Superior Court of New Jersey

Appellate Division

Docket No. A-000057-25

MARCOS D. DOGLIO, *Plaintiff-Respondent,* vs. BOASSO AMERICA CORPORATION, *Defendant-Appellant,* ERIC MOLINA; JOHN DOWNEY; ABC CORPS. 1-10 AND JANE & JOHN DOES 1-10, *Defendants.*	:	CIVIL ACTION ON GRANT OF THE MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. L-6429-19 Sat Below: HON. JOSHUA D. SANDERS, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT BOASSO AMERICA CORPORATION

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Date Submitted: October 15, 2025

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PRELIMINARY STATEMENT

The integrity of the appellate process, New Jersey Court Rules, and New Jersey Supreme Court precedent are at issue in this appeal. In this matter, the trial court granted Defendant-Appellant Boasso America Corporation's ("Defendant") motion for summary judgment, cancelled the scheduled trial, and denied Plaintiff Marcos Doglio's ("Plaintiff") motion for reconsideration. Thereafter, with no motion pending and final appealable orders in place, the trial court "upon reflection" issued a *sua sponte* order reversing the grant of summary judgment. The trial court then denied Defendant's motion for reconsideration on equally untenable grounds. In issuing the *sua sponte* order reversing summary judgment and denying Defendant's motion for reconsideration, the trial court ignored binding New Jersey Supreme Court precedent, disregarded the plain language of the New Jersey Court Rules, and intruded upon the function of this Court. The Appellate Division, therefore, should reverse the trial court for the reasons stated herein.

On January 29, 2025, the trial court entered an Order granting summary judgment as to a single count complaint filed by Plaintiff, an independent contractor, alleging retaliatory discharge in violation of the New Jersey Conscientious Employee Protection Act, N.J.S.A. § 34:19-1, *et seq*. ("CEPA"). Specifically, the trial court applied the twelve (12) factor independent contractor

test set forth in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998), as endorsed by the New Jersey Supreme Court in D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110 (2007), and held "that the factors overwhelmingly" support the grant of summary judgment. Naturally, the scheduled trial was cancelled following the grant of summary judgment and Plaintiff's motion for reconsideration was denied.

After "reflection," the trial court *sua sponte* reversed summary judgment without notice to the parties or argument, relying upon inapposite Supreme Court case law that concerned interlocutory orders under Rule 4:42-2, not final orders under Rule 4:49-2. The trial court, in fact, omitted the key sentence from the Supreme Court case it primarily relied upon, Lombardi v. Masso, 207 N.J. 517 (2011), that clearly stated a trial court may *sua sponte* reconsider only interlocutory orders – not final orders – and, only then, after following a very specific procedure that included advance notice to the parties, additional briefing, and argument before the issuance of an opinion. The trial court, moreover, completely abandoned the Pukowsky test in its *sua sponte* Order and applied no test at all in reversing the grant of summary judgment.

Defendant, recognizing the procedural and substantive errors in the trial court's *sua sponte* Order, moved for reconsideration. On July 21, 2025, rather than address the errors, the trial court found that it possessed authority to *sua*

sponte alter final orders under Rule 1:1-2 and Lombardi, that Defendant was afforded due process, and created a brand new rule: that the trial court may *sua sponte* reconsider final judgments if the twenty (20) day time period for Plaintiff to file a motion for reconsideration had not elapsed. On September 9, 2025, the Appellate Division granted Defendant's motion for leave to file an interlocutory appeal.

As set forth herein, the Appellate Division should vacate the trial court's April 28, 2025 *sua sponte* Order and the July 21, 2025 Order and, in turn, reinstate the January 29, 2025 summary judgment order and the April 23, 2025 denial of Plaintiff's motion for reconsideration. Put simply, the trial court lacked the authority, under both Supreme Court precedent and the New Jersey Court Rules, to *sua sponte* reconsider final appealable orders. Moreover, the Appellate Division should, to the extent this matter is remanded, instruct that no further motions for reconsideration may be entertained by the trial court to bring this matter to conclusion and preserve the ultimate function of this Court—to review the final judgments of the trial courts.

RELEVANT PROCEDURAL HISTORY AND OPINIONS[1]

On September 3, 2019, Plaintiff filed a complaint alleging retaliatory

[1] 1T - Motion Transcript, dated January 6, 2025; 2T - Motion Transcript, dated July 17, 2025.

discharge in violation of CEPA. (Da93 to Da104). On September 13, 2024, Defendant moved for summary judgment as to all claims on the grounds that Plaintiff did not qualify as an "employee" and, therefore, was not entitled to protection under CEPA. (Da53 to Da380).

A. Summary Judgment Granted In Favor of Defendant.

On January 29, 2025, the trial court entered an Order granting the motion for summary judgment and dismissing all claims. (Da37 to Da47). The trial court concluded, in relevant part, that "the [Pukowsky] factors overwhelmingly" demonstrate an independent contractor relationship. (Da46 to Da47). On February 10, 2025, a notice issued which "cancelled" the trial scheduled for the matter. (Da679 to Da680).

B. Denial of Motion For Reconsideration Under Rule 4:49-2.

On February 18, 2025, Plaintiff filed a motion for reconsideration of the summary judgment order. (Da610 to Da621). On April 8, 2025, the trial court denied Plaintiff's motion for reconsideration under Rule 4:49-2. (Da28 to Da36). On April 23, 2025, the trial court issued a subsequent opinion which corrected a typographical error to clarify "there was not sufficient evidence of economic dependence" to demonstrate an employment relationship. (Da17 to Da27). The trial court, in its opinion, identified all of Plaintiff's arguments and rejected

those arguments. (Da17 to Da36). The Orders were final and appealable to the Appellate Division. Rule 2:2-3.

C. Trial Court's *Sua Sponte* Reconsideration of Final Orders.

On April 28, 2025, with summary judgment granted, the trial cancelled, and reconsideration denied, the trial court "[u]pon reflection" *sua sponte* reconsidered the final appealable Orders previously entered in this matter. (Da11 to Da16). In doing so, the trial court cited Lombardi v. Masso, 207 N.J. 517 (2011) as the authority that vested him with the ability to take the extraordinary step of reconsidering a final order *sua sponte*. The trial court stated:

> The Court is also guided by the New Jersey Supreme Court's holding in Lombardi v. Masso, 207 N.J. 517, 537-38 (2011), which, inter alia, taught that:
>
> > We presume that judges ordinarily will not be required to second guess themselves because most attorneys will advance the best case possible the first time around, thus obviating later theoretical or evidential surprises. But where that does not occur, for whatever reason, and the judge later sees or hears something that convinces him that a prior ruling is not consonant with the interests of justice, he is not required to sit idly by and permit injustice to prevail. In such an exceptional case, the judge is empowered to revisit the prior ruling and right the proverbial ship.

(Da14 to Da15).[2] The trial court also abandoned the Pukowsky test which it had previously applied in granting summary judgment in Defendant's favor. (Da15 to Da16 *cf* Da38 to Da47). The opinion issued without notice to the parties, further briefing, or argument, immediately disadvantaging Defendant. (Da11 to Da16).

D. Trial Court's Creation of New Rule Contrary to Rule 4:49-2's Requirement for a Motion to Alter or Amend a Final Judgment.

On July 21, 2025, the trial court denied Defendant's motion for reconsideration which, *inter alia*, challenged the authority to *sua sponte* reconsider a final order. (Da1 to Da10). The July 21, 2025 Order, in relevant part, recognized the April 28, 2025 "order was issued sua sponte without argument[]" and "that final judgment was entered" but continued to create a new rule—that a trial court may *sua sponte* reconsider a final order so long as the *sua sponte* revision of the final order occurs within the twenty (20) day timeframe for a litigant to file a motion to amend a final order under Rule 4:49-2. (Da4 to Da5). The trial court again relied upon Lombardi as the authority to revise a final order. (Da3 to Da6). The trial court also refused to apply the twelve

[2] As set forth herein, the trial court omitted or ignored the very next sentence from the quote in Lombardi which clearly explained the authority to *sua sponte* revise orders is limited to ***interlocutory orders*** not ***final orders***. Additionally, Lombardi concerned reconsideration under Rule 4:42-2, not Rule 4:49-2.

(12) factor Pukowsky test and failed to even mention the evidence presented by Defendant which resulted in a finding that "the [Pukowsky] factors overwhelmingly" support the finding of an independent contractor relationship. (Da2 to Da10; *cf.* Da38 to Da47).

Defendant filed a motion for leave to file an interlocutory appeal which the Appellate Division granted. (Da758).

STATEMENT OF FACTS

Although the procedural issues are more pertinent to this motion, Defendant incorporates its statements of undisputed material facts in support of its motion for summary judgment, filed and annexed to the appendix, into this brief as if set forth herein. (Da57 to Da85). In the interest of brevity, Defendant sets forth the salient material facts below.

On September 13, 2019, Plaintiff filed a Complaint against Defendant alleging retaliatory discharge in violation of CEPA. (Da93 to Da104). Specifically, Plaintiff alleged that, although he worked as an independent contractor, he qualified as Defendant's employee under CEPA. (Da93 to Da104). However, Plaintiff testified, under oath that: (1) he was an "**independent contractor**" during his tenure with Defendant (Da45 to Da47, Da69 to Da70, Da221); (2) the parties intended for Plaintiff to be an independent contractor (Da45, Da 66, Da68 to Da70, Da114 to Da115, Da119, Da186 to Da187, Da200,

Da221); (3) his work was not subject to a high degree of supervision (Da22 to Da23, Da33 to Da34, Da45, Da66 to Da67, Da74, Da81 to Da83, Da188 to Da192, Da200, Da219 to Da220); (4) he was paid on a per trip basis (Da45 to Da46, Da67, Da79, Da180 to Da181, Da201); (5) he owned and controlled the vehicle he used to provide the transportation services and was responsible for the expense items/costs of doing business (Da45 to Da46, Da59 to Da61, Da67 to Da68, Da70 to Da72, Da81, Da117 to Da118, Da123 to Da128, Da136 to Da137, Da154 to Da162, Da203 to Da204); (6) he established his own company, DS Transport, and his company provided services for Defendant for a term less than three years (Da58 to Da59, Da77, Da109 to Da113, Da119, Da148 to Da162); (7) Defendant did not pay social security taxes for plaintiff (Da45, Da80 to Da81, Da178 to Da179); (8) he did not accrue retirement benefits with Defendant (Da80, Da178); (9) he did not accrue leave with Defendant (Da79 to Da80, Da179); (10) he possessed a high degree of skill (Da46, Da63 to Da65, Da107 to Da109, Da181 to Da185); (11) he emailed Defendant that he would no longer accept offered runs three days after performing services for another company (Da83 to Da84, Da231 to Da249, Da252 to Da254); and (12) he, at all times during his relationship with Defendant, (a) retained authority to accept or reject offered work (Da22 to Da23, Da33 to Da34, Da45 to Da47, Da66, Da71 to Da72, Da123 to Da124, Da127 to Da128, Da193 to Da196, Da200); (b)

negotiate pay rates (Da22 to Da23, Da33 to Da34, Da45, Da71 to Da72, Da77 to Da79, Da132 to Da134, Da223 to Da230); (c) select routes and specific means for making trips (Da22 to Da23, Da33 to Da34, Da45, Da66 to Da67, Da72 to Da73, Da129 to Da131, Da189, Da200); (d) employ others to assist (Da45, Da74 to Da76, Da120 to Da122, Da200); (e) retain ownership and control of the vehicle (Da45, Da59 to Da61, Da67 to Da68, Da70 to Da72, Da81, Da117 to Da118, Da123 to Da128, Da136 to Da137, Da154 to Da162, Da203 to Da204); (f) decide where to store his vehicle (Da45, Da70 to Da71, Da136 to Da137); (g) select rest, gas, and oil stops (Da45, Da76 to Da77, Da217 to Da219); (h) determine where his vehicle was to be repaired (Da45, Da76 to Da77, Da217 to Da219); and (i) determine his work hours (Da45, Da72 to Da74, Da129 to Da131, Da189). Plaintiff also testified that his company paid social security taxes (Da80 to Da81, Da178 to Da179) and that he represented himself as an independently established business in tax filings (Da81, Da144, Da148 to Da162).

STANDARDS OF REVIEW

The Appellate Division reviews questions of law, issues of statutory interpretation, and interpretation of the New Jersey Court Rules, de novo. See Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019); State v. Dickerson, 232 N.J. 2, 17 (2018); Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019).

A trial court's exercise of discretion is generally afforded latitude, wherein, the Appellate Division reviews such exercise for an abuse of discretion, i.e., whether the "decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." State v. Chavies, 247 N.J. 245, 247 (2021). However, where the trial court exercises its discretion under a misconception of the law or misapplies the law, that decision is not entitled to any deference by the Appellate Division and the issue must be determined in accordance with applicable law, i.e., de novo. See Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020); Alves v. Rosenberg, 400 N.J. 553, 563 (App. Div. 2008).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT LACKED AUTHORITY TO *SUA SPONTE* RECONSIDER A FINAL ORDER.

(Raised below: Da1 to Da10, Da11 to Da17)

The trial court lacked authority to *sua sponte* reconsider final appealable orders under the principles set forth by the Supreme Court in Lombardi v. Masso and the New Jersey Court Rules.

A. Neither Rule 4:49-2 Nor *Lombardi v. Masso* Permit *Sua Sponte* Reconsideration of Final Orders.

(Raised below: Da1 to Da10, Da11 to Da17)

Rule 4:42-2 permits a trial court to *sua sponte* reconsider interlocutory orders in the interests of justice. Specifically, the Rule provides, in relevant part, that any decision that adjudicates fewer than all the claims "shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." Rule 4:42-2. However, Rule 4:49-2 provides no such latitude for the *sua sponte* reconsideration or revision of final appealable orders and expressly requires "a motion[.]" Indeed, it is well-established that there are stringent constraints imposed on final judgments and orders and a trial court's ability to alter its own final orders are circumscribed. See Pressler & Verniero, *Current N.J. Court Rules,* comment 3 on R. 4:42-2 (2026) ("A significant aspect of the interlocutory nature of an order is its amenability to the trial court's control **until entry of final judgment without interposition of considerations appropriate to finality**.") (emphasis added). The trial court ignored these principles and disregarded Rule 4:49-2 and Lombardi v. Masso in its *sua sponte* reconsideration of the final orders.

In Lombardi v. Masso, 207 N.J. 517, 534-38 (2011), the Court was tasked with analyzing whether a trial judge has the power to review, reconsider, and

modify its interlocutory orders at any time prior to the entry of a final judgment. There, after dismissing several defendants, the trial court conducted a proof hearing as to the remaining defendants. Id. at 529. During that hearing, the trial court noticed discrepancies in the evidence and issued notice to all parties (including the dismissed parties) of its own intention to reconsider the interlocutory order. Id. at 529-530. Upon review, the Supreme Court concluded that Rule 4:42-2—which expressly states "any order . . .which adjudicates fewer than all the claims as to all the parties. . . shall be subject to revision *at any time* **before the entry of final judgment**"—vested trial courts with the ability to modify interlocutory orders in the interests of justice. Lombardi, 207 N.J. at 534 (emphasis added).[3]

In doing so, however, the Court stated, in no uncertain terms, that a trial court's ability to reconsider its interlocutory orders does not extend to final orders as there are "stringent constraints imposed on final judgments and orders." Id. at 534-35; see also Rule 4:50-1 (identifying the specific grounds for relief from a final judgment). Indeed, the Court distinguished the trial court's ability to review final orders by stating, among other things:

[3] Although not necessarily pertinent to this appeal, Lombardi set forth a procedure to follow in the event a judge chooses to exercise its discretion, in the interests of justice, to revisit an interlocutory order which the trial court likewise ignored in this matter. Lombardi 207 N.J. at 537.

> "[A] significant aspect of the interlocutory nature of an order is its amenability to the trial court's control **until entry of final judgment without interposition of considerations appropriate to finality**." Pressler & Verniero, *Current N.J. Court Rules*, comment 3 on R. 4:42-2 (2011) (citing Ford v. Weisman, 188 N.J. Super. 614 (App. Div. 1983)). That paradigm echoes federal jurisprudence. . . .United States v. Jerry, 487 F.2d 600, 604 (3d Cir. 1973) ("[T]he power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts **until entry of final judgment** and is not inconsistent with any of the rules.")

Id. at 534-537 (emphasis added).

Here, in support of the *sua sponte* reconsideration of final appealable orders, the trial court relied upon an incomplete quote from Lombardi as follows:

> The Court is also guided by the New Jersey Supreme Court's holding in Lombardi v. Masso, 207 N.J. 517, 537-38 (2011), which, inter alia, taught that:
>
> > We presume that judges ordinarily will not be required to second guess themselves because most attorneys will advance the best case possible the first time around, thus obviating later theoretical or evidential surprises. But where that does not occur, for whatever reason, and the judge later sees or hears something that convinces him that a prior ruling is not consonant with the interests of justice, he is not required to sit idly by and permit injustice to prevail. In such an exceptional

> case, the judge is empowered to revisit the prior ruling and right the proverbial ship.

(Da14 to Da15). However, the trial court ignored and omitted the very next sentence in Lombardi, which clearly limits the ability of a trial court to *sua sponte* reconsider only ***interlocutory orders,*** and not final appealable orders. Id. In fact, the full quote on which the trial court relied upon to *sua sponte* reconsider final appealable orders reads as follows:

> We presume that judges ordinarily will not be required to second guess themselves because most attorneys will advance the best case possible the first time around, thus obviating later theoretical or evidential surprises. But where that does not occur, for whatever reason, and the judge later sees or hears something that convinces him that a prior ruling is not consonant with the interests of justice, he is not required to sit idly by and permit injustice to prevail. In such an exceptional case, the judge is empowered to revisit the prior ruling and right the proverbial ship. ***That entitlement to change a prior ruling in the interests of justice is what distinguishes an interlocutory order from a final judgment***.

Id. at 537 (emphasis added to portion omitted from April 28, 2025 Order).

Neither the trial court nor Plaintiff disputed that the Orders granting summary judgment and denying reconsideration were final appealable orders; in fact, the July 21, 2025 Order stated, in no uncertain terms: "The court notes that a final judgment was entered." (Da5). Nevertheless, the trial court ignored Rule 4:49-2 and Lombardi based upon the reasoning that "**if**" Plaintiff had filed

a successive motion for reconsideration (which is not permissible under the New Jersey Court Rules), the trial court "could have" ruled on the hypothetical motion in Plaintiff's favor. (2T8-2 to 2T9-25). Stated differently, the trial court considered Plaintiff's purported ability to file a successive motion for reconsideration license to vacate final appealable orders.

The trial court's error in "reversing" the final order, impermissibly encroached upon the Appellate Division's exclusive authority to review the final orders of the trial court. The trial court's actions in this matter, if left undisturbed, will give credence to the position that trial judges could reverse final judgments at any time, notwithstanding the finality the litigation process aims to achieve. Indeed, the trial court's creation of a "new rule"[4] undercuts the goals the Rules aim to achieve and is frankly, unprecedented. For example, Rule 4:49-2 expressly requires **a motion** to alter or amend a final judgment and Rule 1:3-4 expressly prohibits even the relaxation of the time limits to file a motion under Rule 4:49-2. Notwithstanding these rules, the trial court's action went

[4] As discussed herein, the Appellate Division has held that "not only are successive motions for reconsideration violative of our rules, but […] are procedurally improper as well." Carney v. Cannon, 2014 N.J. Super. Unpub. LEXIS 1311, *1 (App. Div., June 6, 2014). Pursuant to Rule 1:36-3, see Da754 to Da757. Accordingly, the "rule" created by the trial court is violative of Appellate Division case law.

further than Rule 1:3-4's prohibition by dispensing of the requirement for Plaintiff to file a motion altogether.

Succinctly stated, the opportunity for a litigant to file a motion does not vest a trial court with unfettered authority to interject itself and disrupt the appellate process. Indeed, a litigant may choose to file a notice of appeal or accept the final judgment, but the trial court cannot usurp the function of the Appellate Division and simply issue decisions amending final orders without a motion by a litigant or even notice to the parties. The Appellate Division is the proper forum to continue any disputes over final appealable judgments.

Accordingly, Defendant respectfully requests this Court reinstate the January 29, 2025 Order granting summary judgment and April 23, 2025 Order denying Plaintiff's motion for reconsideration because the trial court wholly lacked authority to *sua sponte* reconsider the final appealable orders.

B. The Trial Court Impermissibly Vitiated the New Jersey Court Rules by Utilizing Rule 1:1-2 To Create a New Rule Depriving Defendant of Finality and Due Process.

(Raised below: Da1 to Da10, Da11 to Da17)

This Court should vacate the trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order denying Defendant's motion for reconsideration because the court impermissibly utilized Rule 1:1-2 to take the unprecedented

action of relaxing the New Jersey Court Rules to revise a final order and ultimately, deprive Defendant of finality and due process.[5]

The New Jersey Supreme Court has explained the purpose of the Rules is to promote "reasonable uniformity in the expeditious and even administration of justice." See Ragusa v. Lau, 119 N.J. 276 (1990). "Fairness in administration of the Court Rules requires that they be applied evenhandedly and, to the extent possible, uniformly." Salazar v. MKGC Design, 458 N.J. Super. 551, 558 (App. Div. 2019). In fact, the Court Rules have been amended to achieve these precise objectives:

> The project known as Best Practices resulting in a number of significant rule amendments effective September 2000, was undertaken by the Conference of Civil Presiding Judges for the purpose of attempting to improve the efficiency and expedition of litigation as well as **to restore state-wide uniformity to the wide**

[5] *Nota Bene:* Respondent-Plaintiff, in opposition to Defendant's Motion to Reconsider the Trial Court's *Sua Sponte* Order, effectively admitted the trial court had no authority to *sua sponte* reconsider its final order and requested the trial court relax the court rules to challenge the court's final order granting Defendant's motion for summary judgment. The trial court, in its July 21, 2025 denial of Defendant's motion for reconsideration, cited no authority that would allow it to *sua sponte* reconsider its final order and instead, asserted its unprecedented action was permissible because the Plaintiff, under Rule 4:49-2, could file yet another motion to reconsider, among other things, its January 29, 2025 Summary Judgment Order and April 8, 2025, denial of reconsideration of the Summary Judgment Order. While the trial court did not explicitly state it was relaxing the court rules, pursuant to 1:1-2, Defendant construes the Court's actions as a relaxation because, among other things, Rule 4:49-2 provides no basis for the Court to take any affirmative action on its own.

> **range of discretionary and increasing disparate judicial responses to such matters. . . .**

Pressler & Verniero, *Current N.J. Court Rules*, cmt. 4 on R. 1:1-2 (2026) (emphasis added).

With these principles in mind, the rule-makers recognized that there are extremely limited reasons for relaxation of the Rules. See e.g. Romagnola v. Gillespie, 194 N.J. 596 (2008) (explaining the proper circumstances for using the relaxation rule, Rule 1:1-2). The New Jersey Supreme Court has instructed the "relaxation provision of Rule 1:1-2 should be sparingly resorted to, particularly when a reasonable interpretation of the complex of directly applicable rules meets the problem at hand." Romagnola, 194 N.J. at 604.

Indeed, both the Supreme Court and this Court have historically disfavored the use of Rule 1:1-2 and have limited the use of the relaxation provision because it "was not intended to vitiate the rules from which it permitted exceptional relief." State v. Mitchell, 126 N.J. 565 (1991); see also Stewart Title Guar. Co. v. Lewis, 347 N.J. Super. 127, 137 (App. Div. 2001) ("[F]requent or freewheeling use of R[ule] 1:1-2 would lead to a sublimation of all other rules, allowing decisions to be rendered on nothing more than a gestalt-like methodology."); State v. Williams, 164 N.J. 432,442 (2005) ("Case law and common sense, however, demonstrate that Rule 1:1-2 is the exception, rather than the norm."); Hodgson v. Applegate, 31 N.J. 29, 37 (1959 ("[i]n

promulgating rules of practice, it was not intended to have one rule rendered meaningless by another."). Similarly, this Court has declined to expand the scope of Rule 1:1-2 by refusing to allow courts to use Rule 1:1-2 to amend final orders. See Hill v. State Operated Sch. Dist., 2024 N.J. Super. Unpub. LEXIS 2144, *13-14 (App. Div. Apr. 9, 2024)[6] (finding Rule 1:1-2 is "a rule of construction" and not "a mechanism for someone to challenge an order" as "[t]he rule does not provide that any **order** may be relaxed or dispensed with by the court") (emphasis added).

In this case, as set forth in further detail below, the trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order must be vacated because: (1) the trial court's utilization of Rule 1:1-2 to vacate a final order impermissibly expands the scope of Rule 1:1-2; and (2) even assuming, *arguendo*, Rule 1:1-2 could be utilized to amend a final order, which it cannot, the trial court's use of Rule 1:1-2 undermines the salutary purpose of Rule 1:1-2 as it deprived Defendant of both finality and due process.

1. The Trial Court Erred In Expanding The Scope of Rule 1:1-2 To Amend A Final Order.

As noted above, this Court has refused to permit trial courts to utilize Rule 1:1-2 to amend orders because Rule 1:1-2 is a "rule of construction" not a

[6] Pursuant to Rule 1:36-3, see Da733 to Da739.

mechanism to challenge and/or amend a court order. For example, in Hill, 2024 N.J. Super. Unpub. LEXIS 2144, at *13-14 (App. Div. Apr. 9, 2024)[7], this Court held that Rule 1:1-2 cannot be used to amend a court order because Rule 1:1-2 "does not provide that any order may be relaxed or dispensed with by the Court." There, the plaintiff moved to reopen and reinstate the case to the active trial calendar after the Court erroneously entered an Order of disposition stating the matter had been settled. The plaintiff in that case argued for reinstatement under Rule 1:1-2 for "good cause" and "absence of prejudice to. . . defendant." Id. at *6-7. The trial court rejected the plaintiff's argument and found Rule 1:1-2 did not provide the court with a mechanism to reopen a dismissed matter. The court explained:

> [Rule 1:1-2] is a rule of construction, it is not a rule that provides a mechanism for someone to challenge an order[.] . . . I [am] not aware of any case that . . . reopened a matter or reinstated a matter or dealt with a dismissal under [Rule] 1:1-2 as the triggering rule.

Id. at *6. In doing so, the trial court also highlighted the Court Rules expressly provide the triggering events that will warrant relief from a judgment/final order and "only the existence of one of those triggers will allow a party to challenge the substance of the judgment." Id. at *6-8.

[7] Pursuant to Rule 1:36-3, see Da733 to Da739.

In affirming the trial court's refusal to utilize the relaxation provision of Rule 1:1-2 to challenge/amend an order, this Court found "Rule 1:1-2 is 'a rule of construction' and **not 'a mechanism for someone to challenge an order**.'" Id. at *13-15 (emphasis added). This Court also found the utilization of Rule 1:1-2 in this manner was impermissible because there were, among other things, clear mechanisms by which a party may move to vacate a final order and/or seek relief from a final order should he or she believe the order imposes an unjust result. Id.; see also Nichols v. Linden, 2021 N.J. Super. Unpub. LEXIS 1449, at *6-7 (App. Div. Jul. 15, 2021)[8] (reversing trial court's application of Rule 1:1-2 because, among other things, there was a clear directly applicable rule that met the problem at hand) (citing Romagnola, 194 N.J. at 604).

In this case, the trial court erred or abused its discretion by impermissibly expanding the scope of Rule 1:1-2 to vacate a final order granting summary judgment. Indeed, like the circumstance in Hill, Rule 1:1-2 cannot be used to vacate a final order granting summary judgment or denying reconsideration because Rule 1:1-2 does not vest the trial court with the authority to relax **orders** and there are clear Rules governing how a party may seek relief from a final order granting summary judgment, i.e., the appellate process.

[8] Pursuant to Rule 1:36-3, see Da741 to Da744.

Accordingly, Defendant respectfully requests this Court vacate the trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order. See Nichols v. Linden, 2021 N.J. Super. Unpub. LEXIS 1449, at *6-7 (App. Div. Jul. 15, 2021)[9] (rejecting trial court's application of Rule 1:1-2 because, among other things, there was a clear directly applicable rule that met the problem at hand); Lakhani v. Patel, 479 N.J. Super. 291, 300-01 (App. Div. 2024) (finding application of Rule 1:1-2 "would grossly misapply the procedural fairness goal of Rule 1:1-2(a) and substantively alter Rule 4:41-2 for which there is no authority"); Seoung Ouk Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461, 472 (App. Div. 2015) (finding no basis for the application of Rule 1:1-2 because "[t]he 'problem at hand' is the appropriate timing of dispositive motions. Rule 4:46 meets that problem, recognizing the "obvious" desirability of deciding such motion prior to trial and establishing requirements to accomplish that goal.").

2. The Trial Court's Use of Rule 1:1-2 Fosters Potential Abuses of the Rule In the Future and Drains The Rule Of Its Salutary Purpose.

The trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order should also be vacated because of the far-reaching implications of the trial court's actions.

[9] Pursuant to Rule 1:36-3, see Da741 to Da744.

In Nichols v. Linden, 2021 N.J. Super. Unpub. LEXIS 1449, at *8-9 (App. Div. Jul. 15, 2021)[10], this Court found a balancing of the interests revealed that applying Rule 1:1-2 would foster abuses and undermine the ultimate purpose of the Rules. In that case, the defendants moved for summary judgment on, among other things, the ground that the plaintiff's treating doctor failed to provide the necessary sufficient comparative analysis needed to sustain the plaintiff's claims. Id. at *3-4. The trial court, in its oral decision, agreed the plaintiff's treating doctor failed to provide the necessary comparative analysis but found he was obligated to "provide a just determination in this case as in all cases" and that to grant summary judgment to defendants "would be to visit any ills of the attorney upon the client." Id. at*4. Relying on Rule 1:1-2, the judge denied the defendant's motion for summary judgment, without prejudice, and permitted the plaintiff thirty days to provide an updated report. Id.

This Court in Nichols found the trial court abused its discretion in utilizing Rule 1:1-2 where there is a directly applicable rule that controls the extension of discovery in the face of arbitration and trial. Id. This Court also determined that applying Rule 1:1-2 to relieve one side of an established and anticipated burden on the merits risked the very serious consequence of calling the court's impartiality into question. Id.

[10] Pursuant to Rule 1:36-3, see Da741 to Da744.

In the instant matter, the trial court abused its discretion by relaxing the Rules to relieve Plaintiff of the **final order** granting summary judgment because: (1) as noted above, Legal Argument, Point I, Section A, *supra*, Rule 1:1-2 cannot be used to amend a final order granting summary judgment as the rule does not vest the trial court with the authority to relax court orders (especially under circumstances where there is an applicable rule governing the relief sought); and (2) the trial court's error in relaxing the Rules to relieve Plaintiff of the final order, under these circumstances, deprived Defendant of its due process rights, and, in effect, placed the trial court in an adversarial position towards Defendant by creating a new rule—that a trial court can *sua sponte* reconsider a final order because Plaintiff purportedly still had time to file a successive motion for reconsideration. Moreover, the trial court disadvantaged Defendant by requiring it to meet the standards for reconsideration to overturn the trial court's unauthorized *sua sponte* Order after it had obtained summary judgment. Certainly, the trial court's relaxation of the Rules to deprive Defendant of finality and its due process rights severely undercut the salutary purpose of Rule 1:1-2 and encroached upon the role of this Court—to review the final judgments of the trial courts.

Accordingly, the trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order denying Defendant's motion for reconsideration must be vacated.

POINT II

NO FURTHER MOTIONS FOR RECONSIDERATION SHOULD BE ENTERTAINED ON REMAND.

(Raised below: Da1 to Da10, Da11 to Da17)

To the extent the Appellate Division reinstates the January 29, 2025 Order granting summary judgment and April 23, 2025 Order denying Plaintiff's motion for reconsideration, no further motions for reconsideration should be entertained by the trial court to preserve the integrity of the appellate process, in the interests of justice, and in the interests of due process rights.[11] Instead, Plaintiff should have the option to accept the final judgment or file a notice of appeal.[12] Permitting Plaintiff to file a successive motion for reconsideration – as the trial court suggested during oral argument and in its July 21, 2025 Order – would fundamentally impair due process rights as the trial court would essentially be ruling on a motion for an opinion that the trial court already improperly issued *sua sponte*. Such a result would deprive Defendant of any

[11] The trial court issued a *sua sponte* reconsideration order on April 28, 2025. The trial court justified the extraordinary action by reasoning "[g]iven the court sua sponte reconsidered its own order prior to the expiration of the 20 days for a motion for reconsideration, this court finds no procedural deficiency to correcting its own error within this time frame." (Da5).

[12] Alternatively, the Appellate Division may exercise its discretionary power to request briefing on the underlying summary judgment decision to conserve judicial resources. See Rule 2:10-5.

meaningful opportunity to oppose any such successive motion for reconsideration and completely ignore the integrity of the appellate process.

"Repetitive motions for reconsideration are not permitted under our court rules[.]" Carney v. Cannon, 2014 N.J. Super. Unpub. LEXIS 1311, *1 (App. Div., June 6, 2014)[13]. Indeed, this Court has already concluded that "not only are successive motions for reconsideration violative of our rules, but, as here, are procedurally improper as well." Id. at *6. A movant for reconsideration "carries the heavy burden of showing that the court acted in an arbitrary, capricious or unreasonable manner when rendering its decision." Id. However, a motion for reconsideration is not "a second bite at the apple." Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 463 (App. Div. 2002).

Indeed, the "preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal or, if the Order is final, by a notice of appeal." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). As the D'Atria court cautioned, "motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour." Id.

As set forth herein, the trial court reasoned that its *sua sponte* reconsideration of a final order was not procedurally deficient because Plaintiff

[13] Pursuant to Rule 1:36-3, see Da754 to Da757.

could have filed a motion for reconsideration within twenty (20) days of the April 23, 2025 Order. (Da5). Not only is the trial court's reasoning incorrect and contradicted by Carney v. Cannon, but Defendant's ability to meaningfully oppose a motion for reconsideration has been eviscerated by the trial court's actions. That is, Plaintiff would be filing a motion for an opinion that the trial court already improperly issued.

Accordingly, Defendant respectfully requests that should the Court decide remand is appropriate, the Court instruct the trial court that no further motions for reconsideration may be entertained with respect to the final appealable orders.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO FOLLOW SUPREME COURT PRECEDENT BY FAILING TO APPLY THE "PUKOWSKY" TEST FOR DETERMINING WHETHER PLAINTIFF WAS AN "EMPLOYEE" UNDER CEPA.

(Raised below: Da1 to Da10, Da11 to Da17)

This Court should also reverse the April 28, 2025 *sua sponte* Order and July 21, 2025 denial of Defendant's motion for reconsideration because the trial court, without reason, refused to follow New Jersey Supreme Court precedent. In the January 29, 2025 Summary Judgment Order, the trial court appropriately applied the 12-factor test pronounced in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998) and endorsed by the New Jersey Supreme Court in

D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 122 (2007) as the appropriate test for determining employment status under CEPA. Id. ("The test for determining those aspects of a non-traditional work relationship was set out in Pukowsky and we have already indicated our acceptance of that test as appropriate for CEPA purposes."). (Da37 to Da47). However, in both Orders at issue in this appeal, the trial court wholly abandoned the Pukowsky test without explanation. (Da1 to Da16).

"The doctrine of *stare decisis* – the principle that a court is bound to adhere to settled precedent – serves a number of important ends." Luchejko v. City of Hoboken, 207 N.J. 191, 208 (2011). Specifically, "[t]he doctrine 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the ***actual and perceived integrity of the judicial process.***" Id. (emphasis added)(citations omitted). Indeed, the doctrine "carries such a persuasive force that [the New Jersey Supreme Court] ha[s] always required a departure from precedent to be supported by some special justification." State v. Brown, 190 N.J. 144, 157 (2007).

CEPA prohibits an "employer" from taking an adverse employment action against any "employee" who exposes an employer's criminal, fraudulent, or corrupt activities. N.J.S.A. 34:19-3. It authorizes an aggrieved "employee" to

bring a civil suit against an "employer" who retaliates in violation of the statute. N.J.S.A. 34:19-5. Thus, if a plaintiff is not an "employee" under CEPA, that plaintiff may not bring any claim under CEPA. While CEPA's definition of "employee" is broad, "it is plain the Court did not 'extend' the statute to independent contractors." Sauter v. Colts Neck Volunteer Fire Co. No. 2, 451 N.J. Super. 581, 591-92 (App. Div. 2017).

D'Annuzio expressly requires application of the twelve (12) factor Pukowsky test to determine employment status under CEPA. See D'Annunzio, 192 N.J. at 122-24. The D'Annunzio Court explained, in no uncertain terms, that the Pukowsky test should be used to determine whether an individual qualifies for coverage under CEPA:

> In Pukowsky, the Appellate Division identified twelve factors to be considered when determining whether a plaintiff qualifies as an employee []:
>
> > (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation – supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the 'employer;' (10) whether the worker accrues retirement benefits; (11) whether

> the 'employer' pays social security taxes; and (12) the intention of the parties.

D'Annunzio, at 123. In D'Annunzio, the Supreme Court held "[t]he test for determining those aspects of a non-traditional work relationship was set out in Pukowsky and we have already indicated our acceptance of that test as appropriate for CEPA purposes." Id. at 122.

The Appellate Division has consistently held the Pukowsky test as the test to determine whether a plaintiff pursuing a CEPA claim should be considered an "employee," and thereby able to maintain such a claim. In Sauter, 451 N.J. Super. at 591-92, the Appellate Division expressly stated:

> The Court's tool for assessing "the reality of plaintiff's relationship with the party against whom the CEPA claim is advanced" is the Pukowsky test, a twelve-factor hybrid reflecting both the common law right-to-control test and an economic realities test. The Court endorsed the Pukowsky test as the best means of identifying "the specialized and non-traditional worker who is nonetheless integral to the business interests of the employer," and thus deserving of CEPA's protections.

Id. (citing D'Annunzio, at 123-125) (internal citations omitted). Importantly, the Appellate Division held that a plaintiff may enjoy protection under CEPA only after consideration of the twelve (12) Pukowsky factors, not any other test. See Nanavati v. Cape Reg'l Med. Ctr., Nos. A-4111-17T3, A-4126-17T3, 2020 N.J.

Super. Unpub. LEXIS 952, at *21 (App. Div. May 19, 2020)[14] (citing D'Annunzio, at 114, 120-121) ("The Court in D'Annuzio adopted the Pukowsky factors for assessing the real employer-employee status of an alleged independent contractor…. [E]ven where an employee is labeled an independent contractor, he or she may enjoy the protection under CEPA ***after*** consideration of the Pukowsky factors.") (emphasis added).

Here, the trial court applied the Pukowsky twelve (12) factor test in the January 29, 2025 Summary Judgment Order, the April 3, 2025 denial of reconsideration and the April 23, 2025 corrected denial of reconsideration. (Da17 to Da47). In fact, the trial court concluded, under the twelve (12) factor Pukowsky test, the undisputed material facts "overwhelmingly" supported an independent contractor finding. (Da37 to Da47). The trial court denied Plaintiff's motion for reconsideration with attention to the twelve (12) Pukowsky factors. (Da 25 to Da26, Da36).

On April 28, 2025, without providing notice or an opportunity to be heard, the trial court *sua sponte* reversed the grant of summary judgment and never applied the Pukowsky factors. (Da11 to Da16). The trial court, in fact, applied no test at all in reversing summary judgment in the *sua sponte* Order. Id. In the July 21, 2025 Opinion, the trial court denied Defendant's motion for

[14] Pursuant to Rule 1:36-3, see Da759 to Da768.

reconsideration and again failed to apply the Pukowsky factors. (Da1 to Da10). The trial court provided no explanation for the deviation from established precedent or "special justification" for the abandonment of the Pukowsky test.

In applying Pukowsky, the trial court found the evidence "overwhelmingly" supported an independent contractor classification; yet, in the Orders at issue in this appeal, the trial court found issues of fact when it did not apply the Pukowsky factors. (Da1 to Da16 *cf* Da37 to Da47). The trial court's refusal to apply the twelve (12) actor test set forth in Pukowsky and mandated by the New Jersey Supreme Court in D'Annunzio (as well in opinion by this Court) constitutes reversible error in that the trial court is bound by precedential opinions. Accordingly, the Court should grant this appeal and reinstate the January 29, 2025 Summary Judgment Order and April 23, 2025 Order denying reconsideration because those opinions, rather than the ones at issue in this appeal, applied the twelve (12) factor Pukowsky test in granting summary judgment.

CONCLUSION

In light of the compelling arguments set forth herein, Defendant requests that the Appellate Division vacate the trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order denying Defendant's motion for reconsideration. In turn, this Court should reinstate the final appealable orders entered by the

trial court – the January 29, 2025 Summary Judgment Order, the April 8, 2025 Order denying Plaintiff's motion for reconsideration, and the April 23, 2025 corrected Order denying Plaintiff's motion for reconsideration. To the extent this Court remands the matter, no further motions for reconsideration should be entertained by the trial court for the reasons set forth herein.

Respectfully submitted,

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MARCOS D. DOGLIO, Plaintiff-Respondent, v. BOASSO AMERICA CORPORATION, Defendant-Appellant, and ERIC MOLINA; JOHN DOWNEY; ABC CORPS. 1-10 AND JANE & JOHN DOES 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000057-25 CIVIL ACTION ON APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ESSEX COUNTY Docket No. ESX-L-006429-19 Sat Below: Hon. Joshua D. Sanders, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT MARCOS D. DOGLIO

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PRELIMINARY STATEMENT

The appeal of Defendant-Appellant Boasso America Corporation ("Boasso" or "Defendant") is a misguided attempt to elevate procedural formalism over substantive justice. Boasso seeks to reverse a trial court decision in which the Court did nothing more than commendably exercise the inherent authority to correct its own acknowledged, clear error in applying the summary judgment standard, thus allowing this matter to proceed to a jury. Boasso's appeal from that correction is without merit.

Plaintiff-Respondent Marcos Doglio ("Plaintiff" or Mr. Doglio) is a truck driver who suffered retaliation for blowing the whistle on Boasso's illegal safety and wage practices. A threshold issue in the case is whether Plaintiff, despite being labeled an independent contractor, was in reality an employee entitled to protection under New Jersey's Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1, *et seq.*

The integrity of the judicial process is not threatened when a trial court corrects a palpably incorrect or irrational analysis; it is fortified. The trial court has a fundamental duty to prevent injustice. The trial court did not create a new rule or usurp this Court's function; it simply applied existing principles to correct an error in response to Plaintiff's Motion for Reconsideration and in

close proximity to its prior ruling, underscoring the trial court's unique position to recognize a mistake.

Additionally, the trial court properly followed New Jersey Supreme Court ("NJSC") precedent when it ultimately denied summary judgment. The NJSC mandated that courts look past labels and contracts to the "reality of plaintiff's relationship with the party against whom the CEPA claim is advanced." *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110, 121 (2007). Boasso selectively seeks to apply only part of the *D'Annunzio* decision while ignoring the full CEPA standard established in that NJSC decision.

Recognizing the factors identified in *Pukowsky v. Caruso,* 312 N.J. Super. 171 (App. Div. 1998), the NJSC also *expressly modified* those factors with respect to CEPA claims by skilled workers who have been classified as independent contractors. (Boasso does not dispute that Plaintiff is a skilled worker.)

The NJSC recognized that a worker misclassified as an independent contractor will never be able to satisfy certain *Pukowsky* factors (*i.e., Pukowsky* Factors Six, Eight, Ten, and Eleven) and, therefore, established the following *three key factors* to evaluate whether an employer-employee relationship existed in reality:

(1) The defendant's control over the worker (which incorporates *Pukowsky* Factors One, Two, Four, and Seven);

(2) The worker's economic dependence on the work from the defendant (which incorporates *Pukowsk*y Factors Five, and Seven); and

(3) The worker's functional integration into the defendant's business (which incorporates *Pukowsky* Factors Three and Nine).

Factor Twelve (the intention of the parties) is not dispositive based on the holding in *D'Annunzio* (in which a chiropractor operating a separate medical practice was still deemed an employee of the insurance company defendant).

Boasso's effort improperly to apply all *Pukowsky* factors equally defies the NJSC standard, thwarts CEPA's broad remedial purpose to protect whistleblowers, and contradicts New Jersey's firm public policy stance against the epidemic of employee misclassification. To accept Boasso's position would be to provide a roadmap for employers to strip workers of CEPA protections through ostensible independent contractor agreements while retaining all the functional hallmarks of an employer. The law does not permit such a result.

For all these reasons, Plaintiff respectfully requests that the Court affirm the trial court's April 28, 2025 and July 21, 2025 Orders and remand this matter for a trial on the merits that is so clearly warranted.

RELEVANT PROCEDURAL HISTORY

On September 3, 2019, Mr. Doglio filed a Complaint and Jury Trial Demand asserting that he was misclassified as an independent contractor and that Defendants

Boasso, Eric Molina, and John Downey (collectively, "Defendants")[1] violated CEPA after Plaintiff reported numerous safety violations and other unlawful conduct. Da92-Da104. However, rather than correcting the unlawful conduct, Defendants chose to engage in a campaign of unlawful retaliation that culminated in Defendants constructively discharging Plaintiff by depriving him of assigned deliveries and even sending him on bogus deliveries for weeks, thereby depriving Plaintiff of pay and forcing him to find another job to support his family. *Id.*

Boasso's Motion for Summary Judgment

On September 13, 2024, Defendant Boasso filed a Motion for Summary Judgment ("SJ Motion"), asserting that Plaintiff did not qualify as an "employee" for purposes of CEPA protection. Da53-Da56. Plaintiff opposed the SJ Motion. Da384-Da497. On January 29, 2025, the trial court erroneously granted Boasso's SJ Motion. Da37-Da47.

Plaintiff's Motion for Reconsideration & the Court's Corrections *Sua Sponte*

On February 18, 2025, Plaintiff filed a Motion for Reconsideration. Da610-Da621. Defendant Boasso opposed Plaintiff's Motion for Reconsideration. Da622-Da664. On April 8, 2025, the trial court entered an Order and Statement of Reasons ("April 8, 2025 Order"), initially denying Plaintiff's Motion for Reconsideration. Da28-Da36.

[1] Only Defendant Boasso has asserted this appeal.

On April 23, 2025, the trial court entered an Order and Statement of Reasons *sua sponte* ("April 23, 2025 Order") that modified the April 8, 2025 Order but not the initial outcome. Da17-Da27.

Five days later, on April 28, 2025, the trial court entered a second *sua sponte* Order and Statement of Reasons ("April 28, 2025 Order"), which granted Plaintiff's Motion for Reconsideration and denied Boasso's SJ Motion. Da11-Da16. In the April 28, 2025 Order, the trial court correctly found that it had erred in the prior orders because it had discounted the testimony of Boasso's witnesses presented by Plaintiff (supporting an employer-employee relationship), which "is not the province of the court on a motion for summary judgment." *Id.*

Boasso's Motion for Reconsideration

On May 12, 2025, Defendant Boasso filed a Motion for Reconsideration of the April 28, 2025 Order. Da672-Da677. Plaintiff opposed Boasso's Motion for Reconsideration. Da687-Da729. On June 2, 2025, Boasso filed reply papers. Da730-Da757. On July 17, 2025, the Honorable Joshua D. Sanders, J.S.C. held oral argument on Boasso's Motion for Reconsideration. *See generally,* T2. On July 21, 2025, the trial court entered an Order and Statement of Reasons denying Boasso's Motion for Reconsideration of the April 28, 2025 Order ("July 21, 2025 Order"). Da1-Da10.

Boasso's Motion for Leave to File an Interlocutory Appeal

Boasso filed a motion for leave to file an interlocutory appeal, which the Plaintiff opposed. This Court granted Boasso's motion (Da758), and Plaintiff now opposes Boasso's appeal.

COUNTERSTATEMENT OF FACTS

A. Plaintiff's Protected Whistleblowing Activity & Boasso's Unlawful Retaliation

Plaintiff was a truck driver of liquid cargo for Boasso who was misclassified as an independent contractor and suffered significant retaliation after blowing the whistle about safety and other legal violations. Da92-Da104. While working for Boasso, Mr. Doglio raised numerous concerns about very serious safety issues, including violations of the Occupational Safety and Health Administration ("OSHA") requirements, the New Jersey Department of Transportation ("NJDOT") requirements, the Federal Motor Carrier Safety Administration ("FMCSA") rules and regulations, and New Jersey wage laws. *Id.*

Rather than addressing those concerns, however, multiple supervisory and management-level employees from Boasso subjected Mr. Doglio to a lengthy series of retaliation for weeks, including refusing to assign delivery loads to him (after requiring him to report to work in person) and sending him on bogus runs for cargo that was not there. *Id.* This retaliation deprived Plaintiff of pay (since Boasso only

paid him for completed deliveries) and forced Plaintiff to find a job with a different trucking company.[2] *Id.;* Da445-450.

B. Boasso's SJ Motion Disputing Plaintiff's Qualification as an Employee

Boasso then disputed that Plaintiff could satisfy the threshold issue of qualifying as an employee for entitlement to protection against retaliation under CEPA. Da53-Da54; Da11-Da16; Da1-Da10.

1. Boasso's Highly Disputed Evidence

In its SJ Motion, Boasso relied heavily on purported statements by Plaintiff from separate legal matters,[3] deposition testimony taken out of context, and misrepresentations regarding discovery conducted in this matter. Da87-Da91; Da105-Da147; Da176-Da197; Da215-Da222; Da250-Da255; Da500-Da501; Da502-Da513; Da514-Da538; Da548-Da559.

2. Plaintiff's Evidence Based on Admissions by Defendant

By contrast, Plaintiff's evidence in opposition to Defendant's SJ Motion included testimony from Defendant's own witnesses *taken in this action.* Plaintiff's evidence included testimony and admissions by Boasso's terminal manager (the

[2] Notably, Boasso acknowledged OSHA violations approximately one month after Plaintiff found alternate employment. Da452.
[3] Plaintiff contends that testimony and/or statements from separate legal actions will not be admissible at trial under the Rules of Evidence.

highest-level representative at Boasso's facility) and Boasso's dispatchers as well as Boasso's business records. Da421-Da428, Da429-Da430; Da445-Da484; Da493-Da497. This evidence showed Boasso's substantial control over Plaintiff and other *D'Annunzio* factors from which a reasonable factfinder could determine that Plaintiff should be considered an employee for CEPA protection.

a. Boasso's Control Over Plaintiff's Work

The testimony from Boasso's Terminal Manager and dispatchers revealed Boasso's daily control over the means and manner of Plaintiff's work:

- Boasso's Terminal Manager (Eric Molina) testified that, because Plaintiff's truck was "leased" to Boasso, "the truck was to be used for Boasso purposes only" (Da461);

- Molina testified that Boasso's dispatchers provided day-to-day oversight of Boasso's drivers in terms of getting out the door, going to the customers, and addressing any problems that came along on the routes (Da464);

- Molina testified that Boasso communicated to the drivers what time they were required to arrive at the delivery location and where to make the deliveries (Da461);

- Defendant's lead dispatcher, Genesis Arce, testified that the dispatchers, lead dispatcher, and the terminal manager decided which routes to assign to particular drivers (Da468, Da483);

- Two of Defendant's dispatchers (Genesis Arce and Tia Blount) testified that Defendant *required* Plaintiff to attend regular safety meetings (Da469, Da496);

- Defendant's dispatcher testified that Defendant *required* Plaintiff to undergo 15 training programs (Da491);

- Defendant's policies detailed the 15 training programs, which also required that Plaintiff take tests and sign acknowledgement forms to confirm completion (Da496); and
- Boasso required Plaintiff to comply with Defendant's safety and other protocols, and Plaintiff was subject to Defendant's disciplinary policy if he violated those protocols (Da473-Da477).

See also, Da1-Da10; Da11-Da16; Da421-Da428.

Furthermore, Boasso required Plaintiff to display Boasso's name and registration number on his truck, registration, and insurance card, and dictated where and when Plaintiff was required to undergo truck inspections and repairs. Da421-Da428, Da433, Da434, Da461, Da487, Da488.

Boasso supplied the essential tools of its trade—the tanks and chassis, without which the deliveries of liquid products for Boasso could not be performed. Da421-Da428, 461, 462, 484. Boasso even dictated procedures for handling its tanks and chassis. Da421-Da428, Da462.

Contrary to Boasso's assertion, Plaintiff testified at deposition that his work *was* subject to a high degree of supervision. Boasso told him what to do, where to go, and what time to arrive, and "installed a computer in my truck to control every single move that I was doin'." Da421-Da428, Da434, Da461, Da464, Da488.

Also contrary to Boasso's assertion, Plaintiff did *not* have the ability to accept or reject work or negotiate pay rates for trips offered. In fact, Boasso's Terminal Manager testified that Boasso's corporate sales department set the rates that Plaintiff

would receive for a particular route, and the rates were *non-negotiable*. Da421-Da428, Da464. Moreover, the one time that Plaintiff did try to negotiate the rate of pay for an assignment, Boasso then penalized him by depriving him of future assignments. Da421-Da428, Da438, Da439, Da440, Da442-Da443.

b. Plaintiff's Economic Dependence on the Work From Boasso

Boasso's witnesses and documents also reflected Plaintiff's economic dependence on Boasso. Boasso held Plaintiff economically captive, which made its retaliation against Plaintiff all the more egregious.

Boasso expected Plaintiff to provide services on an ongoing, daily basis and required Plaintiff to dedicate his only truck to Boasso's exclusive use. Da1-Da10; Da11-Da16; Da198-Da214; Da457-Da464. Boasso required its logo and registration number to be displayed on Plaintiff's truck, required Plaintiff to register his truck in Boasso's name, and required Plaintiff to identify Boasso on his insurance card, making it impossible for Plaintiff to make deliveries for any other companies while working for Boasso. Da421-Da428, Da433, Da434, Da461, Da487, Da488. In other words, Plaintiff's income was entirely dependent on the assignments and non-negotiable rates provided by Boasso.

c. Plaintiff's Functional Integration into Boasso's Business

Additionally, Boasso's testimony and documents reflected Plaintiff's functional integration into Boasso's business. Boasso is a trucking company and Plaintiff performed truck driving services for Boasso on a regular, daily basis for two years. Da1-Da10; Da11-Da16; Da457-Da464; Da465-Da471; Da472-Da477; Da489-Da492; Da493-Da497. Boasso's own witnesses testified that Boasso expected its contract drivers to make themselves available for deliveries all the time. Da421-Da428, Da460. In fact, drivers had to work continuously or Boasso required them to "re-certify." Da421-Da428, Da463. Plaintiff worked exclusively for Boasso, five days per week, and often 60-70 hours per week, until Boasso retaliated against him and deprived him of work assignments. Da421-Da428, Da445-Da450.

Boasso also required Plaintiff to follow its policies and procedures manual. Boasso further required Plaintiff to regularly attend meetings held by Boasso and engage in administrative duties that Boasso required as part of Plaintiff's driving responsibilities. *Id.*

C. The Trial Court's Analysis of the *D'Annunzio* & *Pukowsky* Factors

The trial court initially weighed the evidence under *Pukowsky* and conducted a partial analysis of the three *D'Annunzio* key factors, but mistakenly gave more weight to the (misstated) evidence presented by Boasso. This misapplication of the

summary judgment standard initially resulted in the erroneous entry of summary judgment. Da37-Da47; Da28-36; Da17-Da27.

However, in the April 28, 2025 Order (and as reiterated in the July 21, 2025 Order), the trial court re-evaluated Plaintiff's Motion for Reconsideration and recognized that its initial summary judgment decision violated the fundamental principles from *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 540 (1995), because courts cannot weigh evidence or make credibility determinations at the summary judgment stage and must view all evidence in the light most favorable to the non-moving party. Da1-Da10; Da11-Da16; Da610-Da615. In the April 28, 2025 Order, the trial court correctly found it had "erred in relying upon the testimony of the plaintiff to the exclusion of other evidence" and had improperly "ranked the evidence." Da1-Da10; Da11-Da16.

Based on the evidence viewed in the light most favorable to Plaintiff, a reasonable fact finder could determine that Plaintiff should be considered an employee for purposes of CEPA protection against retaliation. Therefore, the April 28, 2025 and July 21, 2025 Orders were appropriate, and Plaintiff hereby opposes Boasso's appeal.

STANDARD OF REVIEW

Appellate courts will only overturn a trial court's decision on a motion for reconsideration if an abuse of discretion occurred. *Hoover v. Wetzler,* 472 N.J.

Super. 230, 235 (App. Div. 2022) (citing *Branch v. Cream-O-Land Dairy,* 244 N.J. 567, 582 (2021)); *see also, Matter of Est. of Jones,* 477 N.J. Super. 203, 216 (App. Div. 2023), *aff'd as modified,* 259 N.J. 584 (2025); *Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 N.J. Super. 378, 382 (App. Div. 2015). The decision to grant or deny a motion for reconsideration regarding the entry of summary judgment "rests within the sound discretion of the trial court." *Hoover,* 472 N.J. Super. at 235 (quoting *Pitney Bowes Bank*, 440 N.J. Super. at 382).

"An abuse of discretion 'arises when a decision is ["]made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.["]'" *Kornbleuth v. Westover,* 241 N.J. 289, 302 (2020) (quoting *Pitney Bowes Bank*, 440 N.J. Super. at 382). Boasso cannot satisfy this standard. The trial court properly exercised its discretion in both the April 28, 2025 and July 21, 2025 Orders because the Orders contained a rational explanation, were based on established policies, and rested on a permissible basis set forth in the legal standard for summary judgment.

Boasso also questions the trial court's inherent authority to correct its own acknowledged and palpable error *sua sponte*. Reversal of a trial court's decision *sua sponte* is only appropriate when (1) an erroneous legal determination occurred or (2) a party was deprived of due process. *Lombardi v. Masso*, 207 N.J. 517, 537-38 (2011) ("what is critical is that [the trial judge] provide the parties a fair

opportunity to be heard on the subject…[and] apply the proper legal standard to the facts and explain his reasons"); *Wlasiuk v. McElwee,* 334 N.J. Super. 661, 669, 760 A.2d 829, 833 (App. Div. 2000) (summary judgment reversed because the trial court *sua sponte* raised the legal issue of "duty" but did not properly analyze the legal issue); *Avatar Cap. Fin., LLC v. Nassau Marina Holdings, LLC,* No. A-0423-20, 2022 WL 1495919, at *4 (App. Div. May 12, 2022) (*sua sponte* order issued four days after deciding a motion to amend a final judgment was reversed due to error in legal analysis) (Pa1-Pa8); *Park v. Kuken, LLC,* No. A-0853-19, 2022 WL 189831, at *10 (App. Div. Jan. 21, 2022) (summary judgment entered *sua sponte* in response to motion *in limine* deprived the party of due process) (Pa15-Pa25); *Woloshin v. City of Camden,* No. A-2746-05T3, 2007 WL 1146714, at *11 (App. Div. Apr. 19, 2007) (summary judgment *sua sponte* reversed and remanded because the evidence did not support the entry of summary judgment) (Pa26-Pa34); *Nardi v. RBB Enters., Inc.,* No. A-1243-14T4, 2016 WL 4490594, at *4 (App. Div. Aug. 26, 2016) (*sua sponte* decision regarding expert report deprived the party of due process) (Da701-Da705); *Shurkin v. Elar Realty Co.,* No. A-0727-22, 2023 WL 7486987, at *2-*3 (App. Div. Nov. 13, 2023) (remanded for further due process proceedings when plaintiff's motion for summary judgment resulted in the complaint being dismissed *sua sponte*) (Da717-Da720). Neither situation occurred here.

The April 28, 2025 and July 21, 2025 Orders did not involve any erroneous legal determinations or deprive Boasso of due process. Rather, the trial court corrected its previous misapplication of the legal standard and afforded due process through full briefing of the issues and by allowing oral argument.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS INHERENT AUTHORITY AND DISCRETION TO REVERSE ITS ERRONEOUS ENTRY OF SUMMARY JUDGMENT (Da1-Da10, Da11-Da17).

Boasso's appeal is premised entirely upon a flawed procedural argument that elevates form over substance. Boasso should not be permitted to lock in a judgment that the trial court recognized was the product of clear error due to a misapplication of the summary judgment standard.

The trial court's decision to correct its own clear mistake was not an overreach of authority, but a commendable and necessary exercise of its inherent power to prevent a manifest injustice. Boasso's argument distorts the substance and purpose of the Court Rules, mischaracterizes controlling precedent, and ignores the abundant due process that Boasso was afforded. This Court should reject Boasso's attempt to evade a trial on the merits and affirm the trial court's courageous correction of its own mistake.

A. The Trial Court's Authority to Correct its Own Manifest Error is an Inherent Judicial Function that Serves the Interests of Justice (Da1-Da10, Da11-Da17).

Rule 4:49-2 expressly authorizes a trial court to alter or amend a judgment or final order as long as the motion is filed within 20 days after the order and specifies the basis on which it is made, "including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred." *R.* 4:49-2. Plaintiff's Motion for Reconsideration satisfied this requirement.[4] There is nothing in the records that even suggests the trial court expanded the 20-day deadline, as Boasso contends. Accordingly, Boasso's reliance on *Rule* 1:3-4 is wholly misplaced.

Moreover, Plaintiff's Motion for Reconsideration was the catalyst for two sua sponte Orders by the trial court: (1) the April 23, 2025 *sua sponte* Order; and (2) the April 28, 2025 *sua sponte* Order. Da11-Da16, Da17-26. However, without any explanation, Boasso contends that the trial court lacked the authority to enter the April 28, 2025 Order but not the April 23, 2025 Order that preceded it.

[4] Plaintiff's Motion was filed within 20 days and specified the portions of the summary judgment records the trial court overlooked/erred, including the significant admissions by Boasso's witnesses that demonstrated the three key *D'Annunzio* factors establishing Plaintiff's employment status. Da11-Da16, Da17-Da26, Da28-Da36, Da610-Da613.

The fact that the trial court modified its resulting orders twice within 20 days after its initial decision does not render those modifications somehow *ultra vires*, particularly since Boasso's procedural outrage is targeted only at the second modification, but not the first one. Boasso's true grievance is not with the procedure, but with the outcome of the April 28, 2025 Order.

B. *Lombardi* Actually Supports the Trial Court's *Sua Sponte* Orders (Da1-Da10, Da11-Da17).

Boasso's central argument—that the trial court lacked authority to *sua sponte* reconsider its prior order—is based on a rigid and incorrect reading of *Lombardi v. Masso*, 207 N.J. 517 (2011), and the New Jersey Court Rules. Boasso hangs its entire argument on *Lombardi's* discussion of interlocutory and final orders, but Boasso improperly asserts that the Court's power to modify a prior order is limited to interlocutory orders. Db14. This interpretation is myopic and misstates the holding in *Lombardi*. In *Lombardi*, the NJSC was not faced with reconsideration of a final order under *Rule* 4:49-2. Instead, the issue on appeal was only an interlocutory order under *Rule* 4:42-2. *Id.* at 534.

The main distinction between *Rule* 4:49-2 and *Rule* 4:42-2 is timing, not the authority to reconsider. *Rule* 4:42-2 allows for interlocutory orders to be modified at any time before final judgment whereas *Rule* 4:49-2 requires an application to be made within 20 days for a court to reconsider a final order.

Furthermore, Boasso's position ignores the fundamental principle articulated in *Lombardi* itself that a judge who "sees or hears something that convinces him that a prior ruling is not consonant with the interests of justice…is not required to sit idly by and permit injustice to prevail." *Id.* at 537. When a court recognizes that its prior decision was based on a "palpably incorrect or irrational basis" - such as the failure to properly apply the *Brill* summary judgment standard – the trial court has the power to revisit the prior ruling and "right the proverbial ship." *Id.* This is precisely what the trial court did here.

Moreover, the similarity between the procedural history from *Lombardi* and the present case is noteworthy. In *Lombardi*, the trial court granted summary judgment and initially denied a motion for reconsideration. *Id.* at 522. The trial court then conducted a proof hearing on a defaulted defendant and, as a result, *sua sponte* scheduled a new hearing to reconsider the summary judgment decision. Thereafter, finding legal error in its original ruling, the trial court reversed the prior entry of summary judgment, which was in the Court's discretion. *Id.* at 522-24.

Indeed, the NJSC recognized that judges continue to think about orders after they have been entered. *Id.* at 536. The April 28, 2025 Order was a direct result of the Court's continued evaluation of the arguments and summary judgment record in response to Plaintiff's Motion for Reconsideration. Da610-

Da621. The Court admitted that "upon reflection," its initial adjudication "was flawed" because it had "erred in relying upon the testimony of the plaintiff to the exclusion of other evidence" and failed to give Plaintiff the benefit of all favorable inferences as required by the summary judgment standard. Da15.

The trial court acted just 20 days after its initial erroneous Order and a mere five days after its first *sua sponte* Order. Da17-Da27, Da28-Da36. The trial court's action was a continuation of Plaintiff's Motion for Reconsideration and expressly noted this, finding "no procedural deficiency to correcting its own error within this time frame." Da5.

The Court's proximity to its own ruling distinguishes this case from a scenario where a court might seek to upend a judgment months or years after the fact.[5] The trial court was not resurrecting a long-settled matter; it was correcting a fresh and palpable error while it was still properly seized of the issue. In doing so, the trial court performed its fundamental judicial duty to apply the correct legal standard for deciding a dispositive motion.

[5] However, *sua sponte* orders amending final judgments have been upheld as much as eight months after final orders. *See, e.g., Britman v. Sauro,* No. A-2979-16T4, 2019 WL 406124, at *3–*4 (App. Div. Feb. 1, 2019) (Pa9-Pa12).

C. The Trial Court Did *Not* Utilize *Rule* 1:1-2 to Create a New Rule or Expand the Scope of *Rule* 1:1-2 (Da1-Da10, Da11-Da17).

Boasso's argument regarding Rule 1:1-2 contradicts its assertions regarding the trial court's application of *Rule* 4:49-2. First, Boasso argues that the trial court expanded *Rule* 4:49-2 without proper authority. Next, Boasso argues that the trial court created a new rule rather than expanding one, and *Rule* 1:1-2 only permits expansion. Boasso cannot have it both ways.

In fact, the trial court did not take any of the procedural steps that Boasso argues are improper. The trial court did *not* expand *Rule* 4:49-2. It also did not apply *Rule* 1:1-2 to expand or amend its Order (nor did Plaintiff request the trial court do so, as Boasso contends). Db17, n.5. Rather, Plaintiff moved for reconsideration under *Rule* 4:49-2, not *Rule* 1:1-2, and the April 28, 2025 Order related back to Plaintiff's Motion.

Nonetheless, *Rule* 1:1-2 *does* support the trial court's *sua sponte* action. *Rule* 1:1-2(a) grants the trial court very wide latitude to ensure a just result:

> The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes….

R. 1:1-2.

Notably, *Rule* 4:49-2 is a rule in "Part I through Part VIII" of the Court Rules and, therefore, eligible for relaxation under *Rule* 1:1-2. Furthermore, *Rule* 1:1-2 expressly authorizes the Court to "proceed in any manner compatible with" the purposes of *Rule* 1:1-2 even *in the absence of a Rule*. *Id.*

It is clear from the plain language of *Rule* 1:1-2 that its purpose is to allow flexibility to prevent an unjust result. Yet Boasso seeks the opposite – a rigid and inflexible application of the Court Rules in order to avoid a trial on the merits despite the genuine issues of material facts that exist.

Boasso's reliance on cases like *Hill v. State Operated Sch. Dist.*, 2024 N.J. Super. Unpub. LEXIS 2144 (App. Div. Sep. 11, 2024) (Da733-Da739), is wholly misplaced. The case is distinguishable and also has no binding authority. In *Hill*, a party improperly sought to use the relaxation provision of *Rule* 1:1-2 as the *sole basis* to reinstate a complaint *three years* after a case was dismissed (not *20 days)*. *Id.* at *4-*9, *13-*14 (Da735-Da736; Da738). Furthermore, the case did not involve a *sua sponte* order at all. *Id.*

Nichols v. Linden, 2021 N.J. Super. Unpub. LEXIS 1449 (App. Div. Jul. 15, 2021) (Da741-Da744), is also distinguishable. In *Nichols*, the issue was whether the trial court should have denied summary judgment and reopened discovery to enable the plaintiff to update his expert report. The Appellate Division vacated the trial court's decisions and remanded the matter for the court to decide the summary

judgment motions "on the record as it stood when they were presented." *Id.* at *1-*2 (Da742).

In the case at bar, the April 28, 2025 Order was already based "on the record as it stood." The trial court did not receive new evidence or ask Plaintiff to submit additional evidence. Rather, the trial court merely realized that its prior analysis of the existing record was incorrect under the summary judgment standard because it failed to view the evidence in the light most favorable to Plaintiff as the non-moving party. Da11-Da16.

This trial court did *not* engage in any conduct that called the court's impartiality into question, as was the concern in *Nichols*. The April 28, 2025 Order permissibly corrected a prior misapplication of the summary judgment standard. Had the trial court not corrected its misapplication of the long-standing summary judgment standard, concerns could have been raised about the Court exhibiting partiality *towards Boasso*.

The April 28, 2025 Order was in response to Plaintiff's Motion for Reconsideration filed under *Rule* 4:49-2. Neither the Plaintiff nor the trial court relied exclusively on *Rule* 1:1-2. Instead, *Rule* 1:1-2 merely affirmed the trial court's authority, if necessary, to relax the requirements of *Rule* 4:49-2 in correcting its own error.

D. Boasso Was Afforded Full and Complete Due Process (Da1-Da10, Da11-Da17).

Boasso's claim that it was deprived of due process is utterly baseless. The minimum requirements of due process are notice and an opportunity to be heard. *Klier v. Sordoni Skanska Constr. Co.*, 337 N.J. Super. 76, 84 (App. Div. 2001). Boasso received both in abundance.

First, the April 28, 2025 Order was decided on the same record and addressed the same legal issues—Plaintiff's employment status under CEPA—that were exhaustively briefed and argued by both parties in connection with Boasso's SJ Motion and Plaintiff's Motion for Reconsideration. Da4, Da11-Da16.

In issuing the April 28, 2025 Order, the trial court simply re-evaluated the existing record under the correct legal standard, which it had previously failed to do. Boasso had already been on notice of all of Plaintiff's arguments and had a full opportunity to respond to them. Da4, Da11-Da16.

Second, any potential due process concern was cured when Boasso filed its own Motion for Reconsideration of the April 28, 2025 Order. Da1-Da10. Through that motion, Boasso was afforded a full and fair opportunity to submit a brief, a reply brief, and was also heard through oral argument. Da4; *see generally,* T2 (Motion Transcript dated July 17, 2025). The trial court considered and rejected Boasso's procedural and substantive arguments in a

detailed, ten-page opinion. Da1-Da10. There can be no question that Boasso received more than adequate due process.

Furthermore, even if a due process concern exists, the remedy should be a remand for an additional hearing, not reinstatement of the January 29, 2025 or April 23, 2025 Orders that applied the wrong legal standard, as Boasso requests. In cases where appellate courts have found a due process violation from a *sua sponte* ruling, the remedy has *not* been reinstatement of an erroneous judgment, but a remand to allow the deprived party to be heard. *See, e.g.*, *Nardi v. RBB Enters., Inc.*, 2016 WL 4490594, at *4 (App. Div. Aug. 26, 2016) (Da701-Da705); *Shurkin v. Elar Realty Co.*, 2023 WL 7486987, at *2-*3 (App. Div. Nov. 13, 2023) (Da717-Da720). Here, Boasso has already received multiple opportunities to be heard on the matter; no due process violation occurred that might necessitate further proceedings regarding summary judgment.

Moreover, Boasso's request for reinstatement of erroneous Orders defies logic and would be a waste of judicial resources. Boasso is asking this Court to reverse the April 28, 2025 Order (but not the prior *sua sponte* Order from April 23, 2025) and then force Plaintiff to file his own appeal on the trial court's denial of *his* Motion for Reconsideration – essentially to relitigate the substantive issues that are being addressed through this current appeal.

Ultimately, Boasso's procedural complaints are a smokescreen. The trial court recognized it had made a clear error by failing to view the evidence in the light most favorable to the non-moving party. The Court took the proper, just, and efficient step of correcting that error to allow this case to be decided by a jury on its merits, as justice requires. The trial court's decision was procedurally sound, afforded Boasso complete due process, and should be affirmed.

II. THE TRIAL COURT APPLIED THE NEW JERSEY SUPREME COURT STANDARD FROM *D'ANNUNZIO V. PRUDENTIAL* THAT MODIFIED THE *PUKOWSKY* TEST REGARDING CEPA MATTERS (Da1-Da10, Da11-Da17).

Boasso's contention that the trial court "refus[ed] to follow Supreme Court precedent" is utterly baseless. Db28. The April 28, 2025 and July 21, 2025 Orders reflect the trial court's application of the controlling precedent of *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110 (2007), which mandates a highly fact-sensitive inquiry into the reality of the work relationship. The formalities in Boasso's independent contractor agreement contrasted significantly with the reality of the work relationship - as demonstrated through the testimony of Boasso's own managers and dispatchers presented by Plaintiff - creating a classic jury question that cannot be resolved as a matter of law on summary judgment.

A. New Jersey Public Policy Mandates an Expansive Reading of CEPA and Employment Status (Da1-Da10, Da11-Da17).

The State of New Jersey has recognized that the misclassification of employees as independent contractors is an epidemic that must be curtailed. In 2000, a U.S. Department of Labor study found that between 10% and 30% of employers misclassified at least some of their workers. Dr. Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs,* PLANMATICS, INC. at iii (2000), available at http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

Two decades later, misclassification has remained so prevalent in New Jersey (and has actually *increased*) that Governor Phil Murphy commissioned a Task Force on Employee Misclassification, which issued a report in 2019. *See Report of Gov. Murphy's Task Force on Employee Misclassification,* (July 2019), available at https://www.nj.gov/labor/assets/PDFs/Misclassification %20Report%202019.pdf. The Task Force found that misclassification "has increased by approximately 40% in the last ten years, and is a growing problem in New Jersey (and other states)." *Id.* at 1 (citing David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters,* Harv. Bus. Rev., (July 5, 2017)), available at https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters). This unlawful treatment of workers has resulted in "declining wages, eroding benefits, inadequate health and safety conditions, and ever-widening

income inequality." *Id.* (citing David Weil, *THE FISSURED WORKPLACE* (2017)).

Misclassification of employees as independent contractors also results in billions of dollars in lost revenue to state and federal governments. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 296-297 (2015) (addressing truck drivers misclassified as independent contractors). The State of New Jersey has also recognized that an employer might try to disguise its misclassification by requiring an employee to work through a limited liability company ("LLC") formed by the employee and/or through an independent contractor agreement. *See* https://www.nj.gov/labor/myworkrights/worker-protections/independent_contractors/.

New Jersey courts have also repeatedly recognized this scheme by employers to conceal employment status, even when the workers initially intended to be independent contractors. *See, e.g., Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015); *East Bay Drywall, LLC v. Department of Labor and Workforce Development,* 251 N.J. 477 (2022); *D'Annunzio v. Prudential Ins. Co. of America,* 192 N.J. 110 (2007) (citing *Feldman v. Hunterdon Radiological Assocs.,* 187 N.J. 228, 241 (2006)); *MacDougall v. Weichert*, 144 N.J. 380, 388 (1996) (evaluating a claim for wrongful discharge); *Veras v. Interglobo N. Am., Inc.,* No. A-3313-16T1, 2018 WL 5316459, at *5 (App. Div. Oct. 29, 2018) (Da616-Da621); *Trauma Nurses, Inc. v. Bd. of Rev.,*

New Jersey Dep't of Lab., 242 N.J. Super. 135, 142 (App. Div. 1990) (citation omitted); *Provident Inst. for Sav. In Jersey City v. Div. of Emp. Sec., Dep't of Lab. & Indus.,* 32 N.J. 585, 591 (1960).

Thus, there are critical public policy implications that favor a broad application of employment status for protection under New Jersey's employment laws. CEPA is one of those employment laws that courts deem appropriate to expand to workers classified as independent contractors to encourage all workers to raise concerns about violations of the law occurring in the workplace.

CEPA was enacted to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." *Abbamont v. Piscataway Twp. Bd. of Educ.,* 138 N.J. 405, 431 (1994). Courts have come to view CEPA "as a reaffirmation of this State's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections …." *Lepore v. Nat'l Tool & Mfg. Co.,* 115 N.J. 226, 228, *cert. denied*, 493 U.S. 954 (1989). Moreover, the Supreme Court has held that "CEPA is remedial social legislation designed to promote two complementary public purposes: 'to protect and [thereby] encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.'" *D'Annunzio*, 192 N.J. at 119.

CEPA defines "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." *N.J.S.A.* 34:19–2(b) (defining "[e]mployee[s]" entitled to CEPA protection); *D'Annunzio,* 192 N.J. at 114. "A single guiding principle has instructed [the NJSC's] interpretation of CEPA in the decades since its enactment. As broad, remedial legislation, the statute must be construed liberally." *D'Annunzio,* 192 N.J. at 120. (holding that independent contractors can be entitled to CEPA protection); *see also, Lippman v. Ethicon, Inc.,* 222 N.J. 362, 379 (2015) (holding that "watchdog" employees are entitled to CEPA protection) "Stated differently, CEPA is supposed to encourage, not thwart, legitimate employee complaints." *Estate of Roach v. TRW, Inc.,* 164 N.J. 598 (2000).

B. The Determination of "Employee" Status Under CEPA Is a Fact-Sensitive Inquiry Focusing on the Reality of the Work Relationship (Da1-Da10, Da11-Da17).

Due to the highly-sensitive factual analysis of employment status under CEPA, summary judgment is not appropriate when material facts are in dispute, as in this case. The definition of "employee" under CEPA is intentionally inclusive and "reaches beyond the narrow band of traditional employees." *D'Annunzio v. Prudential Ins. Co. of America,* 192 N.J. 110, 121 (2007). Critically, courts must "'look to the goals underlying CEPA and focus not on labels but on the reality of plaintiff's relationship with the party against whom the CEPA

claim is advanced.'" *Id.* (quoting *MacDougall v. Weichert*, 144 N.J. 380, 388 (1996)).

The seminal case governing this analysis is *D'Annunzio,* which established a modified *Pukowsky* standard for skilled workers seeking CEPA protection. In *Pukowsky v. Caruso,* 312 N.J. Super. 171 (App. Div. 1998), the Court evaluated the following twelve factors to determine employment under the New Jersey Law Against Discrimination, not CEPA:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation—supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Id. at 182-83 (citing *Franz v. Raymond Eisnehardt & Sons, Inc.,* 732 F. Supp. 521, 528 (D.N.J. 1990)).

In *D'Annunzio,* the NJSC adopted the *Pukowsky* test but determined that the following *three key factors* are the *most pertinent* when CEPA protections are invoked by workers designated as independent contractors:

(1) the "employers control";

(2) "the worker's economic dependence on the work relationship;" and

(3) "the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue."

D'Annunzio, 192 N.J. at 122; *see also, Hargrove,* 220 N.J. at 310 (citing *D'Annunzio*).

This framework does not abandon the *Pukowsky* test, as Boasso erroneously argues. Rather, it provides the proper lens through which to evaluate the *Pukowsky* factors in the non-traditional worker context, recognizing that a worker misclassified as an independent contractor can never satisfy certain *Pukowsky* factors. *Id.* at 124.

Thus, the NJSC outlined the following *Pukowsky* factors on which to give *more weight* when determining employment status under CEPA:

- Factor One (the employer's right to control the means and manner of the worker's performance);
- Factor Two (the kind of occupation—supervised or unsupervised);
- Factor Four (who furnishes the equipment and workplace);
- Factor Seven (the manner of termination of the work relationship); and
- Factor Nine (whether the work is an integral part of the business of the "employer").

Id. at 125. All of these *Pukowsky* factors are encompassed within the three key *D'Annunzio* factors.

The NJSC also indicated that *less weight* should be given to those *Pukowksy* factors that would produce evidence of traditional employee status (such as the

payment of wages and benefits, vacation time, and payment of payroll taxes) (*i.e.,* Factors Six, Eight, Ten, and Eleven). *Id.*

Additionally, when evaluating the third key *D'Annunzio* factor (functional integration), the NJSC outlined questions to establish an employer-employee relationship:

- "Has the worker become one of the 'cogs' in the employer's enterprise?"
- "Is the work continuous and directly required for the employer's business to be carried out, as opposed to intermittent and peripheral?"
- "Is the professional routinely or regularly at the disposal of the employer to perform a portion of the employer's work, as opposed to being available to the public for professional services on his or her own terms?"
- "Do the 'professional' services include a duty to perform routine or administrative activities?"

Id. at 123-24.

As set forth in the Counterstatement of Facts, above, Plaintiff does meet the *Pukowsky* factors and the *D'Annunzio* standard to qualify as an employee for CEPA protection. At the very least, genuine issues of material fact exist, as the trial court properly determined in the April 28, 2025 Order.

In a blatant lack of candor to this Court, Boasso has completely omitted any discussion in its appellate papers of this modified *Pukowsky* standard set forth in *D'Annunzio.* The principle of *stare decisis* mandates application of the three key

D'Annunzio factors as the settled precedent by the NJSC, which expressly rejected the strict application of all *Pukowsky* factors that Boasso seeks to impose.

The trial court properly applied the *D'Annunzio* standard in the April 28, 2025 and July 21, 2025 Orders. While those Orders might not identify each *Pukowsky* factor by name, the trial court's analysis in the Statements of Reasons demonstrates that it folded in the *Pukowsky* factors in the manner required by the NJSC in *D'Annunzio*. Da1-Da10, Da11-Da16.

Notably, Boasso's level of control over Plaintiff was much more substantial than Prudential's control over D'Annunzio, but the NJSC still found sufficient genuine issues of material fact that suggested employment status. *D'Annunzio,* 192 N.J. at 127. D'Annunzio was hired as a chiropractic medical director of Prudential who reviewed and pre-approved treatment plans of covered individuals involved in automobile accidents while also maintaining his own private medical practice. *D'Annunzio,* 192 N.J. at 115. He was one of a cadre of professionals designated as independent contractors whom Prudential used to provide independent medical judgments. *Id.* at 115-16. Prudential controlled D'Annunzio's work through instructions on how to review an insurance claim and required him to perform administrative tasks in accordance with protocols devised by Prudential and in furtherance of Prudential's business operations. *Id.* at 126. The

NJSC held that conflicting evidence in the record on the three key factors mandated denial of a motion for summary judgment. *Id.* at 127.

Here, the January 29, 2025 Order evaluated the *Pukowsky* factors and some of the *D'Annunzio* key dispositive factors, but failed to evaluate the three key factors in the manner outlined by the NJSC. In the April 28, 2025 Order, the trial court correctly recognized its initial error of weighing evidence and failing to credit Plaintiff's version of the disputed facts based on testimony provided by Boasso's own witnesses. Da15. The trial court's corrected decision on April 28, 2025 properly identified that the "conflicting testimony" on the three key *D'Annunzio* factors (control, economic dependence, and functional integration) "must be a question for the jury." Da6-Da9.

Boasso's reliance on *Sauter v. Colts Neck Volunteer Fire Co. No. 2*, 451 N.J. Super. 581 (App. Div. 2017), is misplaced; the case is not on point. *Sauter* did not involve analysis of an independent contractor situation at all. Instead, the issue was whether a volunteer firefighter could satisfy the portion of the "employee" definition under CEPA that requires work to be performed "for wages or other remuneration." *Id.* at 587 (quoting *N.J.S.A.* 34:19–2b). Furthermore, Boasso's block quote (Db30) is incomplete and ignores the *Sauter* court's acknowledgement of the three key *D'Annunzio* factors. Citing *D'Annunzio*, the *Sauter* court stated: "The test 'focuses heavily on work-

relationship features that relate to the employer's right to control the non-traditional employee, and allows for recognition that the requisite "control" over a professional or skilled person claiming protection under social legislation may be different from the control that is exerted over a traditional employee.'" *Id*. at 592.

Boasso's reliance on *Nanavati v. Cape Reg'l Med. Ctr.,* No. A-4111-17T3, 2020 WL 2529523, at *8 (App. Div. May 19, 2020) (Da759-Da768), is similarly misplaced. In that case, the court did not perform any analysis of the employment relationship under CEPA. However, the court *did* recognize that an evaluation of the three key *D'Annunzio* factors is "highly fact-sensitive" and should not be decided on even *unopposed* submissions in a motion for summary judgment. *Id.*

Boasso's attempt to mislead the Court by requesting a strict application of the *Pukowsky* factors should not be condoned. In *D'Annunzio,* the NJSC expressly modified the application of the *Pukowsky* factors in CEPA cases*,* and under that standard, the trial court properly reconsidered summary judgment through the April 28, 2025 Order.

III. BOASSO'S REQUEST FOR A RULING PROHIBITING PLAINTIFF FROM FILING A SUBSEQUENT MOTION IS IMPROPER AND SHOULD BE DISREGARDED (Da1-Da10, Da11-Da17).

Boasso's request for an edict prohibiting the trial court from entertaining further motions for reconsideration by Plaintiff equates to an impermissible injunction or advisory opinion. Db25-Db27. To date, Plaintiff has not filed successive motions for reconsideration. Therefore, Boasso's request for an order prohibiting that scenario is purely speculative and violates the threshold requirement for an actual judicial action to precipitate appellate review. *R.* 2:2-3.

The trial court's query at oral argument about whether Plaintiff could file another motion for reconsideration (T2 at 8:8-9:4) does not equate to an appealable issue. If Plaintiff were to file a subsequent motion for reconsideration, Boasso would then be free to oppose it before the trial court and argue that it was procedurally improper. This appellate court is not the proper venue to address an application that has not yet been made.

CONCLUSION

For the foregoing reasons, Plaintiff-Respondent Marcos D. Doglio respectfully requests that this Court affirm the trial court's Orders dated April 28, 2025 and July 21, 2025, in their entirety, and allow this matter to proceed to trial.

Respectfully submitted,

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Attorneys for Plaintiff-Respondent
Marcos D. Doglio

By: /s/ *Ravi Sattiraju*
RAVI SATTIRAJU

Dated: November 5, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-000057-25

MARCOS D. DOGLIO, *Plaintiff-Respondent,* vs. BOASSO AMERICA CORPORATION, *Defendant-Appellant,* ERIC MOLINA; JOHN DOWNEY; ABC CORPS. 1-10 AND JANE & JOHN DOES 1-10, *Defendants.*	:	CIVIL ACTION ON GRANT OF THE MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. L-6429-19 Sat Below: HON. JOSHUA D. SANDERS, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT BOASSO AMERICA CORPORATION

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PRELIMINARY STATEMENT

Marcos Doglio's ("Plaintiff") opposition is replete with revisionism, misrepresentations of law, and baseless arguments regarding the serious ramifications posed by the trial court's *sua sponte* reversal of final orders. Plaintiff describes *stare decisis* and adherence to Court Rules as "myopic" and "rigid," in a thinly-veiled attempt to blur the lines between interlocutory and final orders. Plaintiff presents absolutely no authority to support the trial court's unprecedented *sua sponte* reversal of a final judgment.

Plaintiff's misrepresentations include, *inter alia*: (1) that the trial court possesses authority to *sua sponte* reverse final appealable orders; (2) Lombardi v. Masso, 207 N.J. 517 (2011) supports the trial court's authority to *sua sponte* reverse final orders; (3) that simply remanding the matter for further hearings addresses the fact that the trial court had no authority to reverse the final orders; (4) that a denied motion for reconsideration satisfies Rule 4:49-2's requirement for a motion to reverse a final judgment; and (5) that the trial court was free to abandoned the twelve-factor test set forth in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1988) and endorsed by D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110 (2007) without notice or explanation.

In spite of the fact that the trial court based its authority to *sua sponte* reverse a final order on the incorrect premise that Plaintiff "could have" filed a

successive motion for reconsideration, he now asserts repetitive motions for reconsideration of a final order are not at issue on appeal. However, the transcripts and Orders in this matter make clear that the trial court viewed the twenty-day period during which Plaintiff could allegedly move for a successive motion for reconsideration as a license to *sua sponte* reverse a final judgment. This *sua sponte* action is not only directly contradicted by the Court Rules, but also eliminates Defendant's right to a just determination and fair proceeding.

Clearly, the integrity of final judgments and the appellate process are at stake in this matter. Plaintiff's efforts minimize the ramifications of the issues on appeal, misrepresent the holdings of cases, mischaracterize the Court Rules, diminish the import of the finality of summary judgment, and hinder this Court's ability to perform its essential function (i.e. review final judgments of the trial courts). For the reasons set forth herein and more fully in Defendant's moving brief, this Court should reinstate the January 29, 2025 Summary Judgment Order, the April 8, 2025 Order denying Plaintiff's motion for reconsideration, and the April 23, 2025 corrected Order denying Plaintiff's motion for reconsideration as they are all final appealable orders entered by the trial court.

PROCEDURAL HISTORY

Defendant relies upon the Procedural History included in its original brief.

STATEMENT OF FACTS

Defendant relies upon the Statement of Facts included in its original brief.

LEGAL ARGUMENT

I. Plaintiff Cites No Authority Supporting The Proposition That A Trial Court May *Sua Sponte* Reverse A Final Judgment.

(Raised below: Da1 to Da10, Da11 to Da17)

In an attempt to minimize the significance of the errors in this case and trivialize the ramifications on the legal landscape at large, Plaintiff submitted opposition papers replete with mischaracterizations of the record, New Jersey Court Rules, and Supreme Court precedent as well as immaterial *red herrings*. Once sifted through, however, it is clear that Plaintiff's opposition fails to provide any support for his positions. Indeed, in Point I (A), (B) and (D) of his brief, Plaintiff cites to virtually no authority supporting his positions and, instead, attempts to mislead this Court by claiming the Court Rules and Lombardi authorize *sua sponte* alteration of final orders. These positions are wholly unsupported and must be disregarded by the Court.

A. Plaintiff's Denied Motion For Reconsideration Does Not Satisfy Rule 4:49-2's Requirement That A Motion Be Filed To Reverse The Final Judgment.

(Raised below: Da1 to Da10, Da11 to Da17)

Plaintiff concedes Rule 4:49-2 requires a motion to alter or amend a final order. Pb-16. Plaintiff further concedes the trial court entered a *sua sponte* order that reversed a final judgment. Pb-5 ("the trial court entered a […] *sua sponte* Order[.]"). The trial court characterized its reversal of a final order as "sua

sponte" in both its April 28, 2025 Order and July 21, 2025 Order. Da2 to Da10, Da13 to Da16. The Latin phrase *sua sponte* translates "of its own accord" and is defined "[w]ithout prompting or suggestion; on its own motion." *Sua Sponte*, Black's Law Dictionary (12th ed. 2024). This Court explained *sua sponte* means "on [its] own, even without being requested to do so[.]" State v. Gavilanez-Alectus, 2025 N.J. Super. Unpub. LEXIS 1242, *19 (App. Div., July 8, 2025).[1]

There is no question the trial court dispensed with Rule 4:49-2's requirement for a motion to be filed to reverse a final order. Plaintiff's claim that a denied motion for reconsideration satisfies this requirement must be rejected. As stated in the original brief, Rule 1:3-4 prohibits trial courts from extending time for a party to file a motion for reconsideration of final orders. It is not difficult to surmise that the trial court cannot eliminate the need for a party to file a motion under Rule 4:49-2 if the Rules do not even permit the trial court to expand the timeframe for a party to file a motion under Rule 4:49-2.

Plaintiff's efforts to distract this Court from the pertinent issues by mischaracterizing the April 23, 2025 Order as *sua sponte* must likewise be rejected. Plaintiff fails to explain the April 23, 2025 Order simply corrected a clerical error by adding the word "not" to a sentence and Rule 1:13-1 permits a trial court to correct clerical errors at any time "on its own initiative." Da18 to

[1] Pursuant to Rule 1:36-3, see Dra1 to Dra16.

Da26; *cf.* Da30 to Da36. Accordingly, Plaintiff's argument must be rejected.

B. ***Lombardi* Does Not Authorize A Trial Court To *Sua Sponte* Reconsider A Final Order.**

(Raised below: Da1 to Da10, Da11 to Da17)

Plaintiff's argument that Lombardi "supports the trial court's *sua sponte* orders" is perhaps the starkest example of Plaintiff's efforts to mislead this Court.[2] Rule 4:42-2(b) – the Rule relied upon by the Lombardi Court – expressly permits a trial court to revise an interlocutory order "at any time before the entry of ***final judgment***[.]" (emphasis added). The Rule does not require a motion, instead granting the trial court discretion to so act in the "interest of justice." Id. Plaintiff points to no similar language in Rule 4:49-2 and yet – with absolutely no support – claims the only difference between the Rules is "timing, not the authority to reconsider." Pb17.

The differences between Rule 4:42-2 and 4:49-2 are obvious and Lombardi makes clear, as opposed to interlocutory orders, "***stringent restraints*** [are] imposed on final judgments and orders" due to finality considerations, i.e., the integrity of the appellate process. Id. at 534. Lombardi involved facts distinguishable from those at bar, including an interlocutory order, ongoing litigation, and continued development of an evidentiary record, that provided

[2] For a more complete explanation of the holding of Lombardi, see Db10 to Db15 as this reply brief addresses only Plaintiff's germane arguments.

reason for the trial court to "continue to think about" interlocutory orders. Id. at 536. None of these conditions existed at the time of the trial court's entry of the *sua sponte* order as both Plaintiff and the trial court concede a final order was entered and that a motion for reconsideration was denied. Since final judgment was entered and reconsideration denied, the trial court lacked authority – under Lombardi and the Court Rules – to *sua sponte* reverse a final judgment.

C. Defendant Was Unquestionably Denied Due Process.

(Raised below: Da1 to Da10, Da11 to Da17)

Plaintiff's argument that Defendant received due process is unavailing. The trial court, on its own, (1) reversed a final judgment without notice or argument; (2) required Defendant to establish elements for reconsideration; and (3) meet what it described as a "heavy burden" to demonstrate "that summary judgment should be reinstated[.]" Da2 to Da10, Da13 to Da16. The trial court, without explanation, abandoned the Pukowsky test endorsed by this Court and the Supreme Court after previously finding those "factors overwhelmingly" supported the conclusion Plaintiff was an independent contractor. Da2 to Da10, Da13 to Da16; *cf.* Da18 to Da25, Da30 to Da36, Da38 to Da47. The above hardly qualifies as due process.

"The minimum requirements of due process of law are notice and an opportunity to be heard. The opportunity to be heard contemplated by the concept of due process means an opportunity to be heard at a meaningful time

and in a meaningful manner." Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84 (App. Div. 2000). In Klier, the trial court *sua sponte* initiated a summary proceeding to dismiss a complaint. Id. at 83. This Court condemned the practice and held "[w]e cannot condone a procedure whereby a judge *sua sponte*, without notice to a party […] circumvents the basic requirements of notice and an opportunity to be heard." Id. at 84-85.

Plaintiff's reliance on Nardi v. RBB Enters., Inc. 2016 WL 4490594 (App. Div. Aug. 26, 2016)[3] and Shurkin v. Elar Realty Co., 2023 WL 7486987 (App. Div. Nov. 13, 2023)[4] is of no moment. The cases involved appeals of summary judgment with procedural deficiencies, issues a rehearing might cure, where both cases were referred to different judges on remand. Here, there was no procedural deficiency in the grant of summary judgment as this matter involves entry of a final judgment and a denied reconsideration motion, not the substantive decision on summary judgment. Plaintiff makes no argument supporting such a position but seeks to vitiate the purpose of this appeal by requesting "an additional hearing" on orders the trial court was never authorized to enter. Condoning such a result and allowing a "back-door" additional hearing before the trial court on these final appealable orders would constitute the final

[3] Pursuant to Rule 1:36-3, see Da701 to Da705.
[4] Pursuant to Rule 1:36-3, see Da717 to Da720.

nail in Defendant's due process coffin.

II. The Court Relied On Rule 1:1-2 And A Hypothetical Ability To File For Successive Reconsideration In Reversing A Final Order.

(Raised below: Da1 to Da10, Da11 to Da17)

The entire basis for the trial court's authority to *sua sponte* reverse final appealable orders was Rule 1:1-2 and Plaintiff's hypothetical ability to file for successive reconsideration. 2T8-2 to 2T9-25. Indeed, the trial court invoked Lombardi and Rule 1:1-2 as authority. Da2 to Da10, Da13 to Da16. Plaintiff's efforts to distract the Court's attention from these issues must be ignored.

A. The Trial Court Impermissibly Expanded The Scope Of Rule 1:1-2 To Create A New Rule.

(Raised below: Da1 to Da10, Da11 to Da17)

Plaintiff's alternative argument utilizing Rule 1:1-2 to validate the *sua sponte* order suffers from several material defects. First, as stated fully in the original brief, this Court already held Rule 1:1-2 does not provide trial courts a mechanism to reopen dismissed matters because "Rule 1:1-2 is 'a rule of construction' and not 'a mechanism for someone to challenge an order.'" See Hill v. State Operated Sch. Dist., 2024 N.J. Super. Unpub. LEXIS 2144, *13-15 (App. Div. Apr. 9, 2024)[5]. Second, Rule 1:1-2 cannot be utilized as a means to reverse a final order because, as noted in Defendant's original brief, this Court

[5] Pursuant to Rule 1:36-3, see Da733 to Da739.

repeatedly rejects use of Rule 1:1-2 where, as here, a clear mechanism, Rule 4:49-2, contemplates the issue at hand. See e.g. Seoung Ouk Cho v. Trinitas Reginal Medical Center, 443 N.J. Super. 461, 472 (App. Div. 2015) (finding no basis for application of Rule 1:1-2 because "[t]he 'problem at hand' is the appropriate timing of dispositive motions. Rule 4:46 meets that problem, recognizing the 'obvious' desirability of deciding such motion prior to trial and establishing the requirements to accomplish that goal."); Nichols v. Linden, 2021 N.J. Super. Unpub. LEXIS 1449, at *6-7 (App. Div. Jul. 15, 2021)[6] (rejecting the trial court's application of Rule 1:1-2 because, among other things, there was a clear directly applicable rule that met the problem at hand).

Plaintiff's attempt to assert the trial court acted in the spirit of Rule 1:1-2 and distinguish Hill and Nichols is unavailing. While Plaintiff attempts to distinguish those cases, it is clear they stand for the legal proposition that Rule 1:1-2 cannot be used to vitiate the Rules and is not a mechanism to reopen a dismissed matter. Plaintiff's opposition brief fails to cite any legal authority which endorses his attempt to pervert the scope of Rule 1:1-2.

Indeed, it is beyond cavil that the trial court's use of Rule 1:1-2, in this case, fosters potential abuses of the rule and drains the rule of its salutary purpose. The trial court's error in relaxing the Rules to relieve Plaintiff of the

[6] Pursuant to Rule 1:36-3, see Da741 to Da744.

final order deprived Defendant of its due process rights, usurped the function of this Court and, in effect, placed the trial court in an adversarial position towards Defendant by creating a new rule—that a trial court can *sua sponte* reconsider a final order because Plaintiff purportedly still had time to file a successive motion for reconsideration. Moreover, the trial court disadvantaged Defendant by requiring it to meet the standards of reconsideration and the "heavy burden to reinstate" summary judgment. Succinctly stated, the trial court's relaxation of the Rules to deprive Defendant of finality and its due process rights severely undercut the central function purpose of Rule 1:1-2 whilst simultaneously encroaching upon the role of this Court—to review the final judgments of the trial courts. Thus, the trial court's April 28, 2025 *sua sponte* Order and July 21, 2025 Order denying Defendant's motion for reconsideration must be reversed.

B. No Further Motions For Reconsideration Should Be Entertained On Remand.

(Raised below: Da1 to Da10, Da11 to Da17)

In his Opposition Brief, Plaintiff accuses Defendant of seeking an advisory opinion by requesting this Court, should it find remand appropriate in this matter, instruct the trial court that no further motions for reconsideration may be entertained. Plaintiff's argument misses the mark entirely. As set forth in further detail below and in Defendant's moving brief, Defendant's request for an instruction to the trial court that no successive motions be permitted is not a

request for an advisory opinion because the trial court's unprecedented creation of a "new rule"— which directly impacted Defendant's rights and deprived Defendant of, among other things, due process and finality—was based on the premise that its actions were not procedurally deficient due to Plaintiff's hypothetical ability to file a successive motion for reconsideration.

This Court's authority is limited to adjudication of "actual cases and controversies." See County of Hudson v. State Office of the State Comptroller, 2020 N.J. Super. Unpub. LEXIS 2568, at *9 (App. Div. Dec. 30, 2020)[7]. A justiciable controversy exists when "a claim of right is asserted against one who has an interest in contesting it." Id. at *10. The controversy must be real, not hypothetical or abstract, i.e., when the facts create "concrete contested issues conclusively affecting the parties adverse interests." Ibid. (internal quotation omitted) (quoting In re N.J. Fireman's Ass'n, 230 N.J. 258, 275 (2017)).

Here, the trial court issued a *sua sponte* Order reversing final-appealable orders and justified the extraordinary action on the premise a successive reconsideration motion could have been filed by Plaintiff before the date the *sua sponte* Order was issued. Da1 to Da10. The trial court's justification directly contradicts this Court's reasoning in Carney v. Cannon, 2014 N.J.

[7] Pursuant to Rule 1:36-3, see Dra17 to Dra22.

Super. Unpub. LEXIS 1311, *6 (App. Div. June 6, 2014)[8], where this Court held repetitive reconsideration motions are "violative of our rules [and] are procedurally improper as well." Moreover, permitting Plaintiff to file successive reconsideration motions on remand, as both Plaintiff and the trial court suggested, would fundamentally impair Defendant's due process rights because the trial court would be ruling on a motion for an opinion already improperly issued. Indeed, Plaintiff's claim that the request is based on speculation strains credulity as Plaintiff represented, during oral argument on Defendant's motion for reconsideration, that he could have filed a successive motion for reconsideration. 2T8-14 to 2T10-12.

Since Defendant's right to a fair proceeding has already been tainted, and a successive motion for reconsideration on remand would only compound the prejudice inflicted on Defendant, it cannot be disputed that the issue is ripe for the Court's review.

III. Plaintiff Fails To Demonstrate The Trial Court Followed Supreme Court Precedent By Refusing To Apply The "Pukowsky" Test.

(Raised below: Da1 to Da10, Da11 to Da17)

Plaintiff seeks to mislead the Court on critical CEPA concepts and distract this Court from the issues on appeal.[9] For example, Plaintiff's opposition brief

[8] Pursuant to Rule 1:36-3, see Da754 to Da757.

[9] Plaintiff dedicates twelve pages to mischaracterizing the record pertaining to Plaintiff's independent contractor status. While only the appropriate legal

asserts the trial court properly followed the Supreme Court's holding in D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 122 (2007) by refusing to apply the twelve-factor test pronounced in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998) and focusing on "three key factors." Pb33. Stated differently, Plaintiff effectively concedes that the trial court, in its April 28, 2025 *sua sponte* Order, failed to include any analysis of each Pukowsky factor but nevertheless, asserts the trial court appropriately "laid the roof before the foundation" by *sua sponte* reversing its grant of summary judgment.

Plaintiff's argument, however, is untenable as it ignores the underlying holding in D'Annunzio—the only method for considering the three overarching

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standard for determining employment status under CEPA is presently before the Court on appeal, Plaintiff's recitation of the "record evidence" and procedural history ignores the fact that the trial court (1) found "the [Pukowsky] factors overwhelmingly" demonstrate an independent contractor relationship; and (2) stated its decision to grant Defendant's motion for summary judgment was erroneous because it relied too heavily on the Plaintiff's own testimony. Certainly, Plaintiff cannot dispute, based on the trial court's own reasoning in its *sua sponte* Order, summary judgment was appropriate as this Court has routinely held that a plaintiff cannot create an issue of fact by raising arguments that contradict his own deposition testimony. See e.g. Masoir v. Insurance Co. of North America, 193 N.J. Super. 190, 195 (App. Div. 1984) ("Plaintiff cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations."); Perez v. Express Scripts, 2024 U.S. App. LEXIS 5402, at *1 n.1 (3d Cir. Mar. 6, 2024) ("We presume that when a plaintiff has testified under penalty of perjury. . ., 'she surely understood the significance of her testimony in the context of th[e] case,' and we will not hold there to be an issue of material fact . . . because [she] request[s] that we do so."). Pursuant to Rule 1:36-3, see Da 664 to Da670.

considerations, in the CEPA context, is to apply the twelve-factor hybrid test outlined in Pukowsky. D'Annunzio, 192 N.J. at 123. To give Plaintiff's argument any credence, requires this Court to necessarily abandon the methodology outlined in D'Annunzio/Pukowsky for an arbitrary and capricious process that would produce inconsistent and unpredictable results. Indeed, this is evidenced by the fact that when the trial court actually applied the Pukowsky factors in its January 29, 2025 Summary Judgment Order, it found the undisputed material facts "overwhelmingly" supported an independent contractor finding; conversely, when it abandoned the methodology, without any explanation, it resulted in a different finding that was not supported by the undisputed record evidence. Da2 to Da10, Da13 to Da16; *cf.* Da18 to Da25, Da30 to Da36, Da38 to Da47.

Plaintiff's contention is directly contradicted by both the Supreme Court's and this Court's precedent that have highlighted the need to apply the twelve-factor Pukowsky test in determining employee/independent contractor status under CEPA. See e.g. Stomel v. City of Camden, 192 N.J. 137, 154 (2007) ("Our decision in D'Annunzio v. Prudential Insurance Co. of America, 192 N.J. 110 (2007), reaffirmed our belief in the standards set forth by the Appellate Division in Pukowsky. . . , for assessing [] the work relationship that exists between an employer and a professional person. . . . **The Pukowsky test identifies twelve**

factors to be used in that analysis. . . ."); Kelly v. Cnty of Sussex, 2025 N.J. Super. Unpub. LEXIS 394, at 13-19 (App. Div. Mar. 14, 2025)[10] (applying the twelve-factor Pukowsky test and noting: "In D'Annunzio, the Court identified three considerations that 'must come into play' when 'CEPA. . . is applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor'. . . . The Court held '[t]he test for determining those aspects of a non-traditional work relationship was set out in Pukowsky' and confirmed its 'acceptance of that test as appropriate for CEPA purposes.'" (alteration in original)). The trial court's refusal to apply the twelve-factor Pukowsky test in the April 28, 2025 and July 21, 2025 Orders constituted a misconception of law that requires its *sua sponte* Order and Order denying Defendant's motion for reconsideration to be vacated and reversed.

CONCLUSION

For the reasons set forth herein as well as in the initial brief, Defendant respectfully requests that this Court grant the instant appeal.

Respectfully submitted,
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[10] Pursuant to Rule 1:36-3, see Dra23 to Dra32.