential* future hypothetical legislative amendments to the ESLL are not only irrelevant and meaningless, but are also absurd, since they do not cite to binding law.[5]

For completeness, Defendant is a material supplier and is not subject to the portion of the ESLL that exempts employers "performing service in the construction industry that is under contract pursuant to a collective bargaining agreement." N.J.S.A. 34:11D-1. Defendant does not perform "services" in the construction industry "pursuant to" a CBA, but produces and ships material goods used in construction.

The construction industry is a well-established legal term of art in labor law referring to a specific type of project-by-project employment for multiple employers operating under what are known as "pre-hire" multi-employer collective bargaining agreements. The temporary nature of "construction industry"

[5] As we have noted, Defendant previously raised the possibility of "pending legislation" it in a motion for a stay and in support of an interlocutory appeal of the summary judgment decision. (Da912-14). It then raised the issue again on the eve of trial in seeking an adjournment or stay of the trial, which was denied. (Pa46 - 48).

work is of a particular character that distinguishes it from other industries and does not apply to permanent employees or resemble Plaintiffs' worksite at all. Instead:

> The pattern of employment in the construction industry is characterized by employee mobility. Workers are assembled for specific jobs…as a result, the industry uses union hiring halls as a primary source of labor. (A hiring hall is a place where workers report and the union refers those workers to contractors for employment). George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 22 (1994).

As a result of these employment patterns, Section 8(f) of the NLRA permits the use of "pre-hire" agreements in the construction industry, a CBA only permitted in that industry, which "expressly authorizes negotiation, adoption, and implementation of collective bargaining agreements in the construction industry without initial reference to the union's actual majority status." George Harms, supra. at 23. Defendant's contracts with Plaintiffs and their similarly situated employees were not "job by job" construction industry contracts governed by Section 8(f) pre-hire collective bargaining agreements, but traditional permanent collective bargaining agreements covering permanent employees employed out of permanent facilities

In addition, "construction industry" work is also characterized by the applicability of the prevailing wage law to such work, which effectively results in the union wage provided under local pre-hire agreements becoming the minimum

hourly rate for such construction industry work, whether performed by union or non-union labor. George Harms, supra, at 22. Notably, the defendant does not pay and is not required to pay its workers a prevailing wage.

With that in mind, it is not difficult to imagine what the Legislature had in mind when it exempted those "performing service in the construction industry that is under contract pursuant to a collective bargaining agreement." N.J.S.A. 34:11D-1. Given the uniquely "job-by-job" nature of employment, the ESLL's requirements of tracking accruals of ESLL time for workers would have been an unmanageable burden and inapposite to the needs of the industry.

Time and time again, employers such as Defendant who merely deliver supplies such as concrete to a worksite, are considered "material suppliers," not construction industry employers. Numerous authorities, including this State's courts, the federal courts and the National Labor Relations Board have universally found that redi-mix drivers are not in the "construction industry." Horn v. Seritella Bros., Inc., 190 N.J. Super. 280, 284 (App. Div. 1983) (citations omitted); See also H.B. Zachry Co. v. United States, 170 Ct. Cl. 115, 126-127 (Fed. Ct. Cl. 1965). NLRB v. Irving Ready-Mix, Inc., 780 F. Supp. 2d 747 (N.D. Ind. 2011); See, Inland Concrete Company, 225 NLRB 209 (NRLB 1976); Island Dock Lumber Company, 145 NLRB 484 (NLRB 1963). The NLRB has aptly stated that redi-mix drivers are not "in the building and construction industry any

more than a hardware store which furnishes hammers and nails to building contractors." J.P. Sturrus Co. and Gen. Teamsters Loc. No. 406, 288 NLRB 668, 671 (NLRB 1988). See also Int'l Bhd. of Teamsters, Local 251 (Material Sand & Stone), 356 NLRB No. 135 (Apr. 19, 2011) (it is "a hard and fast [Board] rule that the delivery of ready-mix concrete and asphalt falls outside the construction industry proviso.")

Thus, although Defendant failed to support this affirmative defense, even if it had tried, there is no legal basis to find the Defendant exempt. Defendant's argument that it is exempt from the law must be rejected.

POINT IV.

THE TRIAL COURT'S FINDING WAS SOUND AND CORRECT THAT DEFENDANT HAD NO PTO POLICY TO COMPLY WITH THE ESLL

Defendant's argument under its Section I.(A) of its brief must also be rejected, where it argues it had a compliant PTO policy, since no such policy, written or otherwise, was ever demonstrated, and Defendant's actual written policies were inconsistent with and facially violative of the ESLL law. By Defendant's own admission, it relies, at best, on a vague claim to having an unannounced ability to grant employee leave requests with some flexibility, in contradiction to its own written policies. (Db14). Defendant argues this is somehow "past practice," which is contradictory, since as discussed within, that is

an unwritten, agreed upon practice that assists in CBA interpretation, which by definition could not be a PTO policy. Ibid. Defendant's inability to pick which of argument it raises – a PTO policy (which would be in writing, and explicit), or "past practice" (which would be unwritten) is telling. Compare Db10-11 with Db12-13. Regardless, as the Trial Court correctly held, Defendant had no PTO policy, nor even a past practice, and that finding was supported by voluminous evidence. It cannot be overturned, because it was no abuse of discretion.

We also note that Defendant's arguments regarding PTO seem to be a permutation of its unfounded claim that ESLL benefits were only intended for employees who had no other form of leave. Defendant is wrong - its argument that ESLL cannot "add" to existing benefits was rejected by the Trial Court when it held that it was foreclosed by N.J.S.A. 34:11D-8(b)(1)'s requirement that the Act not be construed to justify an employer reducing other rights, including rights established through collective bargaining. See (Da64-65). As the Court noted "an employer cannot take away or remove [such collectively bargained] benefits such as paid vacation due to the added burden of complying with the ESLL." (Da65).

Regardless, there was no PTO policy. Defendant incorrectly invokes the provisions of the Act which provide that Paid Time Off ("PTO") is a method of compliance with the ESLL: "An employer shall be in compliance with this section if the employer offers paid time off, which is fully paid and shall include but is not

limited to personal days, vacation days, and sick days, and may be used for the purposes of [the ESLL Act].” N.J.S.A. 34:11D-2(b). The statute is clear that for a PTO policy to satisfy the Act, the leave must be available for the purposes under the Act. The New Jersey Department of Labor’s FAQ is equally clear. Such a policy must “meet[] or exceed[] all of the requirements of the earned sick leave law and may be used for the purposes listed within the earned sick leave law.” (Da809-810, at FAQ VII, #1). The PTO policy must “give[s] all employees at least the benefits to which they are entitled under the Earned Sick Leave Law.” (Da810, FAQ VII, #6). Informal and unwritten leave practices cannot constitute a PTO, because they are not a “policy” and do not reliably offer leave for the purposes of the ESLL. Because unwritten practices raised by Defendant would not satisfy these requirements, they were not a valid PTO policy.

Again, Defendant’s claim that its PTO policy was a “past practice” is just doublespeak. A past practice is an accepted practice that supplements the terms of a written collective bargaining agreement, and it cannot contradict explicit contractual language. Lukens Steel Co. v. United Steelworkers of Am., 989 F.2d 668, 673 (3rd Cir. 1993). It is also referred to as “common law of the shop” which is an interpretative aid in understanding a Collective Bargaining Agreement. International Ass’n of Machinists & Aerospace Workers, P.L. No. 1000 v. General Electric Co., 865 F.2d 902, 906 (7th Cir. 1989). It can serve to

"disambiguate a contractual provision by reference to a parties' practices," but it cannot contradict the express terms of an agreement. Ibid. Besides, a true past practice must be "clearly enunciated and consistent, endure over a reasonable length of time, and be accepted practice by both parties." PSE&G Co. v. Local 94 IBEW, 140 F. Supp. 2d 384, 398 (D.N.J. 2001). Thus, a past practice is not a PTO policy. Regardless, the ability to flexibly grant leave in contradiction to written policies such as is claimed by Defendant, is not a past practice either, because it is not a consistent, accepted, and declared practice, *and because a "past practice" cannot contradict the express contractual terms*.

More importantly, Defendant's claim to being compliant with the Act through its "past practice" is not even true. The self-serving testimony of CEO John Crimi, does not address the numerous findings of the Trial Court that explained why Defendant did not have a PTO policy or even past practice that satisfies the ESLL. The Trial Court held that the only general purpose paid leave in Defendant's written policies was "Vacation," requested well in advance and subject to rescheduling by Defendant – by its express terms, it cannot be used flexibly. (Da39-40, Findings of Fact # 9-11). Under Defendant's employee manual, it permitted "excused," and unpaid absences for "sickness," which referred only to the narrow personal sickness of employees, not the multiple purposes leave must be provided under the ESLL. (Da40 -41, Findings of Fact

#12 - 18). Under the employee manual, employees must immediately produce a doctor's note to document a "sickness," and could be disciplined for an unexcused absence. (Da41, Findings of Fact, # 16-17). Because the doctor's note is requested prior to 3 consecutive days of illness, the policy also violates N.J.S.A. 34:11D-3(b). In addition, employees with less than one year's tenure do not receive any Vacation leave, meaning it is not a policy that applies to "all employees" as a bona fide PTO policy must. (Da39, Finding of Fact #10).

As a result, the Trial Court specifically found that Defendant "has not created or issued any Paid Time Off (PTO) policy." (Da42, Findings of Fact #20). The term PTO appeared on employee paychecks due to third party software, but did not result in any changes to the Defendant's policies. Ibid. Defendant advised its employees that "PTO" was simply another term for "Vacation" as appearing in their CBA. (Da42, Finding of Fact #21). Defendant also did not publish any type of PTO policy to its employees. Ibid. Employees entered leave requests through their Paycom App on their phones, which only permitted selection of "Vacation" or "Bereavement," the two forms of paid leave under the CBA. (Da42-43, Findings of Fact # 22). Although Defendant argues that "Vacation," could be used flexibly, the Court was clear in its conclusion: "No persuasive evidence has been presented of any firm practice or written policy of

Defendant of allowing vacation days to be used for all the purposes allowed under the New Jersey Earned Sick Leave Law (ESLL)." (Da44, Findings of Fact # 26).

These facts are further demonstrated by the experiences of the two Plaintiffs, Cano and Bonelli, both of whom sought and were denied paid sick leave during the period when the ESLL was in place. (Da48, Findings of Fact #42-43). Defendant's owner and president has also stated "we're not paying for unproductive time." (Da39, Finding of Fact # 9). Crimi specifically decided that "the company hourly people [i.e. those under CBAs like Plaintiffs and their similarly situated workers] would not be getting ESLL time." (Da30, Findings of Fact # 30). Any leave provided to employees "had nothing to do with the ESLL and was handled on an individual, case-by-case basis…in Mr. Crimi's discretion." (Da10, Findings of Fact # 31).

Nothing in President Crimi's self-serving testimony, nor in the other evidence raised by Defendant, undermines these factual findings that there was no PTO policy. Crimi admitted under cross-examination that "there's nothing put in writing or communicated to [ ] hourly employees that would inform them they're allowed to use their vacation days…under the [ESLL]." (T3 17:16 – 21 and 20:2 – 25). Rather than explain how a supposed PTO policy existed, Crimi simply threw up his hands and said "everyone […] in our company knows [our supposed policy]" and then referenced "past practice." (T3 20:20 – 21:6). But nothing in

Crimi's testimony demonstrated a past practice, because he could not point to any specific time when the supposed "practice" had been clearly enunciated and accepted. Even if it had been, no such past practice could have existed, as it would have contradicted Defendant's express policies - those policies could not be abrogated by a "past practice." Machinists, supra, 865 F.2d, at 906.

When set against the overwhelming evidence that Defendant did not have any PTO policy, these findings cannot be overturned now under an abuse of discretion standard. The Defendant's own self-serving statements do not amount to anything that could impeach the mountain of evidence that showed it was not ESLL compliant.

POINT V.

THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANT VIOLATED THE RECORDKEEPING REQUIREMENTS OF THE ESLL

Defendant admits that its records do not reflect the purposes for which employees took paid leave. Instead of disputing this, Defendant's argument that it did not violate the recordkeeping requirement of the ESLL as found by the Trial Court relies on its erroneous claim that it had a compliant PTO policy, since when such policy exists, an employer need not show that it separately documented the specific reasons PTO was used. (Da810 to FAQ VII, #3). As discussed under

Point III. supra, Defendant *did not* have a compliant PTO policy, and therefore Defendant cannot claim its records were adequate on that basis.

Defendant's records of leave time were recorded in the first instance in the Paycom App, which permitted "Vacation" or "Bereavement" to be chosen by the employee. (Da42, at Finding of Fact #20). Unsurprisingly, although Defendant produced ample employee Paycom reports, and almost none of them provide any notes or indication that any leave was being taken for ESLL purposes. (Da49, at Finding of Fact, # 46). Defendant also produced a document compiled in this litigation that documented unpaid leave – which Defendant's employees took in unusually and suspiciously high numbers despite working sufficient hours to accrue ESLL, leading to an inference that Defendant's employees were not utilizing ESLL leave (because they did not have it available). (Da49, Finding of Fact #47). Defendant's other records, which include paystubs, time detail reports, and total hour summary reports, do not document ESLL leave. (Da48, Findings of Fact #41).

Defendant was aware that its lack of records was a problem. More than one year after the ESLL came into effect, Defendant sent a memo in February 2020 to its management to document that employees were utilizing leave for purposes under the ESLL. (Da47 -48, Findings of Fact #37 -39). However, Defendant's only dispatcher who received the memo to testify at trial admitted he didn't read

the memo, and didn't follow it. (Da48 at Findings of Fact #40). Indeed, the Court considered whether the memo was "part of a ruse to create something on paper" and feign compliance. (Da62). The Court found "there is no record … [of] a PTO 'bank' either in Defendant's policies or in the payroll records." (Da62).

Defendant was found to have violated N.J.S.A. 34:11D-6 with good reason – there is not a shred of evidence in any of its payroll records, though it would have been easy for Defendant to so, of any effort to track ESLL hours. In fact, it is just the opposite – Defendant's President, John Crimi, specifically instructed his officers to stop payroll software from automatically tracking ESLL hours, because in his view, they should not receive it. (T2 31:10-24). On that record, the Trial Court's factual finding that Defendant violated the recordkeeping requirement of the ESLL must be upheld, as there was certainly no abuse of discretion, and in fact the holding below was the only correct conclusion to reach on the evidence.

POINT VI.

ON ABUSE OF DISCRETION REVIEW, THE COURT MUST REJECT DEFENDANT'S APPEAL OF PLAINTIFF'S COLLECTIVE ACTION CERTIFICATION, WHICH WAS PROCEDURALLY CORRECT

Defendant's argument under its' Point II., that Plaintiff's were required to "certify a class," is incorrect. (Db21 – Db26). That is because class certification is inapposite to this action brought under N.J.S.A. 34:11-56a25, which like the related FLSA must be brought as a "collective action," is a fundamentally

different type of lawsuit. As discussed within, a claim brought under the NJWHL, the form of action prescribed by the ESLL, does not specifically require any formal "certification" process at all, though the Trial Court added further due process protections by implementing a post-trial certification procedure to protect the parties' rights and allow them to voluntarily be bound by the judgment, or not. Additionally, as discussed in the Procedural History, supra, despite Defendant's objections to the collective action certification that came after the fact, this matter was conducted throughout as one on behalf of all similarly situated workers, including in discovery and on summary judgment. Until the eve of trial, Defendant never raised any objection, or otherwise sought dismissal of Plaintiffs' claims due to the supposed need for class certification and effectively waived such a defense. The Trial Court's procedures to join the similarly situated workers into the case and establish their damages was more than adequate to protect all parties' interests, and was consistent with the requirements of the ESLL, and due process of law. It was not an abuse of discretion, and cannot be overturned here.

A review of the relevant provision of the NJWHL that permits a collective action under the ESLL, as it is incorporated into the ESLL pursuant to N.J.S.A. 34:11D-5, demonstrates why no "class action" certification was required:

> If any employee is paid by an employer less than the minimum fair wage to which the employee is entitled under [this Act] … the employee may recover in a civil action the full amount of that minimum wage …and an

> additional amount equal to not more than 200 percent of wages that were due … **An employee shall be entitled to maintain the action for and on behalf of himself or other employees similarly situated, and the employee and employees may designate an agent or representative to maintain the action for and on behalf of all employees similarly situated.** N.J.S.A. 34:11-56a25 (emphasis added).

A Plaintiff under the NJWHL has a specific statutory authorization to bring an action on behalf of those "similarly situated," a detail that cannot be squared with the certification requirements for a class action set forth under R. 4:32-1(a) (numerosity, typicality, commonality, superiority, etc.). Interpretation always begins with the plain language of the statute, and the statute makes clear that that an NJWHL action is not brought as a class action subject to the requirements of that Rule. It notably does not even require consent, but permits an "employee" to "designate an agent or representative to maintain the action for [the employees]." N.J.S.A. 34:11-56a25.

The second interpretative aid to understanding this provision comes from comparing the NJWHL with the federal FLSA that is the touchstone for wage and hour laws. Like state wage and hour laws, the FLSA also authorizes a specific statutory action for "similarly situated" employees:

> […] An action to recover the liability prescribed in [this subsection] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other

> employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. 29 U.S.C. 216(b).

As Courts have long noted, the provisions of the FLSA, which preceded modern class action procedures, authorize a different type of mass lawsuit known as a "collective action." Hoffman-La Roche v. Sperling, 493 U.S. 165, 173 (1989). As the FLSA was originally enacted in 1938, it permitted lawsuits brought by representatives who were not employees – usually labor union leaders. Ervin v. OS Rest. Servs., 632 F.3d 971, 978 (7th Cir. 2011). The Portal-to-Portal Act of 1947 eliminated the "representative" action to counteract this perceived problem. Sperling, supra, 493 U.S., supra, at 173. As noted previously, the NJWHL authorizes such representative actions similar if not identical to the FLSA as it existed pre-amendment, prior to the passage of the Portal-to-Portal Act, which does not apply to State laws, such as the NJWHL.

In addition, the "opt-in" provision that required "consent" of employees added to the action was added to the FLSA by the Portal-to-Portal Act to address "plaintiffs lacking a personal interest in the outcome" of the litigation. Sperling, supra, 493 U.S., supra, at 173. Essentially, the consent requirement ensured that employees who elected to join the action would be voluntarily bound by the judgment. The NJWHL provisions under N.J.S.A. 34:11-56a25 notably do not

contain this "consent" or "opt-in," requirement, once again more resembling the pre-amendment FLSA.

What is clear, is that both the FLSA and NJWHL's N.J.S.A. 34:11-56a25 call for a "collective action." It is well established that such a "collective action" cannot be brought as a class action, because they are fundamentally different – in a collective action, unlike a class action, similarly situated employees cannot be bound by a judgment unless they consent to being bound. See Lusardi v. Lechner, 855 F.2d 1062, 1068 fn8 (3rd Cir. 1988); see also LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975). As the Third Circuit has well-explained:

> The FLSA collective action device contains none of the crucial requirements that allow the class action to be excepted from certain rules of 'general application in Anglo-American jurisprudence' [that protect absent class members who will be bound by a judgment] …The lack of such mandatory protections and process for FLSA collective actions means they should not be analogized to class actions. […] 'collective actions have no place for conditions such as adequacy or typicality'. Fischer v. Fed. Express Corp., 42 F. 4th 366, 376 (3rd Cir. 2022).

Thus, the NJWHL's collective action mechanism, both under its plain statutory language, and in light of its relationship with the closely related FLSA, is not one that is brought as a class action. Defendant disagrees, but even Defendant acknowledges that there is no case law that supports its argument, where Defendant points out the "noticeable absence" of case law. (Db27). Instead, Defendant cites unpublished cases that do not directly discuss this issue, which

were decided under the inapposite Wage Payment Law ("WPL") which until its recent amendment by the Wage Theft Act effective August 2019, did not permit a collective action, solely an individual action. Compare (Db22-23) with (Pa23-24, showing the 2019 changes to the WPL at N.J.S.A. 34:11-4.10(c)). In other words, only a "class action" could be pursued under that statute, subjecting that statute to the class action Rule.

The WPL concerns failure to pay wages, including contractual wages. However, none of the cases cited by Defendant concerned failure to pay the minimum wage under the separate NJWHL, which has always statutorily authorized the distinct collective action mechanism at issue in this suit. See N.J.S.A. 34:11-56a25 (permitting civil action by employee and for "similarly situated" employees for failure to pay the "minimum fair wage"). Therefore, Defendant's argument, that R. 4:32-1 applies to N.J.S.A. 34:11-56a25, must fail, since it would contradict and be contrary to the plain language of the statute. Put simply, R. 4:32-1 applies for common law and/or statutory claims which do not have or provide for a "collective action" and may be pursued on behalf of a class or group of employees, only on the basis of that Rule.

Though the statute provides no certification procedure for collective actions under the ESLL, the Court, out of an abundance of caution, fashioned one anyway. That procedure – which certified the similarly situated employees, was

appropriate and just, especially given that unlike under the FLSA, there is no formal "opt in" requirement under N.J.S.A. 34:11-56a25. For example, in the comparable area of FLSA collective actions, due to the absence of statutory guidance, the majority of federal courts have adopted a "two-step" process that first grants "conditional certification" (even though this is a misnomer – FLSA certification is not a true "class certification"). During the first stage, potential employees are provided notice of their potential involvement in the action, and then "final certification" occurs, where a court looks closer to confirm the joined employees are "similarly situated" and that they consent to the action. Zavala v. Wal-Mart Stores, Inc., 691 F.3d 527, 536 (3rd Cir. 2012). In the FLSA context, these procedures help accomplish the following goals:

> Used properly, it reduces multiplicity of suits and offers a convenient means of settling issues common to a large number of persons whose interest is sufficiently similar. To accomplish the Congressional purpose of encouraging private enforcement of these statutes **by making it convenient and inexpensive for the persons they are meant to protect**, the members of the class who opt-in receive the benefit of final judgment despite the action's non-binding effect on absent members. Lusardi, supra, 855 F. 2d at 1071 (emphasis added).

These same considerations show why the post-judgment certification procedure adopted by the Trial Court in this action was both consistent with the statute and satisfies any conceivable due process concerns. As noted, the traditional due process concern in a collective action is the potential for a case to

be litigated on behalf of parties who will not be bound by the judgment. Sperling, supra, 493 U.S., supra, at 173. Those concerns were addressed by requiring the similarly situated employees to "opt in" and voluntarily consent to be bound by the judgment, like in an FLSA action. That certification procedure protects not only the similarly situated employees by permitting their input. By binding employees to the judgment, it also protects Defendant from further lawsuits that would re-litigate the case.

In addition, because the employees joined to this action worked under CBAs with identical terms and conditions concerning paid leave, Defendant cannot object that the employees were not "similarly situated." Effectively, all of the requirements of the FLSA two-step certification procedure were satisfied by the procedures followed below, even in the absence of a statute that would call for such precautions, since unlike the FLSA, N.J.S.A. 34:11-56a25 does not have any formal "opt-in" requirement. Put differently, the procedure utilized by the court provided both County and the similarly situated employees' protections even greater than those required by the statute. Accordingly, the procedures adopted by the trial court in certifying the collective action must stand.

POINT VII.

THE DAMAGES AWARD FOR SIMILARLY SITUATED EMPLOYEES WAS WELL-FOUNDED AND CANNOT BE OVERTURNED ON ABUSE OF DISCRETION, AS TENS OF THOUSANDS OF PAGES OF PAYROLL RECORDS AND EXTENSIVE MEET-AND-CONFER ESTABLISHED THE DAMAGES

Defendant seeks to characterize the damages award as unfounded, but its argument must be rejected, as Defendant simply mischaracterizes the record. To begin, Defendant's claim, that there was no discovery as to the similarly situated employees and no evidence of their damages admitted at trial, is disingenuous. The Plaintiffs sought and Defendant produced over 27,000 pages of records in discovery, most of which consisted of those employees' payroll records. (Pa1247-48). Numerous payroll documents were admitted concerning those employee's accrual and use of ESLL leave, in particular all of the company's Paycom reports for all employees that showed the employees were not taking such ESLL leave. (Da364 - 510). A chart documenting unpaid leave for all employees also established violation of the similarly situated employees' rights. (Pa298 - 301). At trial, to establish the hours work and rate of pay of those employees, a paystub from the end of each applicable year was moved into evidence for each of the employees, in more than 140 separate exhibits. (Pa380 - 658).

As has been noted, at trial it was established that each and every of the similarly situated employees had been deprived of their ESLL rights and would

not have known to exercise them. (Da50). The employees were similarly situated because they worked under five different CBAs whose terms and conditions were admittedly identical as to the leave provided under the agreements. (Da37 -38). The damages found at trial flowed from this determination: each and every employee was deprived of all the ESLL leave they accrued, because of the failure to provide statutory notice, actually implement an ESLL policy, and to keep records of ESLL use. (Da33 - 68). Plaintiffs established damages by using as a measure of the employees' ESLL accruals through their review of employee paystubs that showed overall employee pay and rate of pay (from which hours could be derived). (Da50-51). The Trial Court could have entered a damages finding based on Plaintiffs' method, but instead fashioned a procedure that gave Defendant a chance to object to the estimates of ESLL *accruals*. (Da36). The Court's post-judgment process did not provide Defendant an opportunity to challenge the determination that all employee leave accrued was unused and counted towards the damages, *because such liability was already established on summary judgment and at trial.*

Over an approximately 8-month period, the parties met and conferred, and Defendant objected to Plaintiffs' initial damages estimate of some $782,132.90 that was raised in December 2022. (Pa1064 - 1100). By the time a final damages amount was stipulated to, while the names of some employees had changed and

the accruals for the remaining employees changed somewhat, the number Defendant stipulated to was close to Plaintiffs' original number - $758,898.38. (Pa1083).

The nature of the proofs of damages were more than adequate here. The method of calculating damages was well in line with the standards of proof in wage and hour cases, particularly when dealing with the recalcitrant employer who does not keep proper records like Defendant. Generally, in a wage and hour action, the employee "bears 'the burden of proving he performed work for which he was not properly compensated.'" Rosano v. Twp. of Teaneck, 754 F.3d 177, 188 (3rd Cir. 2014). But in the face of inadequate recordkeeping, the burden shifts to the employer – "the employees will only be required to 'submit evidence from which violations of [the wage and hour law] and the amount of an award may be reasonably inferred." Ibid. This burden shifting framework is incorporated into N.J.S.A. 34:11D-6, and requires that where an employer fails to keep proper documentation of ESLL leave, as Defendant did here, the burden shifts to the employer to disprove the presumption of damages.

Here, Plaintiffs raised sufficient proofs as to all of the similarly situated employees that they were deprived of all ESLL leave that they accrued when subject to the Act. Defendant's records did not contain any documentation of actual use of ESLL leave to rebut that inference. Defendant instead was given

ample time to challenge the calculated damages by showing that some employees accrued less ESLL leave than Plaintiffs estimated with their inferior access to complete records. In nearly all cases, if Defendant demonstrated its calculation was legally and factually justified, the Plaintiffs accepted it. Over months, the parties met and conferred, and Defendant was given ample chance to object, until a final damages calculation was entered into by way of stipulation.[6]

Under those circumstances, it was no abuse of discretion for the Trial Court to accept the damages stipulated through this process to determine how much leave the similarly situated employees had accrued during the relevant period. Those accruals which were amply established by the voluminous payroll records that established the hours worked and ESLL time accrued, the rate and which that time was accrued, and the fact that all employees were deprived of that ESLL. On this record, the finding of the Trial Court cannot be overturned.

CONCLUSION

For all of the reasons set forth herein, Defendant's Appeal should be dismissed, and the decision of the Trial Court upheld.

Respectfully submitted

Dated: March 24, 2025 /s/ **Raymond M. Baldino**
Raymond M. Baldino

[6] The stipulation allowed Defendant to challenge it underlying liability on appeal, but not the calculation of damages calculated on the basis of liability.

WILLIAM CANO AND RAYMOND BONELLI, ON THEIR OWN BEHALF AND ON BEHALF OF ALL SIMILARLY SITUATED EMPLOYEES Plaintiffs/Respondents, v. COUNTY CONCRETE CORPORATION, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000056-24 Civil Action **ON APPEAL FROM ORDER DATED:** **July 23, 2024** **DOCKET NO. MRS-L-1365-19** **SAT BELOW** **Hon. William J. McGovern III, J.S.C.**

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT COUNTY CONCRETE CORPORATION

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PRELIMINARY STATEMENT

While Plaintiffs/Appellees William Cano and Raymond Bonelli ("Plaintiffs") opposition is not surprising to Defendant/Appellant County Concrete Corporation ("County Concrete"), it is riddled with inaccuracies and mischaracterizations. At the outset, the intent of the New Jersey's Earned Sick Leave Law ("ESLL") is clear – to afford paid time off for those eligible New Jersey workers who otherwise have no such time off from work. It is also clear that County Concrete afforded employees with paid time off from work, in excess of that required under the ESLL.

Plaintiffs expect this Court to ignore both the intent of the ESLL, in this case of first impression, and the history of events between the parties. In fact, Plaintiffs' focus on "class" vs. "collective" action is a red herring because in either scenario, Plaintiffs were unfairly permitted to engage in post-trial class discovery despite the absence of class certification.

As a result, County Concrete has been severely prejudiced, resulting in the improper award of a windfall of damages to individuals whom County Concrete was never afforded the opportunity to address during the course of discovery.

LEGAL ARGUMENT

I. PLAINTIFFS DELIBERATELY MISCHARACTERIZED THE LEGISLATIVE INTENT OF THE ESLL, AS WELL AS COUNTY CONCRETE'S TIME OFF POLICIES.

(Raised Below: Da1; Da17; Da19; Da21; Da23; Da25; Da27; Da29; Da31; Da33; Da69; Da71)

Overall, Plaintiffs' opposition[1] misinterprets both the plain language and the legislative intent of the ESLL. First, as addressed in County Concrete's Appellate Brief,[2] it was never the intent of the New Jersey State Legislature for the ESLL to apply to County Concrete or similarly situated companies in which union members are subject to a collective bargaining agreement with an applicable expiration date. (Db17-Db20). As the underlying case clearly demonstrates, this unintended loophole permits unions to weaponize the ESLL by purposely creating an impasse in the collective bargaining process to cause their collective bargaining agreements ("CBAs") to lapse during ongoing contract negotiations. Under Plaintiffs' interpretation of the ESLL, a union would be permitted to maneuver stalled collective bargaining by simply awaiting the expiration of the governing CBAs. In doing so, any union plaintiff in New Jersey would be able to manipulate an impasse in collective bargaining to trigger the ESLL's technical notice and recordkeeping requirements, from

[1] Hereafter, "Pb" refers to Plaintiffs' Appellate Brief.
[2] Hereafter, "Db" refers to Defendant's Appellate Brief.

which it was previously exempt under the CBAs, to argue a violation of the ESLL. Clearly, the New Jersey State Legislature did not promulgate the ESLL with the intent to intrude upon or disrupt the collective bargaining process, nor was it intended to be weaponized by unions during collective bargaining, which would clearly interfere with the process and, significantly, the NLRB's jurisdiction. The collateral damage from this improper imposition of the ESLL directly contradicts the purpose for enacting the ESLL - to provide paid time off to workers who otherwise had none and were left with the difficult choice, by way of example, to either attend a school related function for their child or get paid for work that day.[3]

Indeed, the New Jersey Legislature has recognized these various ambiguities in the statute and is attempting to rectify them through the consideration of several proposed bills, narrowing the application of the ESLL, to ensure that it aligns with the legislative intent. In fact, in order to rectify the exact issue before this Court, pending Bill A4309/S3249[4] clarifies the

[3] County Concrete recognizes that the ESLL affords paid time off to eligible workers in additional circumstances, such as a domestic violence incident or to care for a sick child. § 34:11D-3(a). Ultimately, as discussed in County Concrete's appeal brief, all County Concrete employees were afforded paid time off that exceeded the 40 hours required under the ESLL, or otherwise. (Db10-Db15). As a result, employees could use their paid time off for **any** reason, including those under the ESLL.

[4] It is County Concrete's understanding that Bill A4309/S3249 will be brought to a vote during an upcoming June 2025 session.

application of the ESLL as to unions. More specifically, it provides that employers with employees who are covered by a collective bargaining agreement with an expiration date, are compliant with the ESLL if they alternatively offer *any* type of vacation or paid time off, totaling forty (40) or more hours per year to their employees. By distinguishing between CBAs with and without an expiration date, it clarifies the original intent of the ESLL, which is to afford paid time off to those New Jersey employees otherwise left with none. Further, it eliminates a union's ability to strategically leverage a pending CBA expiration date in an effort to influence collective bargaining, ensuring that the ESLL cannot be used as a mechanism to bring New Jersey courts through the front door of the NLRB.

Second, Plaintiffs' argument manipulates the wording of County Concrete's time off policy. (Pb29-Pb35). More specifically, Plaintiffs' attempt to frame County Concrete's use of the phrase "Vacation policy" as non-compliant under the ESLL. However, as Plaintiffs are well aware, County Concrete's use of the word "Vacation" for its time off policy was a term that was agreed upon between the parties during collective bargaining negotiations for the prior CBAs and, significantly, could only be changed through further collective bargaining. If County Concrete had attempted to change the term "Vacation" prior to or during this lawsuit, Plaintiffs and their union would have

rushed to file a charge with the NLRB. In fact, the phrase "time off from work" is an employment term regarding a "dispute [ ] traditionally resolved through arbitration" under a collective bargaining agreement. See Labree v. Mobil Oil Corp., 300 N.J. Super. 234, 241 (App. Div. 1997). Accordingly, because County Concrete's Employee Manual predated the ESLL, it was impossible to independently amend its time off policy because the amendment would have been considered a unilateral employer action, subjecting County Concrete to a potential NLRB charge. Further, and for the same reason, County Concrete could not amend its policy once the CBAs expired. Thus, knowing that County Concrete's hands were tied, Plaintiffs' heavy reliance upon the term "Vacation" in their opposition is a deliberate attempt to avoid the fact that County Concrete did not have the ability to alter its time off policy without a potential violation under the NLRA. This fact only further demonstrates Plaintiffs' attempts to inappropriately intertwine collective bargaining issues that are solely within the discretion of the NLRB, with the ESLL.

Additionally, Plaintiffs incorrectly argue that Vacation Days could not be used as sick days under the ESLL. (Pb34). However, as stated above, County Concrete could not change the term designating time off in the CBAs or Employee Manual without collective bargaining. Upon recognizing that they were not successful in increasing their allotment of Vacation Days, Plaintiffs

created an impasse in collective bargaining to pursue this case. Further, as explained in detail in County Concrete's Appellate Brief, the ESLL's FAQs issued by the New Jersey Department of Labor, the only ESLL guidance available on this case of first impression, expressly state that other PTO time, **including "vacation" time**, satisfies ESSL requirements. (Da793-Da814).

Finally, Plaintiffs' characterization of County Concrete's past practice of allowing employees to use vacation days for any reason as "doublespeak" is incorrect. (Pb31). Plaintiffs' opposition does nothing to address the fact that, at trial, both former and current County Concrete employees corroborated that they could use their paid time off days for any reason. (T2 8:20-9:3; T2 82:23-83:21). It should also be noted that all attempts by County Concrete to further formalize its policy of allowing employees to take vacation for any reason, were soundly rejected by the International Brotherhood of Teamsters, Local 863 (the "Union") as part of their strategy to pursue this litigation. Tellingly, County Concrete and the Union conducted ten (10) formal bargaining sessions between February 1, 2019 and September 1, 2022 for purposes of negotiating a successor collective bargaining agreement for County Concrete's five (5) expired CBAs. On May 19, 2021, County Concrete submitted a bargaining proposal to the Union that attempted to formalize its past practice of allowing bargaining unit employees to utilize their vacation time for any reason, which upon expiration of the CBAs,

included each of the purposes provided under the ESLL. The Union **rejected** County Concrete's May 19, 2021 Earned Sick Leave proposal. The actions that transpired clearly demonstrate that the Union was not interested in reaching an agreement. Instead, the Union sought to use the interplay between the untested ESLL in court and the looming threat of NLRB charges to their advantage. Certainly, these collective bargaining tactics were never considered by the Legislature when originally enacting the ESLL.

II. PLAINTIFFS' ARGUMENT THAT THE ESLL DOES NOT REQUIRE CLASS CERTIFICATION MUST BE REJECTED, AS THE FAILURE TO DETERMINE WHETHER PLAINTIFFS WERE SIMILARLY SITUATED BEFORE TRIAL HIGHLY PREJUDICED COUNTY CONCRETE AND RESULTED IN A WINDFALL OF DAMAGES.

(Raised Below: Da27; Da33; Da69; Da71)

A. Regardless of Whether Plaintiffs Pursued a Class or Collective Action, Both Procedures Have Certification Requirements that Plaintiffs Blatantly Failed to Meet.

Plaintiffs' arguments regarding class certification must also be rejected. (Pb37-Pb44). Regardless of whether this case is ultimately treated as a class action under N.J. Ct. R. 4:32-1 or as a collective action similar to those brought under the Fair Labor Standards Act ("FLSA"), Plaintiffs were required to affirmatively seek certification. New Jersey courts have not yet addressed whether class claims brought under the ESLL should proceed as class actions or collective actions. Nevertheless,

this uncertainty does not relieve Plaintiffs of their obligation to follow well established certification procedures.

Here, though County Concrete maintains its argument that R. 4:32-1 applies, even assuming, *arguendo*, that ESLL claims could proceed as collective actions, the trial court nevertheless erred in allowing this case to move forward without *any* class certification method. Indeed, plaintiffs are required demonstrate by a preponderance of the evidence that members of a proposed collective action are similarly situated in order to proceed to trial as a collective action. Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 537 (3d Cir. 2012). Here, the trial court made no such determination.

As Plaintiffs correctly pointed out in their opposition, collective actions utilize a two-step certification process in order to determine whether plaintiffs are similarly situated. Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 243 (3d Cir. 2013). If the court grants conditional certification, the case will proceed with class-based discovery. Pearsall-Dineen v. Freedom Mortg. Corp., 27 F. Supp. 3d 567, 570 (D.N.J. 2014). Upon conclusion of discovery, "and with the benefit of a much thicker record than it had at the notice stage, a court following this approach then makes a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff." Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 193 (3d Cir. 2011), *rev'd on other grounds*

Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66 (2013). Significantly, following the completion of class discovery, defendants in collective actions are given the opportunity to challenge whether the plaintiffs sufficiently demonstrated the group of employees are similarly situated. Id. at 194.

Here, in stark contrast, County Concrete was denied both the opportunity to conduct class discovery, and to challenge whether Plaintiffs were in fact similarly situated. Notably, in collective actions, defendants are afforded the ability to assert "highly individualized defenses with respect to each of the opt-in plaintiffs" Fischer v. Fed. Express Corp., 42 F.4th 366, 377 (3d Cir. 2022) Because the trial court failed to make a finding regarding whether the Plaintiffs were similarly situated, County Concrete was denied the right to present individualized defenses to the other employees. In other words, without any type of certification mechanism, County Concrete was deprived of its right to challenge the inclusion of certain opt-in plaintiffs based upon whether they were similarly situated to Plaintiffs.

Finally, it is clear from their opposition that Plaintiffs chose to highlight only those aspects of the collective action framework that aligned with their argument, while ignoring all components fatal to their claims. (Pb37-Pb44). Indeed, when a plaintiff files a complaint containing collective action allegations, "the mere presence of the allegations does not automatically give

rise to the kind of aggregate litigation provided for in Rule 23. Rather, **the existence of a collective action depends upon the affirmative participation of opt-in plaintiffs**." Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 224 (3d Cir. 2016) (emphasis added). Significantly, the alleged similarly situated employees did not opt-in to this case until *after* a finding of liability and a trial for damages had already taken place. Despite Plaintiffs arguments that the language of N.J.S.A. 34:11D-5 does not specifically require plaintiffs to opt-in, the trial court recognized the various issues that arise from failing to do so. Specifically, the trial court noted:

> While the statute uses the word "may," it is readily apparent by logical deduction and procedural due process in its most basic level that, the plaintiffs in an action to enforce compliance with the ESLL on behalf of others should be able to demonstrate that they have been, in fact designated to act on behalf of "all employees similarly situated." There may be, arguably, an employee who may have no interest or desire to pursue the litigation, or who may have privately settled or resolved relevant grievances, or has some other reason to decline involvement in the case, whether it be based on personal likes or dislikes, or simply may "not want to be bothered" by the real or perceived stress of litigation, no matter how others may view that position. If the court were to proceed to address the claims of other similarly situated parties without an objective basis on which to conclude that employee had designated the plaintiffs as agent, the court can envision a wide variety of administrative problems to result. . .

(DA66-Da67). However, the trial court nevertheless erred, as it only proceeded with the opt-in procedure **after the trial for damages was already completed and a decision had been ordered in favor of Plaintiffs**. This post-trial opt-in

procedure was inherently prejudicial to County Concrete, as it allowed a class of plaintiffs to benefit from a favorable judgment without being subjected to any potentially negative aspects of an unfavorable ruling.

B. Plaintiffs' Post-Trial Certifications of Allegedly Similarly Situated Employees Contained Multiple Inaccuracies Which Only Further Demonstrate the Necessity of Engaging in Class Discovery Prior to Trial and the Improper Award of Damages.

Plaintiffs attempt to downplay the prejudice caused by the trial court's handling of the damages phase. (Pb45-Pb48), Defendants do not dispute that the parties engaged in multiple meet-and-confers discussing the calculation of damages, as ordered by the trial court. However, these discussions occurred only after the bench trial on damages had concluded and a decision had already been rendered. They demonstrate nothing more than County Concrete's efforts to comply with the trial court's order. Simply put, these discussions occurred in the absence of County Concrete having the opportunity to conduct class discovery to challenge whether the opt-in employees were entitled to any time under the ESLL.

As extensively argued in County Concrete's Appellate Brief, the process of calculating damages in this manner was highly prejudicial. (Db26-Db33). County Concrete was denied the right to explore whether any of the affected employees actually had a qualifying reason under the ESLL to use paid leave. While Plaintiffs attempt to gloss over it, the ESLL does not guarantee leave for

any purpose - it is limited to specific qualifying reasons. Without discovery regarding the individual circumstances for each employee, County Concrete was unable to challenge whether those employees satisfied the statutory criteria. Further, as Plaintiffs themselves recognized, more than one third of the employees included in the damages calculation were not even identified during discovery. (Pa687).

These issues are further exemplified by the inaccurate information provided by Plaintiffs during the post-trial damages calculations. Though Plaintiffs argued in their opposition that the final calculation for lost wages did not differ greatly from their original proposal, they failed to disclose that they amended their original calculations and ultimately claimed a grand total of $883,092.80[5] in lost wages. (Da932).

However, throughout its review of Plaintiffs' submissions certified by the alleged "similarly situated employees", County Concrete quickly discovered numerous disparities when compared to its own records, including inconsistencies involving the employees' hourly wages, hours worked, and duration of employment - all factors that directly affect the calculation of damages. When confronted about these inaccuracies, Plaintiffs' counsel

[5] Prior to the amendments, Plaintiffs' damages calculation totaled $782.132.90. (Pb46).

conceded that these errors were due in part to a language barrier, as some employees only spoke Spanish and did not understand the ramifications of certifying to certain information. Ultimately, the parties agreed to a final damages calculation of $758,898.38, over $120,000.00 lower than Plaintiffs' damages proposal. (Da993).

These inaccuracies certified by the alleged "similarly situated" plaintiffs only demonstrate how essential class discovery was to this case, and how the lack of such discovery resulted in a windfall award of damages to the alleged class. If County Concrete had been permitted to fully address and object to whether the similarly situated employees were entitled to any portion of the 40 hours of paid time off made available under the ESLL, this result could have been avoided.

CONCLUSION

For the foregoing reasons, Defendant, County Concrete Corporation requests that this Court reverse all decisions made by the trial court against it. Should the trial court findings not be reversed in their entirety, the case should be remanded to the trial court for class discovery as to the issue of potential class damages.

Respectfully submitted,

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