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MICHAEL SHEFTON Appellant, v. EAST ORANGE GENERAL HOSPITAL, JIM KIMBERLING, JOHN DOES 1-10, JANE DOES 1-10, ABC CORPORATIONS A THROUGH Z Respondents.	SUPERIOR COURT NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-000188-23 Civil Action **APPELLATE BRIEF** **SAT BELOW:** **HON. RUSSELL PASSAMANO, JSC** **ESSEX COUNTY VICINAGE** **DOCKET NO. ESX-L-4145-21**

LURETHA M. STRIBLING, ESQ.
FEBRUARY 2, 2024

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PROCEDURAL HISTORY

The Appellant filed a Complaint of Discrimination with the Equal Employment Opportunity Commission and a Charge of Discrimination was served on East Orange General Hospital on August 15, 2019. **(Pa1)** Thereafter an investigation ensued and a Right to Sue Letter was issued which resulted in Appellant proceeding to the Superior Court of New Jersey where a Complaint and Jury Demand was filed on May 25, 2021. **(Pa2).** When there was a failure to Answer the Complaint and Jury Demand, Appellant Requested that Default be entered against the Respondents on July 22, 2021. **(Pa22).** Default was entered against the Respondents on July 26, 2021. **(Pa28, Pa29).** Respondents' Counsel requested that the Default be vacated and a Consent Order was endorsed vacating the Default which was signed by the Court on August 18, 2021. **(Pa30)**. Respondents filed a Motion to Dismiss Appellant's Complaint and Compel Arbitration on September 17, 2021. **(Pa32).** Appellant filed Opposition to the Motion to Dismiss Appellant's Complaint and Compel Arbitration on September 30, 2021. **(Pa39).** The Court entered a decision by way of Order entered on October 22, 2021. **(Pa45).** Appellant filed a Motion to Restore the Case to Active Case Status on July 21, 2022. **(Pa47).** Respondents filed Opposition to the Motion to Restore the Case to Active Case Status on August 18, 2022. **(Pa65).** The Court entered an Order which denied the Motion to Restore the Case to Active Case Status on September 13, 2022. **(Pa72).**

The case was scheduled with Arbitrator Mark B. Epstein, J.S.C. (Ret.) who rendered a decision on Defendants' Motion to Dismiss the Arbitration which was opposed on the date of June 9, 2023 **(Pa74).** Appellant filed a Motion to Vacate the Arbitrator's Decision on July 3, 2023. **(Pa82).** Respondents filed A Cross Motion to Confirm the Arbitration Award on the date of July 13, 2023. **(Pa94).** Appellant filed Opposition to the Cross Motion to Confirm the Arbitration Award on the date of July 17, 2023. **(Pa100).** The Superior Court entered a decision which denied the Motion to Vacate the Arbitrator's Decision on August 25, 2023. **(Pa110).** The Superior Court entered a decision which granted the Motion to Confirm the Arbitration Award on the date of August 25, 2023. **(Pa112).**

STATEMENT OF FACTS

Michael Shefton (Shefton or Appellant) was hired at East Orange General Hospital as a Screener in the Psychiatric Emergency Screening Services (PESS) Unit in the Emergency Department in 2012. **(Pa33, Complaint, par. 7)** Appellant worked diligently in rendering psychiatric services for persons seeking care in the Emergency Department. **(Pa33, Complaint, par. 11)** Appellant was deemed to be an experienced Screener and received good evaluations. **(Pa33, Complaint, par. 8)** In 2016, East Orange General Hospital (EOGH) was purchased by Prospect and became known as Prospect East Orange General Hospital (Prospect)**. (Pa119, Mutual Agreement to Arbitrate)** In the time period after Prospect purchased the hospital, Appellant received a one-page document which set forth details of his job position and what his salary would be and Appellant was told to sign this document regarding his salary and job position and complied. **(Pa119, Mutual Agreement to Arbitrate)** Appellant was subsequently subjected to discriminatory treatment in the workplace based on race and religion. **(Pa2, Complaint, pars. 21-42 and par. 43-67)** Appellant is African-American and practices the Hebrew faith. **(Pa2, Complaint, par. 22, par. 44)** Appellant was mocked in the workplace by superiors after it was learned that he practiced the Jewish faith. **(Pa2, Complaint, par. 54, 55)** He was called Jew Boy and negative comments were made about his yarmulke. **(Pa2, Complaint, par. 53, 54)** Work that Appellant had completed in the computer system

was deleted and it was made to appear that he had not performed his job**. (Pa2, Complaint, pars. 58-60)** Appellant notified the supervisors of the fact that his work was being deleted from the computer, however, no action was taken to address this issue. **(Pa2, Complaint, pars. 75,76)** Appellant requested an accommodation and sought to have Fridays off and in return he agreed to work on Sundays so that an employee who wanted to attend church could do so. Appellant experienced a lot of resistance to this request to have Fridays off**. (Pa2, Complaint, par. 56, 57; Pa114, Emails Re: Fridays off).** After having worked at East Orange General Hospital (EOGH) for twelve years, Appellant was wrongfully terminated on May 29, 2019 in violation of the New Jersey Law Against Discrimination. **(Pa117, Notice of Termination)** Appellant filed a Complaint with the Equal Employment Opportunity Commission (EEOC) citing discrimination based on race and religion. **(Pa1)**. After the EEOC completed a preliminary investigation, a Right to Sue Letter was issued to Appellant and Plaintiff filed the Complaint. **(Pa1, EEOC, Pa2, Complaint).**

Appellant filed the Complaint and Jury Demand under the New Jersey Law Against Discrimination and cited discrimination based on race and religion on May 25, 2021. **(Pa2).** Appellant also cited the causes of action of harassment and hostile work environment. Appellant set forth facts within the Complaint regarding being subjected to scrutiny of his work after having worked at East Orange General Hospital since 2012 with no criticism of his work until 2018**. (Pa2, Complaint,**

pars. 7, 12-16) In 2018, Appellant became more involved in his religion, wore religious garb and requested Fridays off for religious purposes. **(Pa2, Complaint, pars. 44, 50-53)** Thereafter, Counsel for Prospect East Orange General Hospital presented to this Counsel a document which was titled Mutual Agreement to Arbitrate. **(Pa119, Mutual Agreement to Arbitrate).**

Appellant upon review of this document stated that he had no recollection of signing the Mutual Agreement to Arbitrate. Appellant recalled signing a one page document on one occasion after the hospital was purchased by Prospect. **(Pa120, Affidavit of Plaintiff, par. 6)** The document that Appellant signed set forth his job description and his salary. **(Pa120, Affidavit of Plaintiff, par. 6)** Appellant was never provided with any information regarding arbitration and did not know anything about arbitration. **(Pa120, Affidavit of Plaintiff, pars. 7,8)** The Mutual Agreement to Arbitrate was signed by Norrissa Ferguson. **(Pa119, Mutual Agreement to Arbitrate)** Appellant did not meet with Norrissa Ferguson**. (Pa 119, Mutual Agreement to Arbitrate, par. 8)** There was not a knowing and voluntary agreement to arbitrate and a review of the document entitled Mutual Agreement to Arbitrate illustrated that it lacked the mandatory language which would support an employee giving up the right to take their matter to court. **(Pa119, Mutual Agreement to Arbitrate).** In order for a party to waive the right to have a matter heard in court, the agreement must set forth that specific language which was absent

from the Mutual Agreement to Arbitrate. **(Pa119, Mutual Agreement to Arbitrate)** As noted in Appellant's Affidavit, had he been told about the requirement to sign an Agreement to Arbitrate, he would have rejected this as his preference is to have his matters heard in court. **(Pa120, Plaintiff Affidavit, par. 9)**

After the Complaint and Jury Demand was filed, the Respondents did not file an Answer to the Complaint and Jury Demand within the required time period. **(Pa2, Complaint and Jury Demand)**. The Appellant then filed a Request for Entry of Default. **(Pa22, Request for Entry of Default)**. Thereafter, the Court entered Default on East Orange General Hospital and Jim Kimberling. **(Pa28,Pa29 , Entry of Default).** A Consent Order was entered into and signed by the Court which vacated the Entry of Default. **(Pa30, Order Vacating Entry of Default).** The Respondents then filed a Motion to Dismiss the Complaint and to Compel Arbitration**. (Pa32, Motion to Dismiss and Compel Arbitration)** The Court dismissed the matter on Respondents' Motion to Dismiss the Complaint and to Compel Arbitration. **(Pa45, Order Dismissing Complaint and Compelling Arbitration)**. There was a failure to initiate the Arbitration process and calls and emails made to Respondents' Counsel to discuss the case went unanswered. **(Pa123, Email Communication Re: Case)** As a result, Appellant filed a Motion to Reinstate the Case to Active Status. **(Pa47, Motion to Reinstate Matter to Active Status)**. The Motion to Reinstate the Case to Active Status was opposed**. (Pa65, Opposition**

to Reinstate the Case to Active Status). The Court heard oral argument and dismissed the case again in 2022 stating that the matter was to be arbitrated. **(Pa72, Order Dismissing the Case to Arbitration)**. In the time period after the second dismissal, Respondents' Counsel communicated with Appellant's Counsel and agreed to arbitrate the matter and the arbitrator chosen was Hon. Mark Epstein, J.S.C. (Ret.) who had Counsel complete paperwork and thereafter, the Respondents filed a Motion to Dismiss the Complaint Pursuant to Court Rule 4:6-2(e) and the defenses of the statute of limitations which was opposed and the Arbitrator rendered a decision. **(Pa74, Mark Epstein Decision).** Of note, when this matter was initially filed in Superior Court, Respondents had failed to answer timely and default was entered. **(Pa22, Entry of Default).** As a result of the courtesy of the Appellant, the default was withdrawn so that the matter could be litigated. **(Pa30, Consent Order to Vacate Default)**. Counsel engaged in oral argument on the Motion to Dismiss and Respondents' Counsel admitted that they were not prejudiced and despite this and the fact that the Respondents had known of the litigation for some time, the case was dismissed with prejudice by the arbitrator**. (Pa74, Arbitrator's Decision)**

As a result of the manifest disregard of the law by the Arbitrator which was not addressed with a remedy by the trial court, the failure of application of the contract law to this Mutual Agreement to Arbitrate and failure to adhere to the terms set forth in the Mutual Agreement to Arbitrate as well as contract construction and

other issues, Appellant has now filed an Appeal as of Right. **(Pa125, Notice of Appeal)**

LEGAL ARGUMENT

POINT I

THE MUTUAL AGREEMENT TO ARBITRATE DOCUMENT WHICH WAS PRESENTED TO THE APPELLANT BY PROSPECT EAST ORANGE GENERAL HOSPITAL AFTER THE COMPLAINT WAS FILED IN SUPERIOR COURT DID NOT CONTAIN THE NECESSARY NOTICE AND LANGUAGE TO SATISFY THE REQUIREMENT THAT THE AGREEMENT TO ENGAGE IN ARBITRATION WAS VOLUNTARY AND KNOWING, THEREFORE, THE ORDER ISSUED BY THE TRIAL COURT TO COMPEL ARBITRATION WAS IN ERROR. (Pa119)

Our courts in New Jersey have weighed in on agreements to arbitrate and acknowledge that historically, a party may waive statutory remedies in favor of arbitration. Red Bank Reg'l. Educ. Ass'n. v. Red Bank Reg'l. High School Bd. Of Educ. 78 N.J. 122, 140 (1978). While arbitration is an accepted practice in New Jersey, it is not without limits. Garfinkel v. Morristown Obstetrics and Gynecology Associates, PA, 773 A.2d 665, 670, 168 N.J. 124 (N.J. 2001). When there is an absence of consensual understanding of the agreement, a party cannot be forced to arbitrate and inherent in this principal is the point that only issues that have been agreed to can be arbitrated. In Re Arbitration Between Grover and Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979). Our court reached a determination in Morgan et al v. Sanford Brown Institute, where it was found that the agreement to arbitrate which Morgan and Dever, students at Sanford Brown entered into was

deemed to be unenforceable because it did not inform the Plaintiffs that they were waiving statutory rights and remedies and that the agreement was in conflict with the Consumer Fraud Act. Morgan et al v. Sanford Brown Institute, A-31 075074 (June 14, 2016). There was a determination that the agreement failed to satisfy the elements of a contract and failed to define arbitration as a substitute for litigating the case in court. Id. at 1, 2. The failure to tell Plaintiff's that the arbitration was a substitute for going to court and failure to inform Plaintiff's about the waiver of rights was fatal to the Defendant's position. Id. at 13. See also Atalese v. U. S. Legal Servs. Grp. 219 N.J. 430, 436 (2014) where the arbitration agreement was not accepted by the Court because the Plaintiff was not informed that the arbitration proceeding was a substitute for their right to seek redress in the courts. Id. at 436.

With respect to contractual language, where a clause serves to deprive a citizen of presenting the case in court, the basis must be clearly documented. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). Contract language which serves to waive statutory rights must be clearly written so that such language is understood by the person waiving rights and the agreement will not be read expansively. Red Bank supra at 140. When the issue of an arbitration agreement is addressed from the perspective of enforcing the agreement, we defer to contract law. Kernahan v. Warranty Adm'r. of Fla., Inc., 236 N.J. 301 (2019). The terms of the agreement are to be given their plain and ordinary meaning. Id. at 321. The

fundamental question to be answered per contract law is whether the agreement to arbitrate is the result of mutual assent. Atalese, supra at 442. In Rodriguez v. Raymours Furniture Co., the Plaintiff was provided with an agreement to arbitrate and after litigation had been filed, Plaintiff admitted that he did not know what the phrase statute of limitations meant, nor did he know what the wording waiver meant and so he had no understanding that his rights would be limited if there was illegal and unfair treatment that required litigation. Rodriguez v. Raymours Furniture Co., (N.J. 2016).

In fact, our courts have repeatedly addressed the quest to arbitrate where there are vague terms in the arbitration agreement or there is no meeting of the minds and the arbitration agreements have been rejected. In Quigley v. KPMG Peat Marwick, LLP, the Court addressed the issue of arbitration of LAD claims and rejected arbitration. Quigley v. KPMG Peat Marwick LLP, 330 N.J. Super. 252, 257 (App. Div.). Quigley filed suit based on age discrimination and he was allowed to proceed in court because the arbitration agreement contained **ambiguous terms** and was construed against the Defendant. Id. at 270, 273. The finding of the court was that the clause in the arbitration agreement failed to refer specifically to disputes arising out of termination and **did not specifically refer to LAD claims**. Id. at 272. A similar result was reached in Alamo Rent A Car, Inc. v. Galarza where the Plaintiff had been issued an employment manual called the FamPact which set out the terms

and conditions of employment and it was noted in the FamPact that if the employee claimed that the employer had violated the FamPact, then, the dispute was to be submitted and resolved through binding arbitration. Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384 (App. Div. 1997). The court determined that the language was ambiguous and did not clearly state that the employee was waiving the right to pursue her claims in court**.** Id. at 384. The Court further ruled that the clause did not ensure that the waiver of rights was a **knowing and voluntary waiver**. Id. at 384. The Court reached the same conclusion in Garfinkel where it was found that the agreement entered into for arbitration was insufficient to constitute a waiver of Plaintiff's remedies under the LAD; the clause simply stated that any controversy or claim that arises from the agreement or its breach shall be settled by arbitration. Garfinkel supra at 672. In order to enforce a waiver of rights provision in an agreement to arbitrate, there must be a concrete manifestation of the employees' intent which must be reflected in the agreement. Id. at 672. The intent to waive rights must be documented in the agreement in clear terms which acknowledge that the employee agrees to arbitrate statutory claims which come from the employment relationship or termination. Id. at 672. **This issue of the proper use of terminology when a statutory right is being waived must be explicit and must be a knowing and voluntary waiver**. In Camden Board of Education v. Alexander, the issue of necessary language in an agreement was discussed and it was noted that it is well-

established that language in an agreement where one is bargaining away statutory rights must state this in clear and unambiguous terms. Camden Board of Education v. Alexander, 181 N.J. 187 (2004). In addition, there must be clear evidence in the document that the person who is waiving statutory rights made a knowing and voluntary waiver and this information should be included in the agreement. Id. at 187. In Nawrocki v. J & J Outlet et al, the arbitration agreement was found to be unenforceable because there was an absence of language in the arbitration agreement that documented that the Plaintiff was waiving statutory rights and there was a failure to show that the Plaintiff was knowingly and voluntarily waiving statutory rights. Nawrocki v. J & J Outlet et al, Appellate Court, Docket No. A-2813-22 (Decided November 3, 2023).

In this matter, in analysis of the Mutual Agreement to Arbitrate, the language is vague. There is an absence of information that the Plaintiff is giving up a statutory right to proceed in court. This requirement as noted in Garfinkel was fatal to the quest to enforce arbitration. Garfinkel supra at 165. The specific language that there is a Knowing and Voluntary Waiver is not included in this document and there is a failure to specifically identify the New Jersey Law Against Discrimination. The Mutual Agreement to Arbitrate notes that "To the fullest extent allowed by law, any controversy, claim or dispute between you and Prospect EOGH, Inc. dba East Orange General Hospital and any of its related entities... will be submitted to final

and binding arbitration." This language is vague and in terms that might be acceptable for an attorney or one versed in legalese, but, is not clear to the average person. There is no clear information that the person is waiving the right to go to court. Instead, it is noted on the document, "BY AGREEING TO THIS BINDING MUTUAL ARBITRATION PROVISION, BOTH YOU AND THE COMPANY GIVE UP ALL RIGHTS TO TRIAL BY JURY." **(Pa119)** The required language that the person is waiving the right to go to court is absent. Further, the required language Knowing and Voluntary Waiver which is required when a right is being waived is absent from this document. There is a failure to specifically refer to LAD claims. This document only includes the wording discrimination at paragraph three. The language giving up all rights to trial by jury does not inform the lay person that they cannot take their legal issues to court. In fact, for an attorney the interpretation of that entry could simply mean that the person is not able to have a jury trial which means potentially, one could still go to court but would be restricted to having a bench trial only.

In analysis of the Mutual Agreement to Arbitrate, it does not comply with the requirements per case law and as a result, the conclusion that must be reached is that the Mutual Agreement to Arbitrate does not hold muster, fails to be in compliance with the requirements noted above and is not enforceable.

It was error for the trial court to dismiss the Complaint filed under the New Jersey Law Against Discrimination and compel arbitration. It is requested that the Appellate Court reverse and remand this matter to the trial court for litigation in that forum. It is requested that the arbitrator's decision and the order that confirmed the arbitration decision be vacated as well.

POINT II

GOVERNOR MURPHY SIGNED INTO LAW SENATE BILL NUMBER 121 WHICH IS REFERRED TO AS THE METOO BILL WHICH BARS PROVISIONS IN EMPLOYMENT CONTRACTS THAT WAIVE STATUTORY RIGHTS AND RESULT IN THE MATTER BEING DISMISSED FROM COURT AND HEARD IN ARBITRATION. THIS LAW WAS NOT CONSIDERED BY THE TRIAL COURT WHEN THE RESPONDENTS SOUGHT TO HAVE THIS INSTANT MATTER WHICH IS PLED UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION REMOVED FROM COURT WITH THE REQUIREMENT TO GO TO ARBITRATION. (Not argued below)

The New Jersey Law Against Discrimination, codified at N.J.S.A. 10:5-3 provides the following information: "The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights

and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest." N.J.S.A. 10:5-3. The New Jersey Law Against Discrimination (LAD) was enacted in 1945 to prevent and to eliminate discrimination based on race, color, creed, national origin or ancestry and created also was the enforcement agency. Rodriguez v. Raymours Furniture Co., p. 17 (N.J. 2016). There is a clear public policy mandate in the State of New Jersey which permits persons who have claims of discrimination to pursue those claims in an administrative forum with the New Jersey Division of Civil Rights or via our court system. Ackerman v. The Money Store, 321 N.J. Super. 308, 324 (Law Div. 1998) In addition, there is a clear right to present claims to a jury, thus, the person seeking redress in the courts is entitled to trial by jury. Id. at 324. The New Jersey Division of Civil Rights in Garfinkel had no objection to arbitration, however, did oppose compulsory, binding arbitration based on vaguely worded agreements and in cases where the waiver was not voluntary. Garfinkel supra at 665.

On March 18, 2019, Governor Phil Murphy signed into law Senate Bill 121 which is often referred to as the MeToo Bill. One of the key components of this law is that it bars provisions which are at times included in employment contracts which waive

statutory rights and remedies and also bars agreements which conceal details which involve discrimination claims. Senate Bill 121. The tenets of this law reads in part: "An Act concerning discrimination and supplementing Title 10 of the Revised Statutes. Be It Enacted by the Senate and General Assembly of the State of New Jersey: (1) a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation or harassment shall be deemed against public policy and unenforceable. b. No right or remedy under the Law Against Discrimination P.L. 1945, c. 169 (C. 10:5-1 et seq) or any other statute or case law shall be prospectively waived. c. This section shall not apply to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees." This law provided that if there was an attempt to enforce a provision which was deemed to be against public policy, the enforcer would be liable for reasonable attorney's fees and costs. P.L. 1945, c. 169.

In this matter before the Court, the causes of action pled were under the New Jersey Law Against Discrimination and included discrimination based on race, discrimination based on religion, hostile work environment and harassment. The draft and presentment to the Appellant the document entitled Mutual Agreement to Arbitrate served to violate Senate Bill 121. What is clear is that the causes of action pled were statutory rights per the New Jersey Law Against Discrimination. Thus,

the provisions in the Mutual Agreement to Arbitrate served to deprive Appellant of statutory rights and was clearly a violation of this law, in violation of public policy and is not enforceable. **(Pa119)** As noted earlier, Governor Murphy signed this bill into law on March 18, 2019 and it was to be applied prospectively. It was on the date of May 31, 2019 that the Appellant who had been repeatedly subjected to scrutiny, harassment and discrimination on the job was terminated from employment at Prospect East Orange General Hospital (EOGH). **(Pa117)** The Complaint and Jury Demand filed in this matter were filed on May 25, 2021. Because the MeeTo law applied to this matter, it was error for the Court to dismiss the Complaint from Superior Court of New Jersey with the requirement that it be taken to arbitration based on the Mutual Agreement to Arbitrate. The Mutual Agreement to Arbitrate deprived Appellant of statutory rights and as a result of this, the Mutual Agreement to Arbitrate was both against public policy and was unenforceable. **(Pa119)**

It was error for the trial court to dismiss the Complaint filed under the New Jersey Law Against Discrimination and compel arbitration. It is requested that the Appellate Court reverse and remand this matter to the trial court for litigation in that forum. It is requested that the arbitrator's decision and the order that confirmed the arbitration decision be vacated as well.

POINT III

THE ARBITRATOR HEARD A MOTION TO DISMISS FILED BY THE RESPONDENT WHICH WAS OPPOSED BY THE APPELLANT WHO HAD FILED CAUSES OF ACTION UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION AND WHICH WERE ENFORCEABLE AND GOVERNED BY THE FEDERAL ARBITRATION ACT. PER THIS ACT, A BASIS FOR VACATURE OF THE ARBITRATOR'S DECISION IS WHEN THERE IS MANIFEST DISREGARD OF THE LAW. (Pa74, 1 Transcript)

The Federal Arbitration Act of 1925 requires that arbitration proceedings be impartial and sets forth a basis for arbitration awards to be vacated. Commonwealth Coatings Corp. v. Cont'l. Cas. Co., 393 U.S. 145, 147 (1968). The Federal Arbitrations Act of 1925 provides that an arbitration award can be vacated in the following instances: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made; 9 U.S.C. Section 10(a) and (5) with

application of the common law doctrine whereby a court may set aside an arbitration award where there has been a manifest disregard of the law. 9 U.S.C. Section III(B).

Courts have recognized there is a common law basis for vacating an arbitration award which is done when the award is found to be in "manifest disregard for the law" as initially discussed in Wilko v. Swan, 346 U.S. 427 (1953). The manifest disregard of the law doctrine does not focus on an arbitrator's misinterpretation of the law, but rather on the disregard of the law. Id. at 427. This occurs when the arbitrator fails to apply the law which the arbitrator is fully aware of which then becomes the subject of review with the potential of vacating the arbitration award. Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991).

In New Jersey, our case law provides the doctrine of Equitable Tolling which is applied in cases where there is a claim of expiration of the statute of limitations. In Rozek v. Metlife Insurance Company, the Court addressed the issue of expiration of the statute of limitations and the doctrine of Equitable Tolling. Rozek v. Metlife Insurance Company, (N.J. Super. 2011). In that case, the Court discussed the application of the doctrine of Equitable Tolling and the Court explained that the "primary purpose of the statute of limitations is to provide defendants a fair opportunity to defend and to prevent plaintiffs from litigating stale claims." Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 524 (2005) (internal quotation marks and citations

omitted). Further, the Court has emphasized that in circumstances where the Respondents are on notice of what the claims are and no significant prejudice results, the desire to uphold the statute of limitations recedes. Id. at 524. The New Jersey Supreme Court has ruled that in order to avoid the harsh impact from a mechanical application of the statute of limitations, equitable principles should be applied and that other facts must be taken into consideration. Id. at 524-525. The equitable principles are equitable tolling, the discovery rule or estoppel. Id. at 524-525. In Price, the Court applied equitable tolling because the Plaintiff's attorney notified New Jersey Manufacturers of the claim on the date of February 12, 1998 and over the next several years information needed by NJM to evaluate the claim were provided. Id. at 525. The Plaintiff in that case even underwent a physical examination and thereafter, NJM requested additional documents related to Plaintiff's Workers Compensation matter which was shortly before the statute of limitations would run; the statute of limitations was six years. Id. at 526. Even when NJM requested additional documents, Counsel for the Plaintiff quickly fulfilled the requests by providing documents. Id. at 526. On October 28, 2002, a year after the statute of limitations had run, NJM then declined to honor the claim and said that the Statute of Limitations barred the claim. Id. at 526. The Court found in that case that the insurance company, NJM was required to act in a fair manner and that NJM could not sit back continually requesting and receiving documents over a three-year

period and then deny the claim by pointing out that the Plaintiff had failed to file the complaint in superior court or request arbitration. Id. at 526. The Court further found that NJM lulled the Plaintiff and his Counsel into a false sense of security in that they believed that the uninsured motorists claim had been properly filed and the Plaintiff reasonably relied on NJM's conduct in failing to file the Complaint or file for arbitration. Id. at 527 Equitable tolling was applied in that case and the Court said that the statute of limitations should not bar the filing of the Plaintiff's complaint against New Jersey Manufacturers. Id. at 527 The Statute of Limitations defense had been rejected at the trial level and that decision was affirmed at the Appellate Court. Id. at 527. In Carlson v. Aristacare of Cherry Hill, LLC, it was noted by the Court that "we often seek to avoid unswerving, mechanistic application of a procedural statute of limitations and have developed a common law of limitations." Carlson v. Aristacare of Cherry Hill, LLC, pp.3-4 (App. Div. 2023). In such cases, various doctrines which use equitable principles are employed. Id. at pp. 3-4. See also, Gilligan v. Westfield Service Centre, Inc., 82 N.J. 188, 191-192 (1980). It is well settled in New Jersey that the statute of limitations will not be applied when it will result in the sacrifice of individual justice. Zaccairdi v. Becker, 88 N.J. 245, 258-259 (1982).

In the instant matter, it was evident that the Plaintiff filed a Complaint and Jury Demand in Superior Court timely and had no awareness of an Arbitration

Agreement which was produced by Respondents after the case was filed in court. **(Pa2, Pa119)** Plaintiff stated in his Certification that he was not aware of an Arbitration Agreement and had only signed one document with Prospect EOGH which listed his job title and his salary and this document was signed after Prospect EOGH became the owners of the hospital that he worked at. After the Respondents submitted this Mutual Agreement to Arbitrate to the Court when they filed a Motion to Compel Arbitration, the Court determined that the matter would be moved to arbitration. **(Pa45)** The filing in Superior Court was timely, therefore, the removal to arbitration and the start of proceedings in arbitration should have been deemed to be timely as well. The essence of this removal is that the matter was filed in the wrong forum. In the period after removal to arbitration, Counsel for the Appellant attempted to reach Respondents' Counsel so that arbitration could proceed. There was a failure of Respondents' Counsel to respond to phone messages and emails left at that firm. **(Pa123, Pa124)** After a period of time had passed with no response, Appellant's Counsel filed again in Superior Court asking that the matter be placed on active status and proceed in Superior Court. **(Pa47)**

After the motion was filed to return the matter to active status in Superior Court, this was opposed and the Court again ruled that the matter had to proceed in arbitration. **(Pa72)** An Arbitrator was decided on and thereafter, Respondents filed a Motion to Dismiss citing as a defense the statute of limitations. It was claimed that arbitration

did not proceed right after dismissal from the Superior Court and therefore, engaging in arbitration at a later date was beyond the statute of limitations. As is noted in case law cited above, when there are procedural statute of limitations concerns, equitable principles should be employed so that the matter can continue in arbitration. Per the cases cited above, the Appellant should have been allowed to proceed and litigate his matter in the arbitration forum. This would be in line with the view in our courts that matters should be decided based on the merits. Despite the rulings in the above noted cases, the Arbitrator dismissed this case with prejudice ignoring the purpose of the statute of limitations and the fact that Respondents admitted that they were not prejudiced**. (Pa74)** It must be noted that the Appellant had filed the Complaint and Jury Demand timely in the Superior Court, therefore, this timeliness of the initial filing should have been accepted by the Arbitrator. The Arbitrator had the obligation as well to employ equitable tolling.

As per the process for handling Arbitrations, it was clear that the Respondents were responsible for paying for Arbitration, so it was expected that the Respondents would initiate the arbitration process. The Respondents were contacted shortly after the case was dismissed from the Superior Court to discuss proceeding in Arbitration. Contact was made with Respondent's Counsel with no response when calls were placed as well as a failure to respond to emails regarding this matter. **(Pa123, Pa124)** There was silence and only a response after this Counsel filed to have the matter

reinstated to Superior Court. At that time, the Motion to Reinstate the Case to Active Case Status was opposed and the Court again dismissed the case and ruled that it had to proceed in Arbitration. After that Motion was filed, there then was some communication with Respondents' Counsel regarding this case with effort made to obtain an Arbitrator and move the case forward. In this case, JAMS was the entity selected by the employer, Prospect East Orange General Hospital to conduct the arbitration proceedings. This information on what the process entailed under JAMS as well as initiating and paying for the arbitration was within the knowledge base of the Respondents and the responsibility of the Respondents. There was a failure to take steps to initiate this process and a failure to pay for this process. With consideration of the role that the Respondents had in moving this case along in arbitration and the failure to communicate with this Counsel and the failure to pay for the arbitration, the Arbitrator in following the American Arbitration Act, should have utilized the doctrine of Equitable Tolling to continue this matter. Instead, the Arbitrator engaged in manifest disregard of the doctrine of Equitable Tolling which resulted in dismissal of this matter from arbitration. The Arbitrator also engaged in manifest disregard of the ruling of our Supreme Court on procedural statute of limitations issues. Our Supreme Court has addressed procedural statutes of limitations issues by ruling that in such instances, the application of equitable principles should be undertaken. Negron v Llarena, 156 N.J. 296 (1988).

Equitable tolling should have been applied in this case for a number of reasons. First of all, Respondents sought to have the case removed from Superior Court where it had been timely filed with the Court Order noting that the matter could proceed in arbitration. Respondents should have been responsible for initiating the arbitration process. Respondents were fully aware of the steps that had to be taken in initiating arbitration and Respondents were also responsible for making payment for arbitration per JAMS. The Respondents remained silent after the case was dismissed from Superior Court and then claimed that the statute of limitations has passed and therefore the case should be dismissed. There is no citation to a court rule that would require dismissal and in fact, court rules such as the Relation Back Doctrine and other rules provide a basis for cases to be continued or for new parties to be added to a case with adoption of the initial filing date. The silence after the case was dismissed from the Superior Court and the failure to communicate with this Counsel regarding arbitration understanding that there would be the passage of time is similar to the behavior exhibited by New Jersey Manufacturers Insurance Company in Price. Just as in Price where Equitable Tolling was applied, Equitable Tolling was warranted in the instant matter and should have been applied by the Arbitrator.

The Arbitrator disregarded the doctrine of Equitable Tolling which was applicable to this case. The doctrine of Equitable Tolling would have allowed the

instant matter to proceed and be decided on the merits of the case. This is because the Respondents were fully aware of Appellant's claims made in the litigation when originally filed and there was an admission by the Respondents at oral argument on the Motion to Dismiss the Complaint Pursuant to Court Rule 4:6-2 that there was no prejudice to the Respondents. Further, the facts set out in Price v. N. J. Mfrs. Ins. Co. were similar to the instant matter because in that case, there was a position taken to not recognize the claim and cite the statute of limitations as a defense. Price supra at 524. In Price, the Court rejected claims of the statute of limitations and the matter was filed in Superior Court. Id. at 524. The Court in application of Equitable Tolling has ruled that where there is an absence of prejudice, the statute of limitations defense fades. Id. at 524. The Arbitrator in the instant matter exhibited a manifest disregard of the doctrine of Equitable Tolling and procedural statute of limitations provisions. As noted above, when there are claims of procedural statute of limitations, then, engagement in equitable principles should be undertaken and the matter should be continued in Court.

It was error for the trial court to dismiss the Complaint filed under the New Jersey Law Against Discrimination and compel arbitration. It was error for the Arbitrator to engage in manifest disregard of the law as to procedural statute of limitations issues and equitable principles such as Equitable Tolling. It is requested that the Appellate Court reverse and remand this matter to the trial court for litigation in that

forum. It is requested that the Arbitrator's decision and the order that confirmed the arbitration decision and award be vacated as well.

POINT IV

THE TRIAL COURT WAS PRESENTED WITH A BASIS TO VACATE THE ARBITRATOR'S DECISION BECAUSE THE ARBITRATOR ENGAGED IN MANIFEST DISREGARD OF THE LAW OF EQUITABLE TOLLING. THE TRIAL COURT RECOGNIZED THAT THERE WAS MANIFEST DISREGARD OF THE LAW AND FAILED TO EXERCISE THE INHERENT AUTHORITY AND VACATE THE ARBITRATOR'S DECISION. (Pa74, 1 Transcript)

In New Jersey, our case law provides the doctrine of Equitable Tolling which is applied in cases where there is a claim of expiration of the statute of limitations. In Rozek v. Metlife Insurance Company, the Court addressed the issue of expiration of the statute of limitations and the doctrine of Equitable Tolling. Rozek v. Metlife Insurance Company, (N.J. Super. 2011). In that case, the Court discussed the application of the doctrine of Equitable Tolling and the Court explained that the "primary purpose of the statute of limitations is to provide defendants a fair opportunity to defend and to prevent plaintiffs from litigating stale claims." Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 524 (2005) (internal quotation marks and citations omitted). Further, the Court has emphasized that in circumstances where the Defendants are on notice of what the claims are and no significant prejudice results,

the desire to uphold the statute of limitations recedes. Id. at 524. The New Jersey Supreme Court has ruled that in order to avoid the harsh impact from a mechanical application of the statute of limitations, equitable principles should be applied and that other facts must be taken into consideration. Id. at 524-525. The equitable principles are equitable tolling, the discovery rule or estoppel. Id. at 524-525. In Price, the Court applied equitable tolling because the Plaintiff's attorney notified New Jersey Manufacturers of the claim on the date of February 12, 1998 and over the next several years information needed by NJM to evaluate the claim were provided by Counsel. Id. at 525. On October 28, 2002, a year after the statute of limitations had run, NJM then declined to honor the claim and said that the statute of limitations barred the claim. Id. at 526. The Court found in that case that the insurance company, NJM was required to act in a fair manner and that NJM could not sit back and continually request and receive documents over a three-year period and then deny the claim by pointing out that the Plaintiff had failed to file the complaint in superior court or request arbitration. Id. at 526. The Court further found that NJM lulled the Plaintiff and his Counsel into a false sense of security in that they believed that the uninsured motorists claim had been properly filed and the Plaintiff reasonably relied on NJM's conduct in failing to file the Complaint or file for arbitration. Id. at 527 Equitable tolling was applied in that case and the Court said that the statute of limitations should not bar the filing of the Plaintiff's complaint

against New Jersey Manufacturers. Id. at 527 The statute of limitations defense was rejected at the trial level and that decision was affirmed at the Appellate Court. Id. at 527

Equitable tolling is applicable also when the initial filing was timely but filed in the wrong forum. Binder v. Price Waterhouse & Co. LLP, 393 N.J. Super. 304, 312 (App. Div. 2007). Our Supreme Court weighed in on delayed filing when at issue are procedural statutes of limitations and has determined that when addressing procedural statutes of limitations then the application of equitable principles should be undertaken. Negron supra at 296. In Negron, there was a delay in filing the case in state court for eleven weeks after the federal claims were dismissed and the court excused this delayed filing. Id. at 296.

In the instant matter, it was evident that filing for arbitration beyond the statute of limitations was allowed by the Court per the cases cited above. In that vein, it was requested that the Motion to Dismiss the Arbitration based on the statute of limitations having passed should have been denied by the Court. The Appellant should have been allowed to proceed and litigate his matter. This would be in line with the view in our courts that matters should be decided based on the merits. Despite the rulings in the above noted cases, the Arbitrator dismissed the case with

prejudice ignoring the purpose of the statute of limitations and the fact that Respondents admitted that they were not prejudiced.

The Respondents were contacted shortly after the case was dismissed from the Superior Court to discuss settlement of the case or proceeding in arbitration. Respondent's Counsel was unresponsive when calls were placed and also failed to respond to emails regarding this matter. There was silence and only a response after this Counsel filed to have the matter reinstated to Superior Court. At that time, the Motion to Reinstate the Case to Active Status was opposed and the Court again dismissed the case ruling that it had to proceed in Arbitration. After that Motion was filed, there then was some communication with Respondent's Counsel regarding this case with effort made to obtain an Arbitrator and move the case forward. In this case, JAMS was the entity selected by the employer, Prospect East Orange General Hospital to conduct the arbitration proceedings. This information on what the process entailed under JAMS as well as initiating and paying for the arbitration was within the knowledge base of the Respondents and the responsibility of the Respondents. There was a failure to take steps to initiate this process and a failure to pay for this process. As a result of these failures, the dismissal of this matter from Arbitration should have been denied by the Arbitrator. When relief was sought from the Trial Court noting that there had been manifest disregard of the law of equitable tolling by the Arbitrator, the trial court agreed with this and did discuss the issue of

manifest disregard of the law. Despite this, the trial court failed to vacate the arbitrator's decision for engaging in manifest disregard of the law regarding statute of limitations and failing to employ the doctrine of equitable tolling.

Equitable tolling should have been applied in this case for a number of reasons. First of all, Respondents sought to have the case removed from Superior Court where it had been timely filed with the Court Order noting that the matter could proceed in arbitration. Respondents failed to communicate about the arbitration process and remained silent until the matter was filed again in the Superior Court where an order was sought to allow the case to proceed in the trial court. When the matter was returned to arbitration, the Respondents claimed that the statute of limitations had passed and filed a motion to have the case dismissed. The silence after the case was dismissed from the Superior Court and the failure to communicate with this Counsel regarding arbitration understanding that there would be the passage of time is similar to the behavior exhibited by New Jersey Manufacturers Insurance Company in Price. Just as in Price where Equitable Tolling was applied, Equitable Tolling was warranted in the instant matter and the failure of the Arbitrator to employ equitable principles as a result of manifest disregard of the law should have resulted in the trial court identifying that there was manifest disregard of the law and vacating the Arbitrator's decision.

It was error for the trial court to dismiss the Complaint filed under the New Jersey Law Against Discrimination and compel arbitration. It was further error to fail to vacate the Arbitrator's decision because the Arbitrator engaged in manifest disregard of the law. It is requested that the Appellate Court reverse and remand this matter to the trial court for litigation in that forum. It is requested that the arbitrator's decision and the order that confirmed the arbitration decision be vacated as well.

CONCLUSION

For all of the reasons set forth in this Appellate Brief, Appendix, Certification of Counsel and Exhibits, it is requested that the Appellate Court reverse and remand this matter to the trial court and allow Appellant to litigate his case on the merits in that forum. It is requested that the Appellate Court vacate the trial court ruling which denied the motion to vacate the arbitrator's decision and which confirmed the arbitrator's decision. It was error from the inception of this case for the trial court to dismiss the case to Arbitration as there was no knowing and voluntary waiver of the right to proceed in Court, because of Senate Bill 121 and because the waiver per the Mutual Agreement To Arbitrate was against public policy and was unenforceable.

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February 2, 2024

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MICHAEL SHEFTON,

Plaintiff,

v.

EAST ORANGE GENERAL HOSPITAL, JIM KIMBERLING, JOHN DOES 1-10, JANE DOES 1-10, ABC CORPORATIONS A THROUGH Z,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
NO. A-000188-23

CIVIL ACTION

ON APPEAL FROM THE ORDER CONFIRMING THE ARBITRATOR'S AWARD DATED AUGUST 25, 2023 ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY

SAT BELOW:
HON. RUSSELL PASSAMANO, J.S.C.

DOCKET NO. ESX-L-4145-21

SUBMISSION DATE:
APRIL 3, 2024

BRIEF AND APPENDIX ON BEHALF OF RESPONDENTS EAST ORANGE GENERAL HOSPITAL AND JIM KIMBERLING

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PRELIMINARY STATEMENT

On May 25, 2021, Plaintiff-Appellant Michael Shefton ("Appellant" or "Shefton") filed suit in New Jersey Superior Court, alleging discriminatory discharge and hostile work environment based on race and religion in violation of the LAD, ***four*** days before the expiration of the two-year statute of limitations for LAD claims. Because Appellant had entered into a Mutual Agreement to Arbitrate "all employment-related claims including, but not limited to, claims for unpaid wages, breach of contract, torts, violation of public policy, discrimination, harassment, or any other employment-related claim under any state or federal statutes or laws relating to an employee's relationship with his/her employer" with Respondents, on October 22, 2021, the trial court correctly dismissed Appellant's Complaint and directed him to pursue his claims in arbitration.

Appellant failed to do so. For inexplicable reasons, he failed to complete the simple task of initiating an arbitration claim with JAMS, evidently because he was under the impression that the onus was on Respondents to initiate arbitration. Notwithstanding the fact that this would have resulted in a bizarre situation of the Respondents litigating against themselves, Appellant refused to initiate arbitration, and instead filed a motion to reinstate the dismissed law division Complaint. Even after the trial court once again directed him to pursue

his claims in arbitration, Appellant did nothing, and faced with the prospect of this matter simply existing in limbo forever, Respondents reached out to Appellant and together, the parties agreed to select an Arbitrator.

Respondents then filed a motion to dismiss Appellant's claim on the basis that the statute of limitations on his claims had expired. The Arbitrator agreed and issued a decision dismissing Appellant's claims with prejudice. The trial court confirmed the Arbitrator's decision.

Following the confirmation of the Arbitrator's decision, Appellant filed his notice of appeal, in which he specifically noticed his request for judicial review of the trial court's decision to confirm the arbitration award. But Appellant fails to establish any valid basis to overturn the arbitrator's decision. Indeed, there is absolutely zero evidence of fraud, corruption, or wrongdoing on the part of the arbitrator. On the contrary, the arbitrator's eight-page written decision is legally sound, well-reasoned, and supported by the controlling caselaw. Under New Jersey law, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrator. Further, the party seeking to vacate an arbitrator's award bears a heavy burden of demonstrating fraud, corruption, or wrongdoing on the part of the arbitrator.

Appellant further seeks to overturn the trial court's October 22, 2021 Order that dismissed his Complaint and directed him to pursue arbitration.

Though Appellant never noticed this Order as a subject of this instant appeal, he is procedurally barred from seeking review of this Order, and even then, his arguments fail for substantive reasons as discussed in detail below.

Thus, for the reasons explained below, the Court should reject this appeal and affirm the trial court's confirmation of the arbitration award.

PROCEDURAL HISTORY

On August 15, 2019, Appellant filed a Complaint of Discrimination with the Equal Employment Opportunity Commission. Thereafter an investigation ensued and a Right to Sue Letter was issued which resulted in Appellant proceeding to the Superior Court of New Jersey where a Complaint and Jury Demand was filed on May 25, 2021, four days before the expiration of the statute of limitations on Appellant's claims. (Pa2).

Default was entered against the Respondents on July 26, 2021. (Pa28, Pa29). On August 5, 2021, Respondents' counsel advised Appellant's counsel that Appellant was bound by an agreement to arbitrate. (Pa66, Da16[1], Pa119). Default was vacated by Consent Order on August 18, 2021. (Pa30). Respondents filed a Motion to Dismiss Appellant's Complaint and Compel Arbitration on September 17, 2021. (Pa32). The Court granted Respondent's motion on

[1] Citations to Da# refer to Respondents' Appendix, which contains relevant documents Appellant excluded from his Appendix pursuant to Rule 2:6-1(a)(2).

October 22, 2021, entering an Order that dismissed Appellant's Complaint and directed him to "pursue his claims in arbitration." (Pa45-46).

Rather than pursue his claims in arbitration, Appellant made no efforts to initiate arbitration. (Pa66-67). Instead, Appellant filed a Motion to Restore the Case to Active Case Status on July 21, 2022, nine months after the Court had entered its October 22, 2021 Order compelling Appellant to pursue his claims in arbitration. (Pa47). Respondents filed Opposition to the Motion on August 18, 2022. (Pa65). The Court denied Appellant's Motion by Order dated September 13, 2022. (Pa72).

Subsequently, Appellant made no effort to initiate arbitration, but at Respondent's suggestion, agreed to arbitrate before the Hon. Mark B. Epstein, J.S.C. (Ret.). (Da29; Pa86, ¶ 21). On March 13, 2023, Respondent moved before Judge Epstein to dismiss Appellant's claim for his failure to commence arbitration within the two-year statute of limitations applicable to LAD claims. (Pa64, 74). After extensive briefing, on June 9, 2024, Judge Epstein issued an arbitration award dismissing Appellant's complaint. (Pa74).

On July 3, 2023, Appellant filed a Motion to Vacate the Arbitrator's Decision. (Pa82). On July 13, 2023, Respondents filed an Opposition to Appellant's Motion and a Cross-Motion to Confirm the Arbitration Award. (Pa94). On August 25, 2023, The Superior Court entered an Order denying

Appellant's Motion to Vacate and granting Respondent's Cross-Motion. (Pa110-112).

Subsequently, Appellant filed a Notice of Appeal, and later, his operative Amended Notice of Appeal on September 28, 2023 ("Notice of Appeal"). (Da1).

STATEMENT OF FACTS

In 2012, Appellant began working at the Hospital as a mental health "Screener" in the Emergency Department. (Pa2, ¶ 7). Appellant alleges that he was subjected to discriminatory write ups related to his documentation in patient's charts, which ultimately led to his termination on May 29, 2019. (Pa2 ¶¶ 37, 39). Appellant executed a Mutual Agreement to Arbitrate on February 12, 2016. (Pa119). Respondent denies Appellant's allegations, and notes that because of the statute of limitations barred Appellant from proceeding against Respondent, Respondent was not required to file an answer.

On May 25, 2021, Appellant filed suit in New Jersey Superior Court, alleging discriminatory discharge and hostile work environment based on race and religion in violation of the LAD, four days before the expiration of the two-year statute of limitations for LAD claims. (Pa2, *generally*). Appellant was provided a copy of the arbitration agreement he signed, but when he refused to honor his arbitration agreement and dismiss his lawsuit in favor of arbitration, the Hospital filed a motion to compel arbitration on September 17, 2021.

(Pa119; Pa52, 74). The Court granted the Hospital's motion on October 22, 2021. (Pa45). The Order dismissed Appellant's Complaint without prejudice and ordered him to "pursue his claims in arbitration." (Pa45-46).

Rather than file and serve a demand for arbitration, Appellant attempted to reinstate his case before the Court on July 21, 2022, nine months after the Court entered its order compelling him to arbitrate his claim. (Pa47). On September 13, 2022, the Court denied Appellant's motion on the grounds that "[t]he motion record does not show that arbitration was conducted, or any basis to reinstate the matter before this court. The request to restore the complaint in circumstances where arbitration was not pursued is denied." (Pa72).

As set forth in the Arbitration Agreement that was enforced by the Court in its October 22, 2021 Order, arbitration shall be before a neutral arbitrator "in accordance with the JAMS Employment Arbitration Rules and Procedures." (Pa119).[2] The JAMS Rules provide that an arbitration proceeding is commenced once "JAMS has received all payments required under the applicable fee schedule" and "the Claimant [Appellant] has provided JAMS with contact information for all Parties together with evidence that the Demand for

[2] The agreement provides the website to the JAMS Employment Arbitration Rules, "jamsadr.com/rules-employment-arbitration/." (Pa119; Da113). Moreover, that website link contains "related links," which includes how to "submit a case." The "submit a case" link provides step-by-step instructions on how a claimant can commence arbitration. (Da114, "jamsadr.com/submit/").

Arbitration has been served on all Parties." (Da113, Da116, Da120 - Rule 5(b), JAMS Employment Arbitration Rules & Procedures). Even after the Court denied his Motion to Reinstate, Appellant never filed a demand for arbitration with JAMS, choosing instead of continue seeking settlement of the matter. (Da31, 33, 35). Put simply, Respondents were faced with a litigant who would neither let his claim go nor prosecute his claim against them. Accordingly, Respondents proposed arbitration before the Hon. Mark B. Epstein (Ret.), and counsel for the Hospital contacted Judge Epstein on behalf of all parties on November 3, 2022. (Da29).

On March 13, 2023, Respondents moved before Judge Epstein to dismiss Appellant's complaint for his failure to commence arbitration within the two-year statute of limitations applicable to LAD claims. (Da12; Pa74, p. 2). As memorialized in Judge Epstein's decision, Respondents argued that Appellant's claims were barred by the two-year statute of limitations applicable to LAD claims. (Pa74, p. 3). As Appellant was terminated on May 29, 2019, the statute of limitations for his claims expired on May 29, 2021, and he never filed an arbitration demand. (Pa74, p. 3). Recognizing that even if the statute of limitations was temporarily tolled by the filing of the Superior Court complaint in violation of the signed Arbitration Agreement, Judge Epstein also cited to case law holding that equitable tolling requires Appellant to have diligently

pursued his claims. (Pa74, p. 4).

Because Appellant filed his Superior Court Complaint with four (4) days remaining before the expiration of his statute of limitations, once the complaint was properly dismissed, he had four (4) days to initiate arbitration – a relatively simple process. (Pa74, p. 4). As Judge Epstein noted, "[a]ll Claimant [Shefton] had to do was to send JAMS the contact information for all parties together with evidence that a Demand for Arbitration was served on all parties in order for the arbitration to have been deemed, 'commenced'." (Pa74, p. 7). Finding that the efforts of Appellant's counsel to engage with the Hospital's counsel were insufficient, Judge Epstein determined that "Claimant [Shefton] simply failed to prosecute his case within the required time restriction. While equitable tolling would be an appropriate solution in some cases, the amount of time which has passed during which Plaintiff took no action to move forward with arbitration has foreclosed that option." (Pa74, p. 8). Indeed, the matter was not submitted to arbitration until November 3, 2022, more than a year and five months after the statute of limitations had expired, and even then, it would have never been submitted to arbitration had Respondents' counsel not reached out to Appellant with the suggestion of arbitrating before Judge Epstein. Put plainly, Appellant inexcusably delayed and wasted time filing a pointless motion to reinstate, which the court denied because he failed to pursue the mediation as the court

had required him to do. (Pa74, p. 8).

Distinguishing this lawsuit from the *Price v. N.J. Mfrs. Ins. Co.*, 182 N.J. 519, 523 (2005) case cited by Appellant, Judge Epstein noted that in *Price*, "the defendant seeking dismissal based on the expiration of the statute of limitations had engaged in significant and prolonged discovery with plaintiff, leading the plaintiff to believe that a timely UM [uninsured motorist] claim had been made, here there was no reason for Claimant [Shefton] to believe that a timely arbitration claim had been filed." (Pa74, p. 8). Indeed, Judge Epstein found that Respondents' counsel engaged in no misconduct or attempt to trick or mislead Shefton. (Pa74, p. 7).

Noting that "no request for arbitration was ever filed despite an explicit statement by the Court that the Claimant could proceed to arbitration" and finding that "Claimant's [Shefton's] arguments that he did nothing for months because his attorney was trying to communicate with Respondent's attorney or because it was Respondent's attorney's responsibility to schedule the arbitration, are not legally persuasive," Judge Epstein correctly dismissed Appellant's claims with prejudice. (Pa74).

On July 3, 2023, Appellant filed a Motion to Vacate the Arbitrator's Decision. (Pa82). Respondents filed an Opposition to Appellant's Motion and a Cross-Motion to Confirm the Arbitration Award. (Pa94). On August 25, 2023,

The Superior Court entered an Order confirming the Arbitration Award. (Pa110-112). In an oral decision rendered on same date, the Hon. Russell J. Passamano, J.S.C. determined that:

- On October 22, 2021, the trial court entered an Order that Appellant's Complaint was dismissed without prejudice and that he could pursue his claims in arbitration. 1T 31:25 – 32:8.[3]
- On September 13, 2022, the trial court entered an Order denying Appellant's motion to restore the matter because Appellant had not complied with the trial court's October 22, 2021 Order. 1T 32:9-21.
- Ultimately an arbitration was conducted and resolved by way of a dispositive motion before Judge Epstein. 1T 32:22 – 33:6.
- That the Supreme Court noted that arbitration awards may be vacated only for fraud, corruption, similar wrongdoing on the part of the arbitrator, and can be corrected or modified only for very specifically defined mistakes. 1T 33:14-24.

[3] Citations to "1T [Page number]:[Line number]" refers to the Transcript of the oral argument before Judge Passamano and oral decision of Judge Passamano dated August 25, 2023, which was electronically filed with the Clerk of the Appellate Division on November 6, 2023 and named "MOTION (Vol. 01) (08/25/2023)."

- That there has been no suggestion by Appellant that Judge Epstein engaged in any fraud, corruption, or similar wrongdoing. 1T 34:5-14.
- That the Appellant never took issue with the location of Judge Epstein's office before he agreed to arbitrate with Judge Epstein. 1T 34:16 – 35:20.
- That binding judicial decisions do not allow for the trial court to review the legal analysis of the arbitrator's determination. 1T 36:12-25.
- That Judge Epstein heard oral argument, asked questions, carefully analyzed the law - including the issues of equitable tolling and the statute of limitations - ruled in Respondents' favor, and that merely because Appellant disagrees with the decision does not mean that there was a manifest disregard for the law. 1T 34:15-24; 37:8-19.

Subsequently, Appellant filed a Notice of Appeal seeking review of the trial court's August 25, 2023 Order Denying Vacatur and Confirming Judge Epstein's Arbitration Award. (Da1). Appellant does not indicate that he is appealing any other orders entered by the trial court. (Da1).

LEGAL STANDARD

An appellate court reviews an arbitration award de novo. *Minkowitz v. Israeli*, 433 N.J. Super. 111, 136 (App. Div. 2013). In *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, our Supreme Court narrowed the grounds on which arbitration awards may be vacated:

> Basically, arbitration awards may be vacated **only for fraud, corruption, or similar wrongdoing** on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:23B-23]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award.

135 N.J. 349, 358 (1994) (quoting *Perini Corp. v. Greate Bay Hotel & Casino, Inc.,* 129 N.J. 479 (1992) (Wilentz, C.J., concurring)) (emphasis added); *see also Bello v. Halgas*, No. A-1446-21 (App. Div. Mar. 6, 2023) (slip op. at 14).

As codified by statute under N.J.S.A. 2A:23B-23 (the New Jersey Arbitration Act (the "Act")), arbitration awards may be vacated under the Act only if:

> (1) the award was procured by corruption, fraud, or other undue means;
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
> (4) an arbitrator exceeded the arbitrator's powers;

> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

N.J.S.A. 2A:23B-23(a). The Act further provides that "[i]f the court denies an application to vacate an award, it shall confirm the award unless an application to modify or correct the award is pending." *See* N.J.S.A. 2A:23B-23(d). The Hon. Russell J. Passamano, J.S.C. correctly applied this standard in denying Appellant's Motion to Vacate Judge Epstein's Arbitration Award and granting Respondents' Crossmotion to Confirm the Award on August 23, 2023. (1T 32:22 – 37:19).

ARGUMENT

I. APPELLANT CITES NO VALID GROUNDS FOR THE VACATUR OF JUDGE EPSTEIN'S ARBITRATION DECISION. (PA110-113; 1T 34:5-14).

Arbitration awards are not typically vacated. "An arbitrator's award is not to be cast aside lightly. It is subject to being vacated only when it has been shown that a statutory basis justifies that action." *Kearny PBA Local # 21 v. Town of Kearny*, 81 N.J. 208, 221 (1979). In fact, vacatur of arbitration awards is contrary to public policy. "Our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternative forum." *Wein v.*

Morris, 194 N.J. 364, 375-76 (2008) (internal quotation marks and citation omitted). Thus, there is a strong preference for arbitration awards. *Borough of East Rutherford*, 213 N.J. at 201 (citing *Middletown Twp. PBA Local 124 v. Twp. of Middletown*, 193 N.J. 1, 10 (2007)). From a public policy perspective, "[a]rbitration should spell litigation's conclusion, rather than its beginning." *New Jersey Turnpike Auth. v. Local 196, I.F.P.T.E.*, 190 N.J. 283, 292 (2007).

Accordingly, because of the strong judicial presumption in favor of the validity of an arbitral award, the party seeking to vacate it bears a heavy burden of demonstrating fraud, corruption or similar wrongdoing on the part of the arbitrator. *See Minkowitz v. Israel*, 433 N.J. Super. 111, 136 (App. Div. 2013); *Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 372 N.J. Super. 503, 510 (App. Div. 2004), *certif. granted*, 183 N.J. 218, *appeal dismissed*, 195 N.J. 512 (2005). In addition, "[j]udicial review of an arbitration award is very limited." *Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko*, 202 N.J. 268, 276 (2010). In reviewing an arbitration award, the court may not substitute its own judgment for that of the arbitrator. *Borough of E. Rutherford*, 213 N.J. at 201; *Linden Bd. of Educ.*, 202 N.J. at 277.

In this case, Appellant does not even assert, let alone attempt to demonstrate that Judge Epstein committed fraud, corruption, or similar wrongdoing in the course of conducting the arbitration. Instead, Appellant

argues that (1) the trial court erred by failing to vacate Judge Epstein's decision based on "Manifest Disregard"; (2) the trial court erred by failing to vacate Judge Epstein's decision based on "Equitable Tolling"; (3) the trial court erred by sending the matter to arbitration when Appellant (i) had no recollection of meeting with the hospital administrator who countersigned his Arbitration Agreement, (ii) did not understand the Arbitration Agreement, and (iii) did not contain language indicating that Appellant was waiving his right to have his claims heard in Court (which is unrelated to the trial court's October 2022 Order on appeal[4]); (4) the MeToo Bill constitutes a blanket prohibition arbitration of NJLAD claims, even when, as here, Appellant agreed to arbitrate with Judge Epstein. (Da1).

As the above-cited law demonstrates, it is well-settled that none of Appellant's listed reasons in support of vacatur are recognized by our Courts. Notwithstanding same, many of Appellant's arguments are unconvincing and continue to rely on the fundamentally incorrect premise that Appellant – the Plaintiff – was some passive actor along for the ride in this litigation and that

[4] Pursuant to Rule 2:5-1(f)(3)(A) the notice of appeal "shall designate the judgment, decision, . . . or part thereof appealed from." Failure to comply with this rule permits refusal to consider its merits. *See, e.g., Sikes v. Twp. of Rockaway*, 269 N.J. Super. 463, 465-66 (App. Div.), *aff'd o.b.*, 138 N.J. 41 (1994).

Respondents – the Defendants – were obligated to aid Appellant in pursuing his claims against themselves. Following the dismissal of Appellant's superior court complaint and the trial court's direction that Appellant may pursue arbitration, Respondents were effectively left in "legal limbo" because of Appellant's total lack of action in pursuing his claims. Even after Appellant's misguided motion to reinstate the case to active status was denied, Appellant did nothing.

For example, several of the positions taken by Appellant do not make sense because *he agreed* to arbitrate with Respondents, and then *agreed* to the selection of Judge Epstein, after Appellant outright refused to take any steps at initiating arbitration in the normal course. (Pa74, p. 2). He cannot now turn around now and claim that Judge Epstein was an inappropriate choice or that JAMS procedures were violated when he did not even attempt to pursue arbitration through JAMS, suggest any alternative arbitrators, and most importantly, could have refused to arbitrate before Judge Epstein. (Pa74, 7-8).

Appellant's remaining arguments, which, distilled, suggest that Judge Epstein incorrectly cited to New Jersey court rules or misinterpreted or failed to apply the law, are equally unavailing. The New Jersey Supreme Court has made clear that challenging an Arbitrator's Decision on the basis of mistake of law lacks merit. The *Tretina* decision overruled *Perini Corp. v. Greate Bay Hotel*

& Casino, Inc., 129 N.J. 479 (1992), which had allowed judicial intervention for gross errors of law by an arbitrator. *See also Rock Work, Inc. v. Pulaski Const. Co., Inc.,* 396 N.J. Super. 344, 354 (App. Div. 2007) (arbitrators have no obligation to follow principles of law which would govern an action in a court of law). Thus, even if, *arguendo*, Judge Epstein committed a mistake of law – which he did not – such a mistake of law would provide no basis to vacate his Arbitration Decision. *See, e.g., Empire Fire & Marine Ins. Co. v. GSA Ins. Co.,* 354 N.J. Super. 415, 421 (App. Div. 2002); *Cap City Prods. Co., Inc. v. Louriero*, 332 N.J. Super. 499, 504 (App. Div. 2000).

Under New Jersey law, an arbitrator's purported mistake of law does not constitute "undue means" within the meaning of the Act. Rather, a Court may not reverse an arbitrator "for mere errors of New Jersey law" unless the parties' agreement expressly "expand[ed] the scope of judicial review." *Tretina*, 135 N.J. at 358. (*quoting Perini*, 129 N.J. at 549 (Wilentz, C.J., *concurring*)). The Act specifically addresses this by providing that the parties may "expand[] the scope of judicial review of an award by expressly providing for such expansion. *See* N.J.S.A. 2A:23 B-4(e). This language was included in the Act purposely to incorporate the principles enunciated in *Tretina*. *Compare Hogoboom v. Hogoboom*, 393 N.J. Super. 509, 515 (App. Div. 2007) (the parties' arbitration agreement expressly provided that New Jersey substantive law governed all

issues, that the arbitrator's decision can be appealed on the same basis as an Order or Judgment of the Superior Court and that the arbitration award was final except to the extent inconsistent with New Jersey law). The Arbitration Agreement here provided for no such expansions in the scope of review of Judge Epstein's decision.

Likewise, the Federal Arbitration Act ("FAA") does not contain a provision allowing an arbitration award to be challenged for an error of law. FAA §10(a) sets forth four statutory grounds for vacating an arbitration award: (1) the award was procured by corruption, fraud or undue means; (2) evident partiality or corruption of the arbitrators; (3) the arbitrators were guilty of prejudicial misconduct during the course of the hearing; and (4) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. Pursuant to the FAA, 9 U.S.C. § 1, et seq., an arbitration award may be vacated only on the grounds prescribed in § 10, and may only be modified or corrected on the grounds listed in § 11. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 572, 582 (2008). These statutory grounds are exclusive. *Id.* at 584. Since *Hall Street*, New Jersey District courts have since been dismissive of "manifest disregard of the law arguments." *See Indep. Lab'y Emps.' Union, Inc. v. ExxonMobil Rsch. & Eng'r Co.*, 2019 WL 3416897, at *14 (D.N.J. July 29,

2019), *appeal filed*, No. 18-10835 (3d Cir. Sept. 4, 2019) (finding that "manifest disregard of the law" is "no longer an independent basis for vacating an arbitration award but is instead merely a judicial shorthand for the enumerated justifications for vacatur in FAA § 10(a)"); *Andorra Servs. Inc. v. M/T EOS*, 2008 WL 4960449, at *2 (D.N.J. Nov. 19, 2008) (holding that "[s]ince the Supreme Court has recently held that FAA §§ 9-11 provide the exclusive grounds for expedited vacatur and modification . . . the Court limits its review to those statutory grounds") (internal citations and quotation marks omitted).

The courts' rationale is clear. For example, here, even though Appellant claims that Judge Epstein "manifestly disregarded the law," he is really complaining of legal error. *Cf. Smith v. Drivehere.Com, Inc.*, CIVIL ACTION No. 13-1170, at *4 (E.D. Pa. Oct. 7, 2014) ("Although Smith casts her ground for vacatur as manifest disregard of the law, she is actually complaining of legal error. She challenges the arbitrator's rationale for her decision. She complains that the arbitrator failed to decide her UTPCPL claim and failed to distinguish between a vehicle lease and installment sale when analyzing the evidence. She points to nothing in the record to establish that the arbitrator deliberately disregarded what she knew to be the law when she determined that the transaction was a lease and not a sale."). Legal error is not grounds for vacatur.

Accordingly, for all of the reasons set forth above, even if Judge Epstein made legal errors – which he did not – such legal errors are not grounds for the vacatur of his Arbitration Decision, which, as described in greater detail below, correctly dismissed Appellant's LAD claims after over ten months of passive inaction.

II. JUDGE EPSTEIN CORRECTLY DETERMINED THAT APPELLANT'S LAD CLAIMS ARE BARRED BY LAD'S TWO-YEAR STATUTE OF LIMITATIONS. (PA110-113; 1T 34:15-24; 1T 36:12-25; 37:8-19).

Furthermore, the trial court's decision should be affirmed because Judge Epstein's reasoning in his arbitration decision is unassailable. Judge Epstein correctly determined that Appellant commenced this arbitration well beyond the two-year statute of limitations for LAD claims, and that his Complaint must be dismissed with prejudice. (Pa74, pp. 6-7). Noting that "Respondent [the Hospital] is not seeking dismissal of Claimant's [Shefton's] Complaint based on Claimant's failure to adequately plead his case, but rather on the basis of the statute of limitations[,]" Judge Epstein observed that the statute of limitations must be enforced. (Pa74, p. 7).

Statutes of limitations "are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence." *Zaccardi v. Becker*, 88 N.J. 245, 256 (1982). LAD claims are

subject to a two-year statute of limitations. *Alexander v. Seton Hall Univ.*, 204 N.J. 219, 228 (2010) (citing N.J.S.A. 2A:14-2(a)).

According to Appellant's Complaint, he was terminated on May 29, 2019. Therefore, his LAD claims accrued on or before May 29, 2021. *See Alexander*, 204 N.J. at 228 ("Discriminatory termination . . . two-year statute of limitations period commences on the day [it] occur[red]." (alteration added)). Appellant did not file an arbitration demand, ever, despite acknowledging that he was aware of the statute of limitations. (Pa74, p. 5; Da31, 33, 35). Following this Court's Order dismissing his Complaint, Appellant did nothing for approximately ten (10) months, only emerging to file his ill-conceived Motion to Reinstate, which was correctly denied and not the subject of this appeal. (Pa72; Pa74, p. 7).

The issue herein is not a matter of first impression for the Appellate Division. The procedural history and facts of the case at bar mirror those of *Russell v. HCL America, Inc.*, No. A-4354-17T2 (App. Div. July 5, 2019) (slip op. at 2-3) (affirming trial court decision to confirm arbitration award dismissing plaintiff's complaint because the statute of limitations had passed). There, Russell's claims accrued on April 3, 2015. Russell stipulated to the dismissal of her August 4, 2015 complaint in favor of arbitration in December 2015, but failed to initiate arbitration under the false assumption that it was incumbent

upon defense counsel to initiate arbitration. *Id.* at 2 ("The arbitration was not self-initiating. Soon after the dismissal without prejudice, defense counsel wrote to plaintiff's counsel, stating, 'I assume you will now initiate the arbitration proceeding with AAA.' However, plaintiff's counsel did nothing until May 2, 2017, when he inquired about the status of the matter. Defense counsel responded that plaintiff was obliged to initiate the arbitration, but had not. Only thereafter, plaintiff filed a demand for arbitration with AAA on June 8, 2017."). Here, as Judge Epstein recognized in his reasoned opinion, the facts are even more egregious: even after Appellant was directed to arbitration by Judge Passamano after his futile Motion to Reinstate, Appellant *still* did nothing.

A. Judge Epstein Correctly Determined that Appellant Failed to Commence Arbitration Within the Statute of Limitations. (Pa74; 1T 34:15-24; 37:8-19).

In finding that Appellant was obligated to act in a timely manner to pursue arbitration, Judge Epstein correctly observed that "[i]t is elementary that a dismissal without prejudice adjudicates nothing and does not constitute a bar to re-institution of the action, *subject to the constraint imposed by the statute of limitations*." (*Id.*, p. 7) (*citing O'Loughlin v. Nat'l Comm. Bank*, 338 N.J. Super. 592, 603-04 (App. Div. 2001) (emphasis added) (citation omitted)); *see also Bank of Am. v. R.H. Surgent, LLC*, No. A-5423-18 (App. Div. Aug. 31, 2022) (slip op. at 17 n.6).

Judge Epstein's reasoning was sound: while a dismissal "without prejudice" does not bar a subsequent suit, the "defendant in the second suit remains free to assert a statute of limitations defense." *See Czepas v. Schenk*, 362 N.J. Super. 216, 228 (App. Div. 2003) (citations omitted); *see also J. Roberts & Son, Inc. v. Hillcrest Memorial Co.*, 363 N.J. Super. 485, 490-91 (App. Div. 2003) ("a 'subsequent complaint alleging the same cause of action will not be barred simply by reason of its prior dismissal. . . . However, the defendant in the second suit may assert, and a plaintiff may be subject to, the defense of the statute of limitations based upon the filing date of the second complaint.'").

Moreover, "'[a] statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice,' as 'the original complaint is treated as if it never existed.'" *Brennan v. Kulick*, 407 F.3d 603, 606 (3d Cir. 2005) (citation omitted). In other words, "the dismissal of a complaint without prejudice after the statute of limitations has run forecloses the plaintiff's ability to remedy the deficiency underlying the dismissal and refile the complaint." *Id.*; *see also Hagan v. Katz Communications, Inc.*, 200 F. Supp. 3d 435, 441 (S.D.N.Y. 2016) (holding that dismissal of civil action without prejudice in favor of arbitration does not toll statute of limitations).

Here, Judge Epstein observed that the statute of limitations for Appellant's LAD claims expired on May 29, 2021, two years after his termination. (Pa74, p. 7). Appellant seeks to litigate incredibly stale claims, almost four years after his termination and almost two years after the statute of limitations expired. However, Appellant never commenced arbitration prior to the expiration of the statute of limitations. (Da31, 33, 35). As Judge Epstein explained: "All Claimant had to do was to send JAMS the contact information for all parties together with evidence that a Demand for Arbitration was served on all parties in order for the arbitration to have been deemed, 'commenced'. While the statute of limitations may be flexible when a claim is properly filed in an incorrect venue, litigants cannot sit on their hands for an indefinite period of time. Plaintiffs must rather exercise due diligence in refiling in the proper venue." (Pa74, p. 7).

B. Judge Epstein Correctly Determined Equitable Tolling Did Not Apply to this Case. (Pa74; 1T 36:12-25; 37:8-19).

Contrary to Appellant's claims that Judge Epstein ignored the concept of equitable tolling, or the fact that equitable tolling is rarely applied (*see infra*), even assuming *arguendo* that the filing of the state court action tolled the statute of limitations, the arbitration is still time-barred because the limitation period resumed upon dismissal of Appellant's Complaint and he failed to serve and file

a demand for arbitration within the time remaining in the statute of limitations (four days).

A limitations period may be equitably tolled if a plaintiff has timely asserted his rights mistakenly in the wrong forum. *Binder v. Price Waterhouse & Co., L.L.P.*, 393 N.J. Super. 304, 312 (App. Div. 2007) (citing *Freeman v. State*, 347 N.J. Super. 11, 31 (App. Div.), *certif. denied*, 172 N.J. 178 (2002)). However, "[a]bsent a showing of intentional inducement or trickery by a defendant, the doctrine of equitable tolling should be applied sparingly and only in the rare situation." *Freeman*, 347 N.J. Super. at 31 (citing *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998)). Critically, equitable tolling "requires plaintiffs to 'diligently pursue their claims' because although it 'affords relief from inflexible, harsh or unfair application of a statute of limitations,' [it] does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." *Binder*, 393 N.J. Super. at 313.

In applying this doctrine, the Appellate Division has consistently held that a plaintiff's claims are time-barred where the plaintiff delayed in refiling the case after dismissal of an earlier, timely-filed action. *See, e.g. Schmidt v. Celgene Corp.*, 425 N.J. Super. 600, 614-15 (App. Div. 2012) (no equitable tolling where plaintiff initially filed a timely claim in Texas because his "delay

of nearly six months between [the dismissal of that claim] and the filing of the New Jersey complaint cannot be viewed as consistent with diligent pursuit of a remedy."); *Nativo v. Grand Union Co.*, 315 N.J. Super. 185, 188-89 (App. Div. 1998) (holding equitable tolling doctrine did not apply where plaintiff had six weeks remaining in the statute of limitations at the time a bankruptcy court stay on his personal injury claim was lifted, but plaintiff filed a state court action one week after the limitation period expired).

For example, in *Binder*, the Appellate Division held that the equitable tolling doctrine did not apply because plaintiff waited eight months after dismissal of a federal action (on jurisdictional grounds) to file a state court action, thus demonstrating that plaintiff did not use "reasonable insight and diligence" in pursuing his claims. 393 N.J. Super. at 311-14. Even though the original federal action had been timely filed, and the pendency of that action "suspended the running of the statute of limitations for purposes of an ensuing state court action," *id.* at 310, the eight-month delay in refiling the case in state court after the federal court dismissal was viewed as a lack of reasonable diligence. *Id.* at 311-14; *see also Hagan*, 200 F. Supp. 3d at 441 (no equitable tolling where plaintiff's complaint was filed with twelve days left in statute of limitations period, dismissed for arbitration on June 25, 2013, and demand for arbitration was served on August 1, 2013).

Here, Appellant timely filed the state court action with four-days remaining on the statute of limitations. However, once the Court dismissed his state court action on October 22, 2021, the clock on the statute of limitations began to run once again, leaving Appellant with four days to file and serve his demand for arbitration. He never did so. Instead, counsel for the Hospital contacted Judge Epstein on November 3, 2022 for a private arbitration, which is over one year from the time the state court action was dismissed. Appellant acted with zero diligence in initiating arbitration since his matter was dismissed. Put simply, "attorney error, miscalculation, inadequate research or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." *Binder*, 393 N.J. Super. at 314 (affirming dismissal of complaint and denying application of equitable tolling where "'plaintiff's inaction and extraordinary delay' justified the court's judgment." (citation omitted)).

Appellant's present claims that counsel for the Hospital acted unfairly are of meritless as well. It is well-established in American jurisprudence that the Hospital's attorneys are not obligated to assist Appellant in litigating a claim against the Hospital. "Defendant was under no duty to complainant to call her attention to the statute of limitations." *Hawkins v. Public Service, c., Transport*, 137 N.J. Eq. 183, 184 (1945). Moreover, "silence" by the Hospital is not

sufficient to demonstrate "trickery" for purposes of equitable tolling. *See R.A.C. v. P.J.S*, 192 N.J. 81, 103 (2007) (holding "silence" does not demonstrate "overt trickery" or "active deception" to warrant equitable tolling); *see also Freeman v. State*, 347 N.J. Super. 11, 32 (App. Div. 2002) (no equitable tolling where "[t]here is simply no factual allegation which bespeaks the kind of trickery or misconduct that would justify the application of equitable tolling.").

By contrast, an attorney must zealously advocate for their client – they have no duty to advocate for their client's adversary. *N.J. Div. of Youth &Family Servs. v. Robert M.*, 347 N.J. Super. 44, 70 (App. Div. 2002). Here, Respondents and their counsel did not engage in any underhanded tactics, trick the Appellant or his counsel, or lead them to believe that the statute of limitations had not expired by engaging in three years of discovery, as was the case in the *Price* case cited to by Appellant. As Judge Epstein observed in distinguishing *Price* from the present case, "[n]or can Claimant show that Respondent engaged in any misconduct or attempted to trick or mislead the Claimant. Claimant simply failed to prosecute his case within the required time restriction. While equitable tolling would be an appropriate solution in some cases, the amount of time which has passed during which Plaintiff took no action to move forward with arbitration has foreclosed that option." (Pa74, p. 8).

III. APPELLANT IMPROPERLY AND BELATEDLY SEEKS APPEAL OF THE OCTOBER 22, 2021 ORDER DISMISSING HIS COMPLAINT AND DIRECTING HIM TO PURSUE ARBITRATION. (1T 31:25 – 32:8; 1T 32:9-21)

Appellant also improperly seeks appeal of the trial court's on October 22, 2021 Order that dismissed Appellant's Complaint and directed him to "pursue his claims in arbitration" on Appeal, when the time to seek judicial review of that order has expired years ago. (Da1). It is well-settled that "an order denying or granting a motion to enforce an arbitration agreement is not 'an interlocutory order [which] may always be reconsidered, on good cause shown and in the interests of justice, prior to entry of final judgment.'" *Hayes v. Jeep*, 453 N.J. Super. 309, 311 (App. Div. 2018) (citing *Akhtar v. JDN Properties at Florham Park*, 439 N.J. Super. 391, 399–400 (App. Div.), *certif. denied*, 221 N.J. 566 (2015)).

In *Hayes*, the Hon. Jose L. Fuentes, P.J.A.D. explained that pursuant to Rule 2:2–3(a)(3), "appeals may be taken to the Appellate Division as of right ... from final judgments of the Superior Court trial divisions[.]" The rule also provides, "any order either compelling arbitration, whether the action is dismissed or stayed, or denying arbitration shall also be deemed a final judgment of the court for appeal purposes." *R.* 2:2–3(a)(3). Furthermore, our Supreme Court made clear in *GMAC v. Pitella*, that "all orders compelling and denying arbitration shall be deemed final for purposes of appeal, regardless of whether

such orders dispose of all issues and all parties, and the time for appeal therefrom starts from the date of the entry of that order." 205 N.J. 572, 587 (2011). Indeed, to dispel any lingering doubts about the need to seek timely appellate review of such an order, the Court also included the following admonition: "Because the order shall be deemed final, a timely appeal on the issue must be taken then or not at all." *Id.* at 586. Here, Appellant failed to timely file an appeal of the October 22, 2021 Order and he should not be permitted to circumvent our Court Rules by deliberately excluding the Order from his Notice of Appeal. (Da1).

Even if his appeal had been timely filed with 45 days of October 22, 2021, Appellant's claim that the Arbitration Agreement fails to contain necessary language is wrong. In all capital letters, right above the parties' signature lines, the Arbitration Agreement sets forth: "BY AGREEING TO THIS BINDING MUTUAL ARBITRATION PROVISION, BOTH YOU AND THE COMPANY GIVE UP ALL RIGHTS TO A TRIAL BY JURY." (Pa119). Moreover, Appellant cannot argue that he did not understand the Arbitration Agreement. Right below the waiver of jury trial language, the Arbitration Agreement states: "BY SIGNING BELOW, I CONFIRM THAT I HAVE READ, UNDERSTAND AND AGREE TO THIS ARBITRATION AGREEMENT." (Pa119). Appellant attested that he read, understood, and agreed to the Arbitration Agreement – he cannot now escape its terms by claiming that he did not understand it. *Sullivan*

v. Max Spann Real Estate & Auction Co., 465 N.J. Super. 243, 260-61 (App. Div. 2020) (internal citation omitted) ("one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that the party did not read or understand them.").

IV. N.J.S.A 10:5-12.7 OF THE NEW JERSEY LAW AGAINST DISCRIMINATION DOES NOT PROHIBIT THE ARBITRATION OF NJLAD CLAIMS. (NOT RAISED BELOW).

In his brief, Appellant also suggests that N.J.S.A. 10:5-12.7, an amendment to the NJLAD which was signed into law on March 18, 2019, serves as a blanket ban to arbitration agreements which deal claims arising under the LAD. (Appellant's Brief, p. 24). Appellant further argues that because N.J.S.A. 10:5-12.7 was intended to apply prospectively, it should have been considered by the trial court when it dismissed Appellant's Complaint on October 22, 2021 because the Complaint was filed on May 25, 2021.[5] (Appellant's Brief, p. 26).

Initially, as discussed in Respondents' preceding point, Appellant has not noticed the trial court's October 22, 2021 Order as a subject of his appeal and more importantly, Appellant is out of time to appeal the court's October 22, 2021 Order. (Da1). The only orders on are the trial court's August 25, 2023

[5] Appellant began working at the Hospital in 2012 and entered into the Mutual Agreement to Arbitrate on February 12, 2016, well before March 18, 2019. (Pa119; Pa120, ¶ 2).

Orders Denying Vacatur and Confirming Judge Epstein's Arbitration Award. (Da1, Pa110-113). This procedural defect alone is fatal to Appellant's argument and Appellant's attempt at an end-run around his failure to appeal the October 22, 2021 Order by including these arguments in his brief without noticing the Order should not be permitted.

Notwithstanding the above, Appellant's reliance on the amendment is misleading because he knew – or should have known – of N.J.S.A. 10:5-12.7 at the time he filed his Complaint, but made no attempts to raise it then – likely because Appellant was aware that numerous courts have since determined that the provision is preempted. Indeed, shortly after N.J.S.A. 10:5-12.7 took effect, the New Jersey Supreme Court granted a motion to compel arbitration despite alleged NJLAD violations. *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 60 (2020). Just months before Appellant filed his Complaint on May 25, 2021, the United States District Court barred the State of New Jersey from enforcing N.J.S.A. 10:5-12.7, finding that the provision violated the Supremacy Clause, holding that the FAA preempts N.J.S.A 10:5-12.7, and permanently enjoining New Jersey from enforcing the provision to invalidate arbitration agreements. *N.J. Civ. Justice Inst. v. Grewal*, No. 19-17518, 2021 WL 1138144, at *17 (D.N.J. Mar. 25, 2021). The rationale expressed by the District Court have been echoed by numerous New Jersey courts that have found that the FAA preempts the LAD.

See e.g. Cangiano v. The Doherty Grp., No. A-3082-19 (App. Div. Apr. 8, 2022) (slip op. at 12); *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553, 557 (App. Div. 2022).

Here, the Mutual Agreement to Arbitrate executed by Appellant is governed and enforceable under the FAA. (Pa119). Put simply, even if Appellant had raised these issues in a timely manner – before the trial court when it heard Respondents' initial motion to dismiss and compel arbitration, or perhaps, if Appellant had timely filed an appeal of that October 22, 2021 Order – Appellant's arguments would not have been successful.

CONCLUSION

For the above reasons, Respondent respectfully requests that Appellant's appeal is denied and that the trial court's August 25, 2023 Orders Denying Vacatur and Confirming Judge Epstein's Arbitration Award is affirmed.

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By: */s/ Pierre Chwang*
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Dated: April 3, 2024

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MICHAEL SHEFTON Appellant, v. EAST ORANGE GENERAL HOSPITAL, JIM KIMBERLING, JOHN DOES 1-10, JANE DOES 1-10, ABC CORPORATIONS A THROUGH Z Respondents.	SUPERIOR COURT NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-000188-23 Civil Action **AMENDED APPELLATE REPLY BRIEF** **SAT BELOW:** **HON. RUSSELL PASSAMANO, JSC** **ESSEX COUNTY VICINAGE** **DOCKET NO. ESX-L-4145-21**

LURETHA M. STRIBLING, ESQ.

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RESPONSE TO THE PRELIMINARY STATEMENT

The Respondent repeatedly makes statements regarding the fact that the Complaint and Jury Demand in this matter was filed in the Superior Court of New Jersey four days prior to the statute of limitations running. The Complaint filing in the Superior Court was timely.

The Agreement to Arbitrate was in question when it was presented for the first time in Superior Court when Respondent filed a Motion to Dismiss the Complaint and Compel Arbitration. The Appellant had not seen the document that was presented in the Respondent's application to have the case go to arbitration. Appellant recalled signing one document only which was one page and which described his job title and compensation. This document regarding his job title and compensation was presented to employees after Prospect, Inc. purchased East Orange General Hospital. This same issue came up in the case of Walsh v. Prospect EOGH Inc. where Anita Walsh had filed a Complaint against East Orange General Hospital per the Conscientious Employee Protection Act. Walsh v. Prospect EOGH Inc., Docket No. A-3218-17T2 (Decided November 21, 2018). Walsh was wrongfully discharged. Id. at 1. Defendants filed a motion to compel arbitration in that case and relied on the Mutual Agreement to Arbitrate in making that motion. Id. at 1. Walsh in response stated that the Mutual Agreement was not explained to her, she did not recall signing the Agreement and that the Agreement presented was not

signed by management and as a result it was not enforceable. Id. at 1. The issue of not having the Agreement explained and not recalling signing the Mutual Agreement to Arbitrate is what has been stated by the Appellant. In Walsh, there was a reversal at the Appellate Court as there had been no oral argument in that case. Id. at 2.

The claim that the Appellant refused to go to arbitration is incorrect. After the matter was heard on the Motion to Dismiss the Complaint and Compel Arbitration, this Counsel made contact with Counsel for Respondent and the calls and email were ignored. It was plausible that this failure to respond to the email and calls was done to allow the time frame for going into arbitration to elapse. The Appellant had timely filed the case in Superior Court. Respondents responded when the Appellant filed to have the case reinstated in Superior Court which was opposed. The Court denied this motion and thereafter, discussions did take place with Respondents to arbitrate the matter and there were settlement discussions. The arbitrator, Hon. Marc Epstein, J.S.C. (ret.) allowed Respondents to argue Statute of Limitations and Appellant was deprived of his opportunity to be heard as the dismissal sought by Respondents was granted. The trial court denial of my Motion to Vacate the Arbitrator's Decision should be reversed. The confirmation of the Arbitration Decision granted to Respondents should be vacated. This matter should be remanded to the trial court for adjudication on the merits.

PROCEDURAL HISTORY

The repeat claim that Appellant made no attempt to arbitrate the matter is inaccurate**. (Pa72)** As was noted in the Appellate Brief as well as earlier in this Brief, when the Complaint was dismissed from Superior Court to go to arbitration, contact was made with Counsel for Respondents to get started with the arbitration process and my calls and emails were ignored. **(Pa123)** The Arbitrator noted in his email to which his decision was attached that the Respondent likely intended to argue the defense of statute of limitations once at arbitration. **(Pa74)**

STATEMENT OF FACTS

The repeat claim that the Appellant signed the Mutual Agreement to Arbitrate is not what the Appellant has certified to**. (Pa120)** The Appellant certified that he did not recall signing a document to arbitrate**. (Pa120)** He did recall signing one document when Prospect Inc. purchased East Orange General Hospital**. (Pa120)** The document that Appellant signed was one page in which his job description and salary were documented. **(Pa120)** When Respondents presented the Mutual Agreement to Arbitrate, Appellant did not recognize this document**. (Pa119, Pa120)** This is similar to what Anita Walsh stated in her Complaint as she said that the Agreement was not explained to her, she did not recall signing the Agreement and that the document was not signed by management**. (Pa120)**

LEGAL STANDARD

The Appellate Court reviews the determinations made at the trial court de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013). Per our statute, N.J.S.A. 2A:23B-23 the grounds on which an arbitrator's decision can be vacated or modified are as follows: " it was procured by corruption, fraud, or other undue means; evident corruption, partiality or misconduct by the arbitrator; the arbitrator refused to postpone a hearing or consider evidence to the substantial prejudice of a party; the award exceeded the arbitrator powers; **there was no agreement to arbitrate**; or the arbitration proceeded without notice, to the substantial prejudice of a party." Hogoboom v. Hogoboom (n/k/a Grimsley), 393 N.J. Super. 509, 514 (Decided June 14, 2007). With regard to modification of an award, N.J.S.A. 2A:23B-24 provides three grounds by which to modify an award: an evident mathematical miscalculation or other evident mistake; the award includes a claim not within the scope of the arbitration; or the award is imperfect in a matter of form not affecting the merits." Id. at 514.

The Federal Arbitration Act of 1925 is implicated in this matter per the Mutual Agreement to Arbitrate. The Federal Arbitrations Act of 1925 provides that an arbitration award can be vacated in the following instances: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty

of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made; 9 U.S.C. Section 10(a) and (5) with application of the common law doctrine whereby a court may set aside an arbitration award where there has been a **manifest disregard** of the law. 9 U.S.C. Section III(B).

In the instant matter, the Arbitrator engaged in a manifest disregard of the law. The Arbitrator failed to engage in analysis and application of equitable tolling. When the motion was filed to vacate the Arbitrator's decision, the trial court addressed minimally the manifest disregard of the law of equitable tolling by the Arbitrator and failed to vacate the Arbitrator's decision on this basis.

POINT I. THE ARBITRATOR ENGAGED IN MANIFEST DISREGARD OF THE LAW AND THE TRIAL COURT FAILED TO VACATE THE ARBITRATOR'S DECISION WHERE IT WAS CLEAR THAT EQUITABLE PRINCIPLES WERE IGNORED BY THE ARBITRATOR.

Courts have recognized there is a common law basis for vacating an arbitration award which is done when the award is found to be in "manifest disregard for the law" as initially discussed in Wilko v. Swan, 346 U.S. 427 (1953). The

manifest disregard of the law doctrine does not focus on an arbitrator's misinterpretation of the law, but rather on the disregard of the law. Id. at 427. This occurs when the arbitrator fails to apply the law which the arbitrator is fully aware of which then becomes the subject of review with the potential of vacating the arbitration award. Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991).

In New Jersey, our case law applies equitable principles including the doctrine of Equitable Tolling in cases where there is a claim of expiration of the Statute of Limitations. In Rozek v. Metlife Insurance Company, the Court addressed the issue of expiration of the Statute of Limitations and the doctrine of Equitable Tolling. Rozek v. Metlife Insurance Company, (N.J. Super. 2011). In that case, the Court discussed the application of the doctrine of Equitable Tolling and the Court explained that the "primary purpose of the statute of limitations is to provide defendants a fair opportunity to defend and to prevent plaintiffs from litigating stale claims." Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 524 (2005) (internal quotation marks and citations omitted). Further, the Court has emphasized that in circumstances where the Respondents are on notice of what the claims are and no significant prejudice results, the desire to uphold the statute of limitations recedes. Id. at 524. The New Jersey Supreme Court has ruled that in order to avoid the harsh impact from a mechanical application of the statute of limitations, equitable

principles should be applied and that other facts must be taken into consideration. Id. at 524-525. The equitable principles are equitable tolling, the discovery rule or estoppel. Id. at 524-525. In Price, the Court applied equitable tolling as noted in the Appellate Brief.

In Binder v. Price Waterhouse & Co. LLP, equitable tolling was applied when the initial filing was timely but in the wrong forum. Binder v. Price Waterhouse & Co. LLP, 393 N.J. Super. 304, 312 (App. Div. 2007). In Negron v. Llarena, there was a delay in filing the case in state court for eleven weeks after the federal claims were dismissed and the court excused this delayed filing. Negron v. Llarena, 156 N.J. 296 (1998).

In W. Rac Contracting Corp v. Sapthagirl, the issue of manifest disregard of the law was addressed as it was cited as a basis for vacating the arbitrator's decision. W. Rac Contracting Corp v. Sapthagirl, Docket No. A-2355-20 (Decided March 28, 2022). In that case, the Appellant sought to vacate the arbitrator's decision because the arbitrator misinterpreted and misapplied contract provisions. Id. at 5. In making the case for manifest disregard of the law what must be shown is: that the law that was disregarded is well-defined, explicit and clearly applicable; that the arbitrator understood the law and the legal principle but decided to ignore it. Merrill Lynch Pierce, Fenner & Smith, Inc., 808 F.2d 930, 934(2d Cir. 1986). Manifest disregard

of the law is established where the arbitration award is (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge or group of judges ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact. Zayas v. Bacardi Corp., 524 F.3d 65, 68 (quoting Teamsters Local Union No. 42 v. Supervalu, Inc. 212 F.3d 59, 66 (1st Cir. 2000). In W. Rac Contr. Corp. it was claimed that the arbitrator misinterpreted contract provisions and it was found that this was not a basis for vacating the arbitrator's decision. Id. at 5.

In the instant matter, the Arbitrator recognized equitable principles and the doctrine of Equitable Tolling and addressed Equitable Tolling at oral argument on the Motion to Dismiss the Arbitration filed by Respondents. The Arbitrator declined to apply Equitable Tolling inaccurately claiming that there had been no diligence by the Appellant in seeking arbitration which was inconsistent with the Brief and this writing. Judges of the Superior Court would have applied Equitable Tolling.

It is on those two bases which are the Appellant's certification that he did not recall signing the Mutual Agreement to Arbitrate and the manifest disregard of the law of Equitable Tolling by the Arbitrator and the trial court that it is requested that the Appellate Court reverse the decisions of the trial court which denied Appellant's Motion to Vacate the Arbitrator's Decision and Confirmed the Arbitrator's Decision.

POINT II. THE COMPLAINT FILED IN THE SUPERIOR COURT WAS TIMELY FILED AND WHEN ARBITRATION WAS ORDERED, THE COMPLAINT BEFORE THE ARBITRATOR SHOULD HAVE BEEN CONSIDERED TO BE TIMELY.

The Complaint was filed in Superior Court on May 25, 2021. The two year time period would run on May 29, 2021. The trial court transferred a timely filed Complaint to Arbitration. The Respondents ignored calls and email regarding moving forward with arbitration and the Appellant then filed a Motion to Reinstate the Complaint to Active Status. At this point, there was a response from Respondents who opposed the Motion to Reinstate the Complaint. The trial court denied the Motion to Reinstate the Complaint to Active Status and again said that the matter had to go to arbitration. This issue is identical to the matter of ASHI-GTO Associates v. Irvington Pediatrics where the Complaint was timely filed and was dismissed and sent to arbitration as there was an agreement to arbitrate disputes. ASHI-GTO Associates v. Irvington Pediatrics, P.A., 414 N.J. Super. 351 (App. Div. 2010). In that case, the defendant objected to the arbitrator because of his race, walked out of the arbitration and refused arbitration of some of the issues. Id. at 356-357. Reinstatement at the Superior Court was sought and the matter was reinstated and it was noted that reinstatement was left to the court's discretion. Id. at 359. It was decided in that case that the statute of limitations was not a bar because with

reinstatement the case assumed its original status in the Superior Court prior to the dismissal. Id. at 359.

In Barron v. Gersten, the statute of limitations was addressed with bases established for application of equitable tolling and reasons for applying equitable tolling were noted: (1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his or her rights; or (3) if the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). In this case, the matter was filed in the Superior Court which was deemed to be the proper place to file the Complaint. It was at the time that the Respondents filed the Motion to Compel Arbitration that it was learned that there existed an arbitration agreement and that matter should have been filed for arbitration. The filing in the wrong forum should have resulted in Equitable Tolling being applied to this case.

In Antonucci v. Curvature Newco, Inc. it was noted that the trial court had entered an order which dismissed the Complaint with prejudice and ordered arbitration. Antonucci v. Curvature Newco, Inc., 470 N.J. Super 553, 557 (Decided February 15, 2022). The Appellate Court remanded the matter to the trial court for a new Order which would indicate that the matter was stayed by the trial court pending the arbitration outcome. This step would have resulted in the filing in the

trial court being deemed inactive. If the trial court had stayed the instant matter rather than issuance of a dismissal without prejudice, there would have been no issue with regard to the statute of limitations.

It is requested that the Appellate Court apply the ruling in ASHI-GTO Associates noted above and reverse the arbitrator's decision, vacate the confirmation of the arbitration decision and reinstate this case to the Superior Court as was done in ASHI-GTO Associates.

POINT III. THE APPELLANT ARGUED BEFORE THE TRIAL COURT THE ISSUES OF CONTRACT LAW IN ANALYSIS OF THE ARBITRATION AGREEMENT AND THAT MATTER IS A PART OF THE APPEAL AS WELL BECAUSE IT SETS FORTH A BASIS FOR REVERSAL OF THE TRIAL COURT'S DECISIONS NOTED IN BOTH ORDERS BEFORE THE APPELLATE COURT.

The Mutual Agreement to Arbitrate was not written in simple language as is required, the Appellant did not understand what arbitration was and the Appellant certified that had arbitration been explained to him he would not have signed for arbitration as his preference was to go to Court. The missing wording in the Mutual Agreement to Arbitrate was that the person signing knowingly and voluntarily signed the document to go to arbitration. In addition, the wording: **BY AGREEING**

TO THIS BINDING MUTUAL ARBITRATION PROVISION, BOTH YOU AND THE COMPANY GIVE UP ALL RIGHTS TO TRIAL BY JURY is not clear to the average person. The language that would put the average person on notice is wording to the effect of by signing this agreement, your case cannot be filed in court. Such clear language is absent from the document that the Appellant does not even recall signing as was the case with Anita Walsh, another employee from East Orange General Hospital who filed her Complaint in Superior Court and then was presented with the arbitration agreement that she did not recall signing which required that she go to arbitration.

It is requested that the contract principles be applied to this Appeal with a finding that there was no meeting of the minds, that the Mutual Agreement to Arbitrate was unclear that Appellant did not recall signing this document and that the agreement was deficient as it lacked specific language required to be in a contract requiring arbitration. It is requested that the Appellate Court vacate the arbitrator's decision which dismissed the Complaint and vacate the confirmation of the arbitrator's decision with a return of this matter to the Superior Court to be litigated and decided on the merits.

POINT IV. THE EXPANSION OF THE NEW JERSEY LAW AGAINST DISCRIMINATION WHICH PROHIBITS CLAIMS OF DISCRIMINATION FROM BEING SENT TO ARBITRATION SHOULD BE APPLIED IN THIS CASE AS A RESULT OF CONTRACT LAW

On March 18, 2019, Governor Phil Murphy signed into law Senate Bill 121 which is often referred to as the MeToo Bill. One of the key components of this law is that it bars provisions which are at times included in employment contracts which waive statutory rights and remedies and also bars agreements which conceal details which involve discrimination claims. Senate Bill 121. The tenets of this law are spelled out in Appellant's Brief.

The pre-emption of NJLAD per the Federal Arbitration Act is problematic as it requires arbitration of discrimination when that is inconsistent with the law in the State of New Jersey. The FAA however recognizes that arbitration agreements must be analyzed per general contract principles. Settle v. Securitas Sec. Servs. United States, 2023 N.J. Super. Unpub. LEXIS 537. A court can invalidate an arbitration agreement or clause on the grounds that exist in law or in equity which allow revocation of a contract. Id. at 8. Arbitration cannot be compelled when there is absence of an agreement to arbitrate. Id. at 9. What the court is required to do is make the following determinations: (1) whether a valid arbitration agreement exists;

and (2) whether the dispute falls within the scope of the agreement. Martindale v. Sandvik, Inc. 173 N.J. 76, 83(2002).

In this matter, the Appellant certified that he did not recall signing the Mutual Agreement to Arbitrate, that he did not meet with Norrissa Ferguson, that arbitration was not discussed with him and that had it been discussed with him, he would not have signed the agreement as his preference would be to go to court. There was no valid agreement to arbitrate per the certification of the Appellant. The dispute falls under the New Jersey Law Against Discrimination which is not specifically noted in the Mutual Agreement to arbitrate. Thus, despite the fact that there is potential for FAA pre-emption, contract law requires that the instant matter be reversed and remanded to the trial court because there was no valid agreement to arbitrate and because there was a failure to identify the New Jersey Law Against Discrimination within the document, the Mutual Agreement to Arbitrate.

It was error for the trial court to dismiss the Complaint filed under the New Jersey Law Against Discrimination and then compel arbitration. It is requested that the Appellate Court reverse and remand this matter to the trial court for litigation in that forum. It is requested that the arbitrator's decision and the order that affirmed the arbitration decision be vacated. Appellant should be allowed to have the case heard on the merits in the Superior Court of New Jersey.

CONCLUSION

For all of the reasons set forth in this Reply Brief, Appellant's Brief, the Exhibits, case law and Court Rules, it is requested the Appellate Court reverse and remand this matter to the trial court for litigation in that forum. It is requested that the arbitrator's decision which dismissed the Complaint be vacated. It is requested that the trial court decision which failed to vacate the arbitrator's decision be vacated. It is further requested that the trial court order that confirmed the arbitration decision be vacated.

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