THE ESTATE OF JOAN BERKELEY, DECEASED,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000806-23T2
Plaintiff-Appellant	:	
vs.	:	ON APPEAL FROM ORDERS DATED DATED NOVEMBER 30, 2018 AND JANUARY 11, 2019 ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY (MID-L-778-17)
AMC ENTERTAINMENT HOLDINGS, AMC THEATRES, AMC LOEWS, AMC LOEWS BRICK PLAZA 10, JOHN DOES 1-10,	:	CIVIL ACTION
Defendant-Respondent.	:	SAT BELOW: HON. CARLIA BRADY, J.C.S.

PLAINTIFF-APPELLANT'S MERITS BRIEF

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Dated submitted: April 26, 2024

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(A) The motion judge's order is at Pa293 to Pa294

(B) The motion judge's statement of reasons is at Pa295.

(C) There were no intermediate decisions.

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PROCEDURAL HISTORY

On February 2, 2017, plaintiff Joan Berkeley filed a complaint seeking damages for injuries that she sustained in a fall in the defendant AMC Entertainment Holdings, Inc.'s movie theater in Brick, New Jersey on August 13, 2016. (Pa1 to Pa5) The defendant filed an answer to the complaint on March 27, 2017. (Pa6 to Pa10)

On October 24, 2018, the plaintiff filed a motion to amend her complaint to include a claim for the defendant's failure to preserve the in-house movie theater logs as evidence in support of her claim that there was negligence on the part of the defendant that caused her to fall and injure herself. (Pa11 to Pa120).

The defendant filed opposition to the motion to amend on November 1, 2010. (Pa121 to Pa159)

The plaintiff filed a reply to the defendant's opposition to the motion to amend on November 26, 2018. (Pa160 to Pa184)

On November 30, 2018, the court entered an Order denying the plaintiff's motion to amend. (Pa185 to Pa186)

On December 24, 2018, the plaintiff filed a motion for reconsideration of the Order entered November 30, 2018. (Pa187 to Pa219)

The defendant filed opposition to the motion for reconsideration on January 3, 2019. (Pa220 to Pa227)

The plaintiff filed a reply to the defendant's opposition to the motion for reconsideration on January 7, 2019. (Pa228 to Pa292)

On January 11, 2019, the court entered an Order denying the plaintiff's motion for reconsideration. (Pa293 to Pa295)

The case went to trial before a jury in March 2023, which resulted in a verdict of no cause for the plaintiff. On March 22, 2023, the court entered an Order of Dismissal based on the jury verdict. (Pa296)

On November 27, 2023, the plaintiff filed a notice of appeal with the appellate division for review of the Orders entered November 30, 2018 and January 11, 2019. (Pa297 to Pa305) The plaintiff filed an amended notice of appeal to correct the trial court docket number for the case on December 1, 2023. (Pa306 to Pa315)

The Certification of Transcript Completion and Delivery was filed with the appellate division on November 27, 2023. (Pa316)

On May 16, 2024, the plaintiff filed a second amended notice of appeal to amend the name of the plaintiff from Joan Berkeley to The Estate of Joan Berkeley, Deceased. (Pa317 to Pa321).

STATEMENT OF FACTS

The level of the ceiling lights and the playback of digital content on the movie screen in Auditorium 5 operate in tandem by computer. In reply to the plaintiff's Request for Admissions, AMC admitted that the playback of commercial ads and movie trailers in Auditorium 5 was automatically controlled by the Theater Management System software used by AMC in the AMC theater in Brick, New Jersey on August 13, 2016. AMC also admitted that the dimming of the ceiling lights in Auditorium 5 was automatically controlled by the Theater Management System software used by AMC in its movie theater complex in Brick, New Jersey on August 13, 2016. AMC finally admitted that the brightness of the ceiling lights in Auditorium 5 for the playback of commercial ads and movie trailers in connection with the August 13, 2016, 8:00 p.m., showing of the movie "Star Trek: Beyond" was automatically controlled by the Theater Management System software used by AMC in its movie theater complex in Brick, New Jersey on August 13, 2016. (Pa24 to Pa36)

AMC's answers to the plaintiff's First and Second Sets of Interrogatories confirmed that the Theater Management System software generates various types of logs, including error reports. (Pa37 to Pa43) Supplemental Interrogatory No. 1 (First Set) stated, "Set forth a detailed

description of the substance of all reports or logs automatically created by the Theater Management System software used by AMC in connection with the advertised August 13, 2016, 8:00 p.m., showing of the movie "Star Trek: Beyond" in Theater 5." AMC answered, "TMS was reviewed (emphasis added) by AMC Brick Plaza 10 theatre personnel following Plaintiff's alleged incident and showed that all cues played; TMS does not retain information dating as far back as August 13, 2016." Supplemental Interrogatory No. 24 (Second Set) asked further questions about the logs generated by the Theater Management System software. The AMC response to Supplemental Interrogatory No. 24 was, "...AMC does provide DCIP with logs, however AMC uses different logs than DCIP and is not familiar with the contents of the logs or the codes that are contained within them." (Pa44 to Pa66)

Supplemental Interrogatory No. 6(C) (Second Set) asked for a detailed description of the of any errors in the operation of the Theater Management System detected by the Network Operations Center during the playback of advertisements and movie trailers in Theater 5 in connection with the August 13, 2016, 8:00 p.m., showing of the movie "Star Trek: Beyond" in Theater 5 at the AMC movie theater in Brick, New Jersey. AMC answered, "AMC does not retain alerts/errors/logs from any monitoring systems or the TMS on a specific date and time in 2016 or that far back." (Pa44 to Pa46)

The plaintiff and her son, Charles C. Berkeley, testified at their depositions on April 5, 2018 that the ceiling lights were off and the movie screen was blank when they entered Auditorium 5 and the plaintiff fell and injured herself in Auditorium 5 several minutes prior to 8:00 p.m. on August 13, 2016. (Pa66 to Pa75)

Former AMC employee Kirsten Puff and current AMC manager Brianne Owen testified at their depositions on August 31, 2018 that the ceiling lights in the auditoriums at the AMC theater are sometimes off when they should be on. (Pa87 to Pa92) Ms. Puff testified that this problem would occur about once or twice a month and she attributed the problem to "cues not signaling" or "a lack of cues." (Pa80 to Pa86) Ms. Owen likewise testified that this type of problem involved a "cue issue." Ms. Owen further testified that she determined that the ceiling lights were in working order at the time of the plaintiff's fall by observing the operation of the ceiling lights in Auditorium 5 during the playback of the movie trailers during the next movie in Auditorium 5.

Current AMC employee Hemil Patel, the person responsible for the hands-on operation of the Theater Management System software and hardware at the AMC theater in Brick, New Jersey, testified at his deposition on August 31, 2018 to an array of errors that can occur during the operation of the

Theater Management System software and their adverse impact on the level of the ceiling lights during the playback of digital content on the movie screen. (Pa101 to Pa106) These errors included what he described as "automation errors," "some sort of SPL error," "a show is not playable for – ingesting the trailers," "some sort of disconnect," and "just a connection error."

Current AMC general manager Katherine Higgins testified at her deposition on August 31, 2018 that the records generated by the Theater Management System software are not retained for more than three weeks, after which they self-delete from the system. (Pa107 to Pa112)

The plaintiff's son, Charles C. Berkeley, completed a Guest Incident Report for his mother after she fell and injured herself in Auditorium 5 on August 13, 2016. He wrote in general terms what happened regarding the plaintiff's accident, that the plaintiff would seek medical attention, and that the plaintiff wished to be contacted by the plaintiff's insurance carrier. (Pa93 to Pa94)

AMC employees are required to follow an AMC Operations Incident Reporting Manual for completing an Incident Report. This manual instructs AMC employees not to ask a guest if he or she wants a call from AMC's insurance company or plans on contacting an attorney. (Pa95 to Pa100)

By letter dated September 1, 2016, the plaintiff's former attorney, Peter Spaeth, Esquire, notified AMC that the plaintiff would be asserting a claim against AMC for her injuries resulting from her accident in Auditorium 5 on August 13, 2016. (Pa113 to Pa114) This letter was presumably received by AMC within three weeks of the date of the plaintiff's accident.

LEGAL ARGUMENT

POINT I

WITH REGARD TO THE ORDER ENTERED NOVEMBER 30, 2018, THE COURT ABUSED ITS DISCRETION WHEN IT DENIED THE PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO INCLUDE A CLAIM FOR SPOLIATION OF EVIDENCE (T54:2 TO t57:16)

> 'Rule 4:9-1 requires that motions for leave to amend be granted liberally' and that 'the granting of a motion to file an amended complaint always rests in the court's sound discretion.' (citation omitted) That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would be futile.

Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490 (2005)

AMC had a legal duty to preserve whatever logs it reviewed in making its determination that there were no errors in the operation of the Theater Management System software that automatically control the level of the ceilings lights during the playback of commercials ads, movie trailers, and the movie itself on the movie screen in Auditorium 5 on August 13, 2016, the date on which the plaintiff fell and injured herself in Auditorium 5.

The existence of a legal duty to preserve evidence is a question of law to be determined by the court. Cockerline v. Mendez, 411 N.J. Super. 596, 620 (App. Div. 2009)(citing Manorcare Health Services v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 225 (App. Div. 2001)).

The New Jersey courts have developed a four-part test for determining whether a party has a duty to preserve evidence as follows:

> Such a duty arises when there is pending or likely litigation between two parties, knowledge of this fact by the alleged spoliating party, evidence relevant to the litigation, and the foreseeability that the opposing party would be prejudiced by the destruction or disposal of the evidence.

Id.

First, the Guest Incident Report completed by the plaintiff's son and signed by the plaintiff apprised AMC of the likelihood of litigation. The Guest Incident Report described the plaintiff's accident in general terms, advised that the plaintiff would seek medical attention for her injuries, and requested that the plaintiff be contacted by AMC's insurance carrier. On the other hand, the AMC Operations Incident Reporting Manual for completing an Incident Reports directs AMC employees to refrain from asking an injured guest if he or she wants a call from AMC's insurance company or plans on contacting an attorney, which is intended to decrease the likelihood of litigation.

Second, AMC had knowledge of the likelihood of litigation because the Guest Incident Report was received by AMC on the same date that the plaintiff's accident occurred. In addition, by letter dated September 1, 2016, the plaintiff's former attorney notified AMC that the plaintiff would be asserting a claim against AMC for her injuries sustained less than three weeks

earlier on August 13, 2016. AMC general manager Katherine Higgins provided testimony that the error logs are not kept for longer than three weeks, after which they self-delete from the system.

Third, it was foreseeable that the plaintiff would be prejudiced by the destruction of the logs that AMC reviewed in making its determination that there were no errors in the operation of the Theater Management System software that automatically controlled the level of the ceilings lights during the playback of commercials ads, movie trailers, and the movie itself on the movie screen in Auditorium 5 on August 13, 2016. The defendant was denied the opportunity to examine the logs generated by the Theater Management System software to determine the validity of the AMC findings that there were no errors in the operation of the Theater Management System software that automatically controls the level of the ceiling lights during the playback of digital content on the movie screen.

Although AMC claims that it determined that there were no errors in the operation of the Theater Management System software, AMC also stated in its answer to the plaintiff's Supplemental Interrogatory No. 24 (Second Set) that "AMC does provide DCIP with logs, however AMC uses different logs than DCIP and is not familiar with the contents of the logs or the codes that are

contained within them." This answer casts grave doubt on whether AMC even knows how to interpret its own logs correctly.

Finally, the adequacy and safety of the lighting in Auditorium at the time of the plaintiff's accident in Auditorium 5 is a central issue in this case. The plaintiff and her son observed that the ceiling lights were off when they should have been on at the time of the plaintiff's accident. AMC claims, on the other hand, that the ceiling lights operated properly at the time of the plaintiff's accident. The level of the ceiling lights and the playback of digital content on the screen operate in tandem by computer. Current and former AMC employees testified to the frequency of the ceiling lights being off in the auditoriums when they should be on - once or twice a month prior to the plaintiff's accident. They attributed the failure of the ceiling lights to operate properly to "cues not signaling," "a lack of cues," "cue issues," "automation errors," "some sort of SPL error," "some sort of disconnect," and/or "just a connection error." Such testimony also casts serious doubt on whether, subsequent to the plaintiff's accident, AMC actually determined that there were no errors in the operation of the Theater Management System software that automatically controlled the level of the ceilings lights and the playback of commercials ads, movie trailers, and the movie itself in Auditorium 5 on August 13, 2016.

In short, AMC had a duty to preserve the Theater Management System software logs at issue in this case and AMC breached this duty by not preserving the Theater Management System logs for inspection by the plaintiff, thereby substantially and irreparably interfering with the discovery process.

In Rosenblitt v. Zimmerman, 166 N.J. 391 (2001), the New Jersey Supreme Court addressed a case in which the defendant medical doctor destroyed medical records that were considered critical to the plaintiff's medical malpractice case, the remedies that may be available to the non-spoliating party, and the purpose of such remedies.

> When spoliation occurs, the law has developed a number of civil remedies, the purpose of which is to make whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; to punish the wrongdoer; and to deter others from such conduct.

Id. at 401.

The remedies may include the spoliation inference at trial, discovery sanctions set forth in R. 4:23-4, and a separate tort action for fraudulent concealment. Id. at 401-407.

With regard to the tort action for fraudulent concealment, the Rosenblitt court set forth the elements for such a claim as follows:

(1)That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation;
(2)That the evidence was material to the litigation;
(3)That plaintiff could not reasonably have obtained access to the evidence from another source;
(4)That defendant intentionally withheld evidence with purpose to disrupt the litigation;
(5)That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

Id. at 406-407.

Also with regard to the claim for fraudulent concealment, the Rosenblitt court stated in part:

> In sum, where an adversary has intentionally hidden or destroyed (spoliated) evidence necessary to a party's cause of action and that misdeed is uncovered in time for trial, plaintiff is entitled to a spoliation inference that the missing evidence would be unfavorable to the wrongdoer and may also amend his or her complaint to add a claim for fraudulent concealment.

Id. at 411.

The plaintiff discovered that AMC destroyed evidence critical to her case near the end of the time frame for the completion of discovery in this matter. Based upon the guidance provided by the Rosenblitt court, the plaintiff should be permitted to amend her complaint to include a count for fraudulent concealment even though the discovery end date in this matter is currently November 20, 2018.

POINT II

WITH REGARD TO THE ORDER ENTERED JANUARY 11, 2019, THE COURT ABUSED ITS DISCRETION WHEN IT DENIED THE PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE ORDER ENTERED NOVEMBER 30, 2018, WHICH DENIED THE PLAINTIFF'S MOTION TO INCLUDE A CLAIM FOR SPOLIATION OF EVIDENCE (Pa295)

Rule 4:49-2 states in pertinent part, "The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred."

The court denied the plaintiff's request to amend the complaint to include a count for fraudulent concealment on the basis that it would not survive a motion to dismiss for failure to state a claim. The court stated, "This Court finds that plaintiff proposed an amended Complaint adding what is tantamount to a spoliation Count would not survive a motion to dismiss for failure to state a claim." (T:54:18-21) The court then made various findings of fact gleaned from the parties' certifications in support of its conclusion that the plaintiff's proposed fraudulent concealment count would not survive a motion to dismiss for failure to state a claim.

It is respectfully submitted that it was improper for the court to decide the plaintiff's motion to amend the complaint to include a count for fraudulent concealment as if it were a motion for summary judgment under R. 4:46.

In Interchange State Bank v. Rinaldi, 303 N.J. Super. 239 (App. Div. 1997), the appellate division affirmed the trial court's denial of the defendant's motion for leave to amend his answer to include a counterclaim asserting that the plaintiff violated the anti-tying provisions of the Bank Holding Company Act because the defendant's allegations that plaintiff violated the provisions of the Bank Holding Act were legally insufficient to establish the necessary elements of the claimed cause of action.

Because the appellate division in the Interchange State Bank case did not have a factual record to determine the basis on which the trial court had denied the defendant's motion for leave to amend his answer to include a counterclaim, it decided the issue under R. 4:6-2(e) and made the following remarks in this regard:

> Objection to the filing of an amended complaint on the ground that it fails to state a cause of action should be determined by the same standard applicable to a motion to dismiss under R. 4:6-2(e). *Maxim Sewerage v. Monmouth Ridings, 273 N.J. Super 84, 90 640 A.2d 1215 (Law Div. 1993)* 'This requires treating all the allegations of the pleadings as true, and considering only whether those allegations are legally sufficient to establish the necessary elements of the claimed cause of action.' *Id. at 90, 640 A.2d 1216* (citing *Banks v. Wolk, 918 F.2d 418 3d Cir. 1990))*; see also *Printing Mart Morristown v. Sharp Electronics, 116 N.J. 739, 746, 563 A.2d 31 (1989)*.

Id. at 257.

Rule 4:6-2 states in pertinent part as follows:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6- 3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1. . .If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.

In Printing Mart-Morristown v. Sharp Electronics Corporation, 116 N.J. 739, 746 (1987), the New Jersey Supreme Court set forth the standard applicable to a motion to dismiss under R. 4:6-2(e) as follows:

> In reviewing a complaint dismissed under *Rule 4:6-2(e)* our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. *Rieder v. Department of Transp., 221 N.J.Super. 547, 552 (App.Div.1987)*. However, a reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *DiCristofaro v. Laurel Grove Memorial Park, 43 N.J.Super. 244, 252 (App.Div.1957)*. At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. *Somers Constr. Co. v. Board of Educ., 198 F.Supp.732, 734 D.N.J.1961)*. For purposes of analysis plaintiffs are

> entitled to every reasonable inference of fact. *Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956)*. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

The court in the instant case never reviewed the plaintiff's proposed amended complaint in accordance with the standard set forth in Printing Mart-Morristown case. The court instead considered extraneous information gleaned from the parties' certifications, which effectively converted the plaintiff's motion to amend the complaint to a motion for summary judgment under R. 4:46. In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court outlined the standard for deciding a summary judgment motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party.

In Raverta v. Lake Mohawk Golf Club, No. A-2682-09 (App. Div. July 29, 2011), the appellate division reversed the trial court's dismissal of the plaintiff's complaint because the trial court considered evidence beyond the pleadings and erroneously decided the matter under the Printing Mart standard instead of the Brill standard. The Raverta court also remarked that the defendants failed to provide a statement of material facts required by R. 4:46-

2(a), which alone may be ground for denying a summary judgment motion. See R. 4:46-2(a) ("a motion for summary judgment may be denied without prejudice for failure to file the required statement of material facts.").

In the instant case, the court denied the plaintiff's request to amend her complaint to include a count for fraudulent concealment because it deemed the proposed amendment futile under the facts of the case as gleaned from the parties' certifications, the case of Notte v. Merchants Mutual Insurance Company, 185 N.J. 490 (2006), and the case of Kernan v. One Washington Park Urban Renewal Associates, 154 N.J. 437 (1998). (T:54:9-11) The main issue in the Notte case was whether the plaintiff's proposed amended complaint was time-barred under the applicable statute of limitations but could be saved under R. 4:9-3, the "relation back" rule. The main issue in the Kernan case was nearly the same, that is, whether the plaintiff's proposed amended complaint adding new parties was time-barred under the applicable statute of limitations but could be saved under R. 4:9-3. It is respectfully submitted that the court's reliance on the Notte and Kernan cases was misplaced since there is no statute of limitations problem with the plaintiff's proposed amended complaint. In this regard, it should be noted that in Printing Mart-Morristown v. Sharp Electronic Corporation, 116 N.J. 739, 772 (1987), the New Jersey Supreme Court stated:

> If a complaint must be dismissed after it has been accorded the kind of meticulous and indulgent examination counselled in this opinion, then, barring any other impediment such as a statute of limitations (emphasis added), the dismissal should be without prejudice to a plaintiff's filing of an amended complaint.

The plaintiff contests the court's findings of fact based on information obtained from outside the proposed amended complaint itself in support of the its decision that the proposed amended complaint should not be allowed because it would only be dismissed for failure to state a claim upon which relief can be granted.

The elements of a claim for fraudulent concealment are set forth in Rosenblitt v. Zimmerman, 166 N.J. 391, 406-407 (2001) as follows:

> (1)That defendant in the fraudulent concealment action had a legal obligation todisclose evidence in connection with an existing or pending litigation;
>
> (2)That the evidence was material to the litigation;
>
> (3)That plaintiff could not reasonably have obtained access to the evidence from another source;
>
> (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation;
>
> (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

The fact that the guest incident report "makes no mention of lighting or that the movie trailer failed to play as a factor in plaintiff's fall" is not relevant

to any of the elements of the fraudulent concealment claim. (T55:8-12) Assuming that this fact is relevant, AMC manager Brianne Owen testified at her deposition on August 31, 2018 that the plaintiff and her son informed her that the lighting was factor in the plaintiff's fall when they filled out the guest incident report so that it does not make any difference that there is no mention of lighting in the guest incident report. (Pa87 to Pa92))

The fact that there was no "request to preserve the TMS logs for the 8/13/16 date" is not relevant to any of the elements of the fraudulent concealment claim. (T55:13-14) There is no requirement that the plaintiff make a request that the spoliating party preserve evidence as a condition of making a fraudulent concealment claim. The plaintiff did not have any knowledge of the existence of the "in-house" error logs to ask for them shortly after her accident. AMC stated in its answer to Interrogatory No. 1 of the plaintiff's First Set of Supplemental Interrogatories that it reviewed the "in-house" error logs and determined that there were no errors in the computer operation of the digital cinema. AMC saw fit to review the "in-house" error logs after the plaintiff's accident but then allowed these records to self-delete. The fact that AMC reviewed the "in-house" error logs shortly after the plaintiff's accident put AMC under a duty to preserve this evidence.

There is an issue of fact regarding whether the "in-house" error logs self-deleted after eight days or after three weeks. The court found as fact that the logs self-deleted after eight days based upon the self-serving certification of Trevor Hart, the AMC Director of Technical Operations. (T55:25 – T56:1-2) On the other hand, AMC manager Katherine Higgins testified at her deposition on August 31, 2018 that the logs self-deleted after three weeks. (Pa107 to Pa112) Nevertheless, the court found as fact, "Since Mr. Spaeth's request was not made within eight days of plaintiff's accident there is no merit to plaintiff's argument that AMC destroyed the logs despite Mr. Spaeth's letter." (T56:4-8)

The "playing field" is not "fair and even" as between the plaintiff and AMC because of the plaintiff's lack of access to the "in-house" error logs that were destroyed by AMC. However, the court found as fact that there would be no "undue prejudice" to the plaintiff and that the "playing field is fair and even" as between the parties despite the plaintiff's lack of access to the "in-house" error logs. In this regard, the court stated:

> [P]laintiff's counsel obtained via subpoena from DCIP the security log, performance log, and event log, and if defendant's expert is able to offer an opinion that there were no errors in the playback based on a review of these documents, then plaintiff's expert who didn't review the TSM logs and neither did the defense expert review the TSM logs would be put in the same footing if they reviewed the DCIP, the security log, the performance and event logs, as well. So basically both experts would be put in the same footing because neither of them reviewed the TSM logs,

> and so, therefore, there would be no undue prejudice to the plaintiff because the playing field is fair and even in this regard.

(T56:18-25 – T57:1-6)

The Rosenblitt court set forth that the spoliation inference is intended to level the playing field in cases where evidence has been destroyed as follows:

> Courts use the spoliation inference during the underlying litigation as a method of evening the playing field where evidence has been hidden or destroyed. It essentially allows a jury in the underlying case to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.

Rosenblitt at 401-402.

The Rosenblitt court set forth that the tort of fraudulent concealment serves a different purpose as follows:

> We hold that the tort of fraudulent concealment, as adopted, may be invoked as a remedy for spoliation where those elements exist. Such conduct cannot go undeterred and unpunished and those aggrieved by it should be made whole with compensatory damages and, if the elements of the Punitive Damages Act, N.J.S.A. 2A:15-5.12 are met, punitive damages for intentional wrongdoing.

Id. at 407.

In Tartaglia v. UBS Paine Webber, Inc., 197 N.J. 81, 121 (2007), the New Jersey Supreme Court reiterated that the adverse inference and the tort of fraudulent concealment are "different remedies serving different purposes."

The Tartaglia case addressed the procedure that applies when there is spoliation of evidence as follows:

> If the spoliation is discovered while the underlying litigation is ongoing, the adverse inference may be invoked and the party is permitted to amend the complaint to add a count for fraudulent concealment, but the counts must then be bifurcated. The same jury would first try the underlying claim and then, after returning a verdict, would hear the fraudulent concealment claim.

Id. at 118-119.

In addition, the Tartaglia court noted that the adverse inference and the tort of fraudulent concealment remedies may be cumulative as follows:

> There is no inherent contradiction between permitting a plaintiff to try the case in chief, absent the missing evidence, but with the benefit of an adverse inference charge, and permitting the same plaintiff to proceed as well on the substance of the intentional spoliation claims in a bifurcated proceeding: The evils to be remedied are not the same and, as long as the matter is carefully charged to the jury, the awards of damages will not overlap.

Id. at 121.

The "in-house" error logs destroyed by AMC are substantially different from TMS logs stored with DCIP. The AMC employees testified to the various types of errors that are recorded by the "in-house" error logs. The TMS logs stored by DCIP do not record the same types of errors. AMC did not have to retain an expert to review its "in-house" error logs. Both AMC and the plaintiff have had to retain experts for the purpose of reviewing the

DCIP logs. Paragraph 6 of Count Three of the proposed amended complaint alleges that the plaintiff had to expend monies on a software expert to review the DCIP logs for errors in the operation of the TMS software and hardware. (Pa115 to Pa120)

The plaintiff's expenditure of funds on a software expert is compensable as damages under the fraudulent concealment claim. In this regard, the Tartaglia court stated:

> [W]hether a plaintiff succeeds on the claim in the original litigation or not, there are damages that might be recoverable, including punitive damages, in the event that the plaintiff can demonstrate that the loss of the evidence caused that plaintiff to incur costs or expenses in the litigation that would not otherwise have been incurred. Thus, for example, a plaintiff who is deprived of evidence due to a defendant's spoliation and is therefore required to hire additional experts or to develop and rely on alternate proofs might well sustain damages separate and apart from those incurred as a result of the underlying cause of action.

Id. at 121-122.

In summary, it is respectfully submitted that the court made a series of errors in refusing to grant the plaintiff leave to file an amended complaint to add a count for fraudulent concealment. First, the court decided the plaintiff's motion to amend the complaint as if it were a motion for summary judgment under R. 4:46 instead of R. 4:6-2(e). Second, the court relied upon the inapposite cases of Notte and Kernan in support of its decision on the plaintiff's motion. These two cases addressed whether the plaintiffs' proposed

amended complaints were time-barred under the relevant statutes of limitation and whether the proposed amended complaints should be permitted under the "relation back" doctrine under R. 4:9-3. Third, the court found facts in support of its decision that are irrelevant to the plaintiff's fraudulent concealment claim. In addition, the court found facts in support of its decision that are disputed by the plaintiff. Finally, the court failed to appreciate that the plaintiff is not asserting a fraudulent concealment claim as a means of leveling the playing field between herself and AMC. The tort of fraudulent concealment is intended to make the plaintiff whole with compensatory damages and punitive damages for intentional wrongdoing on the part of AMC.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the appellate division reverse the trial court's Order entered November 30, 2018, which denied the plaintiff's motion to amend the complaint to include a claim for spoliation of evidence.

It is further respectfully requested that the appellate division reverse the trial court's Order entered January 11, 2019, which denied the plaintiff's motion for reconsideration of the Order dated November 30, 2018.

Dated: 4/26/2024

Respectfully submitted,

/s/ Charles C. Berkeley

CHARLES C. BERKELEY

Superior Court of New Jersey

Appellate Division

Docket No. A-000806-23T2

THE ESTATE OF JOAN BERKELEY, Deceased, *Plaintiff-Appellant,* vs. AMC ENTERTAINMENT HOLDINGS, AMC THEATRES, AMC LOEWS, AMC LOEWS BRICK PLAZA 10 and JOHN DOES 1-10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO. MID-L-778-17 Sat Below: HON. CARLIA BRADY, J.S.C.

BRIEF AND APPENDIX FOR DEFENDANTS-RESPONDENTS

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RESPONDENT'S PRELIMINARY STATEMENT

After multiple motions that include a motion for a new trial, it is still readily apparent Plaintiff does not understand the technical aspects of the digital cinema software at issue and there is no merit to any claim that AMC spoliated evidence never mind that AMC committed fraud in an attempt to conceal evidence. The Trial Court committed no error in deciding the pre-trial Motions at issue and there is no support to disturb those findings after all that has transpired since then **and** after Plaintiff did nothing to pursue or clarify the evidence that was mistakenly thought to support these claims, through all remaining stages of the case including trial.

Providing some brief background, Plaintiff's case involves a trip and fall due to alleged insufficient lighting in an AMC movie theater. Plaintiff, through discovery, began a fishing expedition in an attempt to prove the lighting malfunctioned and therefore was inadequate at the time of Plaintiff's fall. This appeal is due to Plaintiff's unfounded allegation that one of the various types of logs generated by the Theater Management System ("TMS") was not preserved by AMC. However, the actual evidence established the TMS is the scheduling software that merely ***schedules*** the events to take place in the theater, i.e. the previews, commercials, movies and cues for the lights during the sequence of events. The TMS generated various logs, most of which were obtained through

discovery. The logs at issue on this appeal, not only would not contain information helpful, relevant, important or necessary for Plaintiff's case, they were merely duplicative of other logs actually exchanged in discovery. More specifically, there is no evidence these logs would provide confirmation the scheduled events actually took place. Regardless, the evidence showed the TMS logs at issue were automatically deleted by the computer system after 8 days.

Plaintiff had absolutely no evidence to present to the Trial Court that showed AMC was on notice this one set of TMS logs should have been preserved and therefore had no support for the Motions at issue. The evidence will show this Court how the cause of Plaintiff's fall was initially unknown and while AMC employees investigated all possibilities, Plaintiff's letter of representation alleging the cause of the fall being inadequate lighting, was not received before the logs at issue were automatically deleted by the computer system. All evidence as to the functioning and adequacy of the lights was obtained from other sources and therefore not spoliated. Plaintiff could not and still cannot show the necessary support for the Motion to Amend the Pleadings.

Plaintiff's team of attorneys throughout the litigation and trial of this case, made conscious decisions on what evidence to pursue, and most relevant to this appeal, Plaintiff's attorneys made the decision **not** to renew the motion to amend to add fraudulent concealment or to pursue the evidence at trial and request a

spoliation charge to be read to the jury despite presenting the same witnesses cited to in the motions and this appeal. It is abundantly clear these decisions were made because those claims were meritless from the start; the same reason the Trial Court denied the earlier motions. Futility defeats a motion to amend. Plaintiff presented Judge Brady with evidence believed to be persuasive of the position but ultimately that backfired. Plaintiff was stuck and is still stuck because that same evidence presented led to the motions being denied.

Appellant is here for the fifth time with the exact same tired arguments and overstated and misunderstood evidence as was presented at the Trial Court level. There is still no proof of any form of abuse of discretion by Judge Brady. There is still no evidence AMC committed some form of spoliation or fraudulent concealment. There is still no evidence the TMS logs at issue would have provided any evidence as to whether the lights functioned properly in the theater, and certainly not as to whether the lighting in the location of Plaintiff's fall was "adequate" or not.

All evidence relevant to Plaintiff's fall was preserved and the logs at issue, despite being completely irrelevant, were merely duplicative of other evidence produced in the case. Plaintiff's appeal should be denied as the prior motions were because Plaintiff's claims at issue are simply meritless.

PROCEDURAL HISTORY

For the purposes and sake of judicial efficiency, Respondent can agree to the majority of the procedural history presented by Appellant as it mostly reflects the lengthy litigation and motion practice that took place. That being said, Respondent has a duty to supplement the procedural history in order for the Appellate Court to truly appreciate the nature of this appeal and how all parties made their way before the Court.

With respect to Plaintiff's October 24, 2018, Motion to Amend the complaint, which is the subject of this appeal, Opposition for Defendant AMC was filed on November 1, 2018, not 2010 as Appellant inadvertently wrote in the brief. (Pa122). Further, the Opposition filed by Defendant AMC included reference to the Affidavit of AMC's Director of Technical Operations Center, Trevor Hart, although mistakenly left out of Plaintiff's Appendix. Therefore, Defendant's Appendix includes the Affidavit of Mr. Hart. (Da32 to Da34).

The motion practice and history provided by Appellant up to and including the jury trial of March 2023 is otherwise accurate.

That being said, Appellant did not wait until November 27, 2023, to challenge the result of the Jury trial. Appellant omits that a Motion for a New Trial was filed on April 11, 2023. (Da35 to Da36). The oral argument regarding this motion was heard on October 20, 2023, and on that day, the Honorable Judge

Joseph Rea J.S.C., denied the request for a New Trial. (Da37 to Da38). Having been unsuccessful with all of the above-mentioned motions and the trial (Pa185, Pa293, Pa296), Plaintiff then filed the Notice of Appeal on November 27, 2023, with the Appellate Division for review of the Orders entered November 30, 2018, and January 11, 2019. (Pa297).

COUNTER STATEMENT OF FACTS

The Statement of Facts provided by the Appellant to the Appellate Court is inaccurate, argumentative, and discursive. (Pb3 to Pb7). It proved to be impossible for Respondent to completely adopt, accept and/or respond to thus necessitating the submission of this counter statement of facts which includes some additional facts and expanded explanation of others.

Initially, it should be noted that this matter originates from an alleged accident that took place on August 13, 2016, at the AMC Brick Plaza 10 in Brick, New Jersey. (Pa1a to Pa5a (*sic*)). Although the true allegation continued to be vaguely pled initially, Plaintiff, Joan Berkeley, and her son, Charles Berkeley, Esq., counsel on this appeal and witness at the time of trial, alleged that the movie theater was too dark and as a result, Plaintiff was caused her to trip and fall causing personal injury. (Da2 at ¶2). In essence, plaintiff alleged that the accident was the result of AMC's negligence in failing to provide proper lighting. (Da2 at ¶2).

As discovery continued, Plaintiff / appellant then attempted to develop a theory of liability with respect to the lighting in the theater and the Theater Management System ("TMS") software used by AMC in connection with the advertised August 13, 2016, 8:00 p.m. showing of the movie "Star Trek: Beyond" in theater 5. (Pa24 and Pa37). Whether or not the lights were working as intended in the theater and in tandem with the TMS became the subject of all previous motions. (Pa11 and Pa187).

At the time of the incident, it was Charles Berkeley, Plaintiff's son and current attorney, who filled out the AMC Guest Incident Report when the movie ended. (Pa77). The guest incident report stated, "[f]ell walking down left side of theater five at first step down before the movie at approximately 8:00 p.m." (Pa77). The Report did not mention any issues regarding the lighting or projection of the movie (Pa77). As Appellant stated in the statement of facts, "he wrote in general terms regarding the plaintiff's accident." (Pb6). Those "general terms" provided absolutely no basis for AMC to have been on notice of any allegations as to the alleged cause of plaintiff's fall being lack of sufficient lighting or anything else later alleged.

The September 1, 2016 letter from Plaintiff's former attorney, Peter Spaeth Esq., notifying AMC of the claim, was not even sent out until 19 days after the August 13, 2016 incident, based on the date assigned to the letter by

counsel, not the date of receipt by AMC. (Pa113). Factoring in the 5-day typical timeframe for mail to be received means ***at the earliest***, AMC cannot be charged with receiving the letter before September 6, 2016, i.e. 24 days after the incident of August 13, 2016. See N.J. Ct. R. 1:3-3.

Plaintiff went on to testify that a trailer failed to play but also admitted under oath that she could still the lights as she walked through the auditorium. (Pa152 at 29-6 to 16, Pa152 31-4 to 20 and Pa152:31-18 to 25). Additionally, Plaintiff's son testified he also saw lights in the auditorium at the time of her fall. (Pa157:25-613).

Depositions of multiple AMC theater employees [current and former ones] took place during the course of litigation. (Pa80, Pa87, Pa101, Pa107). In previous motion practice, Plaintiff took snippets of the testimony out of context in an attempt to present an unfounded theory on liability against AMC and Appellant has not altered their approach and looks to do the same here before **this** Court. (Pa13 and Pa187).

More specifically, AMC witnesses Kristin Puff and Brianne Owen were deposed on August 31, 2018. (Pa80, Pa87). Ms. Puff was employed part time and responsible for ushering, concession sales, box office sales and customer service. (Pa81-13-18). Ms. Puff answered the questions to the best of her ability and as the Court can see, she offered **estimations** and testified that she could not

attest to certain things as she may not have been working. (Pa85-11-17, 85-22-25, 86-5-7). In fact, she goes on to testify that she had no direct knowledge of this accident as she was not there. (Da53-11 to19).

AMC employee Brianne Taylor Owen inspected the theater and wrote in the incident report, "I checked the lights on the steps, and they were all fully lit and the lights in the auditorium itself were at trailer level and in working order as well." (Pa93). Ms. Owen "checked the area for hazards, none were present. Aisle lights and step lights were all in working order. Mid-level trailer lights were also in working order." (Pa93-94). The AMC Incident Report was provided with discovery responses served on Plaintiff's second attorney, Raymond Gill of Gill & Chamas by letter dated July 11, 2017. (Da55, Da67).

Both Ms. Puff and Ms. Owen were subjected to detailed and lengthy depositions as exemplified from the portions of their depositions referenced throughout Plaintiff/Appellants papers (Puff at Pa80 to Pa86, PaDa53 to 54 and Owen at Pa87 to Pa92, Pa172, Pa184 and Da69). Both were also subject to a continuing trial subpoena served by Plaintiff. (Da79 and Da70).

Ms. Higgins testified to an *estimate* as to the length of time *she thought* the "TMS" logs (Theater Management System) at issue were retained and she specifically stated that it was an estimate more than once despite Plaintiff's counsel continuing to push. (Pa110-15-18, Pa111-18-22). Ms. Higgins was also

subpoenaed and present in Court throughout the entire trial, available to testify at Plaintiff's request. (Da76).

To settle the issue, in opposition to Plaintiff's Motion, AMC provided the Affidavit of the person at AMC who could affirmatively provide that information, Trevor Hart, the Director of Technical Operations Center for AMC. (Da32 to Da34). Mr. Hart attested to the specific retention policy for the TMS logs at issue, which was 8 days. (Da33 at ¶5). (*It is salient to mention that Appellant failed to include the Affidavit of Trevor Hart in Plaintiff's Appendix, which was filed as an exhibit to Respondent's November 1, 2018 Opposition to Plaintiff's Motion to Amend Complaint*).

Per Mr. Hart, the TMS is a piece of software that can schedule many different things. (Da33 at ¶3). It sends the schedule to the digital cinema equipment which will interface with another hardware automation system. (Da33 at ¶3). It is a scheduling system that is primarily concerned with whether the schedule was created as opposed to accurately showing that the equipment did what was asked. (Da33 at ¶3).

There is no evidence that the TMS logs produced any information that was not already contained in any of the other logs or anything specifically about whether the lights functioned properly.

Mr. Hart further explained, the TMS created were developed by the company that made the TMS for its own purposes. (Da33 at ¶4). When AMC builds a schedule, it builds a Show Play List ("SPL") which includes the pre-show content which starts 20-30 minutes before a movie, the trailers and the movie. (Da33 at ¶4). The TMS digital cinema equipment has a schedule which will be executed and the TMS asks whether the SPL was executed. (Da33 at ¶4). AMC does not regularly use the TMS logs because it does not have data that would be valuable or useful to AMC. (Da33 at ¶5).

Pete Lude, the Chief Technical Officer for Mission Rock Digital, LLC and former Vice President of Sony Electronics, who was retained as a digital cinema software expert on behalf of AMC, that Digital Cinema Implementation Partners ("DCIP") leases AMC the equipment for the digital projection of its movies and maintains unfiltered log data required by its distributors. (Pa231 at ¶4). Pursuant to Plaintiff's subpoena upon DCIP, Plaintiff was provided with the Security Log, Performance Log and Event Log from the AMC Brick Plaza for auditorium 5 on August 13, 2016, which were archived by DCIP. (Pa231 at ¶4). As Mr. Lude explained, these are raw log files which showed the content playback start and end and the use of decryption keys to unlock secure content for the date of the movie at issue. (Pa231 at ¶4).

Mr. Lude further explained the Security Log, Performance Log and Event Log which were produced to Plaintiff *are the functional equivalent of the TMS log* which is the subject of this appeal. (Pa231 at ¶5). More technically, TMS is software that allows the ingestion of material (moving the digital file of a new movie into the local storage) and scheduling between all auditoriums in the complex. (Pa231 at ¶5).

According to Mr. Lude, "[t]he TMS log would not include useful information." (Pa232 at ¶6). It would mostly be things like when a movie file was transferred to local storage two days before the movie opened or to tell the ticketing system that "Batman is scheduled in Auditorium 3 on Wednesday at 3 p.m." (Pa232 at ¶6). *It would not contain an accurate representation of when something actually played at a given auditorium.*" (Pa232 at ¶6). Pete Lude further stated: "[t]he **'gold standard**' for determining what actually played back in a theatre is the Security Log ("SL"), which Plaintiff received. (Pa232 at ¶7 and ¶5). He further explained, this is because the SL: (1) is the only log system designed to precisely record the start and stop times of actual events, including decryption, (2) the log is stored in a secure module that cannot be tampered with, (3) the design and performance of the logging system is fully tested and confirmed by a certification lab, (4) the SL is referenced to a "secure clock" that is extremely precise, tamper-proof, battery back-up and (5) the SL uses block-

chain to authenticate the contents of the log so it cannot be tampered with. (Pa232 at ¶7). In Mr. Lude's own words, [y]ou would be hard-pressed to find a log of events that is **more accurate**, **robust and secure** in almost any other application. (Pa232 at ¶7). The Security logging system borrows cryptographic technology from the banking industry. (Pa232 at ¶7). By contrast, the Performance Log, TMS logs and other records are "best effort" logging systems intended primarily to track administrative tasks (like transferring files) and troubleshooting other outside systems." (Pa232 at ¶7).

Mr. Lude explained that because Plaintiff was provided with the Security Log, as well as the Performance Log and Event log, in addition to all of the other secure data which she was provided, Plaintiff had not been disadvantaged by not being provided with the TMS log at issue. (Pa232 at ¶8).

A review of the Security Log by Pete Lude revealed no errors in playback. (Pa232). The Performance Log often had different information because it was not intended to duplicate the accurate record already captured in the Security Log. (Pa232). Plaintiff's software expert also decoded and analyzed the AMC security and performance logs generated by the TMS just as Mr. Peter Lude did. (Pa264).

In furtherance of Plaintiff's Motion to Amend the Complaint, Judge Brady analyzed the evidence that Plaintiff submitted reviewing it piece by piece. (T54-18 to T57-16).

After the denial of the motions at issue on this appeal, Plaintiff did nothing further to pursue the supposed fraudulent concealment or spoliation claim including doing nothing to pursue that evidence at trial despite the fact that the witnesses Plaintiff claims had the "smoking gun," were subpoenaed by Plaintiff, were made available to testify at trial, with Kristin Puff on call, Katherine Higgins present in court every day of the trial and both Hemil Patel and Brianne Owen testifying live at trial. (Da70 to Da81). Plaintiff was not precluded from eliciting testimony from these witnesses. Plaintiff also was not precluded from requesting the jury charge for spoliation of evidence be read to the jury. Even this was not done.

LEGAL ARGUMENT

POINT I

WITH REGARD TO THE ORDER ENTERED NOVEMBER 30, 2018, THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ADD A CLAIM FOR FRAUDULENT CONCEALMENT AND SPOLIATION OF EVIDENCE

The decision on a motion to amend a pleading is left to the "sound discretion of the trial court" and its "exercise of discretion will not be disturbed on appeal, unless it constitutes a "clear abuse of discretion." Franklin Medical Associates v. Newark Public Schools, 362 N.J. Super. 494, 506. *See also*, Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011)(*quoting* Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div.2007)) (When examining a Trial Court's exercise of discretionary authority, we reverse ***only*** when the exercise of discretion was 'manifestly unjust' under the circumstances.")(*emphasis added*). An abuse of discretion takes place when a decision is made without a rational explanation, inexplicably departs from established policies or is rested on an impermissible basis. State v. Chavies, 247 N.J. 245, 257(2021) (*quoting* State v. R.Y., 242 N.J. 48, 65 (2020)).

The Court in Moraes v. Wesler was presented with an appeal to determine if the Trial Court abused its discretionary power when it denied a motion to

consolidate matters. In the discussion of the standards of review, the Appellate Court went on to explicate "[a]lthough the ordinary 'abuse of discretion' standard defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Moraes v. Wesler, 439 N.J. Super. 375, 378 (App. Div. 2015) *citing* Flagg v. Essex Co. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002) (*quoting* Achacoso-Sanchez v. Immigration & Naturalization Service, 779 F.2d 1260, 1265 (7th Cir.1985)). An abuse of discretion also arises when "the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193, 887 A.2d 1191 (App.Div.2005).

Where a Motion to Amend has ***little or no merit*** or its substance is ***irrelevant*** to the underlying claim, denying the motion is proper. Cutler v. Dorn, 196 N.J. 419, 441 (2008) (*emphasis added*)("So too is a motion to amend properly denied where its merits are ***marginal***, its substance generally ***irrelevant*** to the main claim, and allowing the amendment would unduly protract the litigation or cause undue prejudice.")(*emphasis added*). Ultimately, Motions to Amend Pleadings are best left to the discretion of the Trial Court, which in this case it was, and Judge Brady reviewed the facts of the case thoroughly, and

decided the motion, within her sound discretion. Rule 4:9-1; Du-Wel Products v. U.S., 270 N.J. Super. 458, 465 (App. Div. 1989).

In the unpublished case Moche v. Levy, the Appellate Division reviewed the denial of a motion to amend the complaint finding that the court did not abuse its discretion in denying the Plaintiffs' motion based on the lateness of the request to amend, the prejudice that would result if allowed and the proposed amendment was futile. Moche v. Levy, No. A-5480-13T2, 2016 N.J. Super. Unpub. LEXIS 928, at *17 (App. Div. Apr. 22, 2016). (Da39 at Da43). The motion at issue here was filed extremely late in the discovery period. (Pa11).

Plaintiff/Appellant believes the Trial Court abused its discretion when it denied the motion to amend the complaint to include a claim for fraudulent concealment and for spoliation of evidence and now attempts to relitigate prior motions in the same manner with the same evidence. (Pb8). The relief sought by Plaintiff at the time of the original motion was for an inference of spoliation and to add a claim fraudulent concealment. (Pa12). Plaintiff did not stop there, and it should be noted that Plaintiff also wanted certain facts conclusively established and uncontroverted so that was lumped into the October 24, 2018, Motion for Leave to Amend. (Pa11 to Pa23). For lack of a better phrase, Plaintiff essentially wanted the Court to take judicial notice of a bunch of disputed issues of fact that were presented by a variety of uncertain and conflicting pieces of

evidence, some of which turned out to be disproven through discovery and eventually at trial.

Judge Brady succinctly laid out the law in her denial of Plaintiff's Motion for Reconsideration of the Motion for Leave to Amend the complaint:

> "In order for a *spoilation inference* to apply, four essential factors must be satisfied: 1) the evidence in question must be within the party's control; 2) it must appear that there has been actual suppression or withholding of evidence; 3) the evidence destroyed or withheld must be relevant; and 4) it must have been reasonably foreseeable that the evidence would later be discoverable. R.L. v. Voytac, 402 N.J. Super. 392, 406 (App. Div. 2008) *citing* MOISAID Techs., Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 336 (D.N.J. 2004). (Pa295).

Based on the evidence presented in support and in opposition to the motion, and after oral argument on the Motion, the Court found that the elements as outlined above, were simply not satisfied and therefore denied the motion." (Pa185-6). Plaintiff/Appellant brings the same arguments and evidence or lack thereof before ***this*** Appellate Court after being unable and/or unwilling to accept the simple fact that AMC did not intentionally suppress or spoliate evidence.

Plaintiff/Appellant cites the case of Rosenblit v. Zimmerman, 166 N.J. 391 (2001), and provides this Court with the elements for fraudulent concealment

and the explanation that the Rosenblit Court offered for spoliation. (Pb12 to Pb13). Notably, intent is the key element for both legal theories to apply. Rosenblit, supra. 116 N.J. at 411. (Pb13). However, in this case, Plaintiff cannot prove intent and will never be able to prove AMC hid or destroyed any evidence in this case, especially not key or crucial evidence, as will be explicated below. If one cites cases and elements, they should apply the same to the facts of the case at issue. Plaintiff/Appellate sprinkles in law but does not provide any analysis and application of facts to the law. This much was clear to Judge Brady as Plaintiff did not and could not present any such evidence in support of the original October 24, 2018 Motion for Leave to Amend the Complaint. (Pa11 to Pa23). The same arguments and exact same "evidence" proffered in that motion has now been annexed to Appellant's brief before this Court.

Recall that this Appeal resulted only after Plaintiff's dissatisfaction with Judge Brady's denial of the Trial Court motions and then the Trial of the case which resulted in a jury finding no cause of action in favor of Defendant. (Pb2, Pa296).

Although motions to amend "are ordinarily afforded liberal treatment, ***the factual situation in each case must guide the court's discretion***, particularly where the motion is to add new claims or new parties ***late*** in the litigation." Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593,602 (App. Div. 1997),

certif. denied, 153 NJ 51 (1998)(*emphasis added*). That exercise of discretion requires a two-step process, which Judge Brady specifically applied: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile, that is, whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). Thus, while motions for leave to amend are to be determined without consideration of the ultimate merits of the amendment, those determinations must still be made "in light of the factual situation existing at the time each motion is made." Interstate State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997). Most importantly, "***courts are free to refuse leave to amend*** when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point in permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Id. at 256-57 (*citing* Mustilli v. Mustilli, 287 N.J. Super. 605, 607 (Ch. Div. 1995)(*emphasis added*). Therefore, Judge Brady was within her authority to refuse Plaintiff leave to amend her complaint as she did.

The denial of such a motion is also sustainable when made on the eve of trial... " *Pressler, Current NJ Court Rules*, comment 2.2.2 on R. 4:9-1 (2019). See Fisher v. Yates, 270 N.J. Super. 458,467 (App. Div. 1994) (holding no abuse of discretion in denying late motion to add new claims); DuWel Products, Inc.

v. United States Fire Ins. Co., 236 N.J Super. 349, 365 (App. Div. 1989) (denial of late motion to permit new claims), *certif. denied*, 121 NJ. 617 (1990). In this case, the Motion for Leave to Amend was filed on October 24, 2018 with a return date of November 9, 2018 noting the discovery end date was November 20, 2018 and the trial was scheduled for January 7, 2018. (Pa11-12).

Considerations the court should consider include whether the newly asserted claim would unduly prejudice the opposing party, survive a motion to dismiss on the merits, cause undue delay of the trial or constitute an effort to avoid another applicable rule of law. Kimmel v. Dayrit, 154 NJ. 337,343 (1998). Based on the circumstances and timing of Plaintiff's motion, these are all clearly considerations made by Judge Brady and included in her reasoning for denying the Plaintiff's motion in this case. (T54-3 to 57-16).

Another simple point demonstrated by all of the case law is that the law allows for motions to amend the pleadings to be denied and if Appellant's reasoning were correct, every single denial of a Motion to Amend the Pleadings would be on appeal.

In the case at bar, the Honorable Judge Brady stated the Court was not obligated to permit a pleading to be amended when a subsequent motion to dismiss must be granted and this is in light of the factual situation existing at the time each motion is made (T54-12-17). Plaintiff's claim that AMC destroyed the

theater management system of software logs even though it had notice of the likelihood of litigation prior to said alleged destruction was and continues to be without merit.

Judge Brady was presented with the same evidence as this Appellate Court; the guest incident report, answers to request for admissions, the letter from Attorney Spaeth, and selective pages from witness depositions, taken out of context. The guest incident report stated, "[f]ell walking down left side of theater five at first step down before the movie at approximately 8:00 p.m." (Pa77). It provided absolutely no insight as to the cause of Plaintiff's fall and therefore there was no basis for AMC to have been on notice of any allegations as to the supposed cause of plaintiff's fall. Additionally, both Plaintiff and her son testified that they saw lights on in the auditorium at the time of her fall. (Pa152:29-6 to 16, Pa152:31-4 to 14 and Pa152:31-18 to 25) and (Pa157:25-613). Plaintiff alleges the trailers for the movie failed to play but admits that she could still see lights on the aisles inside the theater. (Pa152:29-6 to 16, Pa152:31-4 to 14 and Pa152:31-18 to 25).

Plaintiff attempts to use this guest incident report as a smoking gun showing how AMC was on notice of litigation, but yet it is completely devoid of any pertinent facts or accusations against AMC to be on notice of. (Pa77). Furthermore, plaintiff's son, Charles Berkeley Esq., readily admits he wrote

down general details on the report regarding the accident after enjoying the movie. (Pb6). Plaintiff's theory of liability crumbles based on the facts, but plaintiff continued to pursue the fruitless endeavor. The Honorable Judge Brady merely relied upon the evidence presented to her by the Plaintiff and therefore correctly found that the guest incident report failed to put AMC on notice to preserve any specific evidence and certainly not the referenced logs. (T55-9-16].

Plaintiff cites the deposition testimony of Ms. Kristen Puff and current (at the time) AMC Manager Ms. Brianne Owen, as alleged proof of some wrongdoing. (Pb5). Both witnesses were deposed on August 31, 2018. (Pa80, Pa87). With respect to Ms. Puff's deposition transcript, Appellant extracts six nonsequential pages as "evidence" for the brief (just as Plaintiff did in the original motions). (Pa80). Specifically, Plaintiff included pages 10, 34, 35, 37, 39 and 40. (Pa80). Ms. Puff was employed part time and responsible for ushering, concession sales, box office sales and customer service. (Pa81-13-18). Ms. Puff answered the questions to the best of her ability and as the Court can see, she offered **estimations** and testified that she could not attest to certain things as she may not have been working. (Pa85-11-17, 85-22-25, 86-5-7). In fact, she goes on to testify that she had no direct knowledge of this accident as she was not there. (Da53-11 to19). This is one of the pages that Appellant leaves

out and this is how Appellant takes an estimation from an employee who was not even working on the night in question and presents it as fact. This clearly shines a light on the Appellant's failure to provide actual evidence and an accurate record to the Court.

AMC employee Brianne Taylor Owen performed a thorough inspection of the location of the incident per the AMC Incident Report noting that she "checked the area for hazards, none were present. Aisle lights and step lights were all in working order. Mid-level trailer lights were also in working order." (Pa93-94). Ms. Owen further wrote, "I checked the lights on the steps, and they were all fully lit and the lights in the auditorium itself were at trailer level and in working order as well." (Pa93). All actions taken by Ms. Owen in inspecting the theater were timely, proper, and provided in writing to Plaintiff's counsel long ago in discovery responses served on Plaintiff's second attorney, Raymond Gill of Gill & Chamas by letter dated July 11, 2017. (Da55).

Still nothing at this initial stage in post-accident investigation put AMC on notice to preserve the logs generated by the movie scheduling software.

Both witnesses were subjected to detailed and lengthy depositions as exemplified from the portions of their depositions referenced throughout Plaintiff/Appellants papers (Puff at Pa80 to Pa86, PaDa53 to 54 and Owen at

Pa87 to Pa92, Pa172, Pa184 and Da69). Both were also subpoenaed and made available for trial. (Da79 and Da70).

Plaintiff further raises, as fact, how the witnesses deposed during discovery stated that the ceiling lights in the auditoriums at the AMC theater are "sometimes off" when they should be on. (Pb5). Plaintiff's counsel then equates *"sometimes off*" as proof and an absolute fact that the ceiling lights were off when plaintiff was walking in the auditorium. This is pure speculation and cannot be treated as factual but Plaintiff does it anyway.

Similarly, Plaintiff claims that the deponents stated that *sometimes*, the cues to lower the lights do not work but there is no citation to the testimony to back that up. (Pb11). The "cue issue" that may or may not occur an estimated once or twice a month was never a proven fact of what took place on the date in question; it was just a mere estimate and approximation made by a fact witness. (Pa85, Pa86). The mere possibility of errors occurring does not mean that an error occurred and even if an error occurred, that is still not evidence that the lights available were insufficient. Plaintiff attempts to stretch the truth too far. Again, there were aisle lights and step lights which provided adequate visual cues for someone walking in the auditorium and whether the ceiling lights were on or not, becomes completely irrelevant.

Plaintiff then employs a similar tactic when discussing the deposition of Katherine Higgins, one of the AMC General Managers over the years at this theatre, but not at the time at issue, suggesting that an *estimate* by **this** deponent is fact. (Pb6). The reality is that Ms. Higgins only provided an *estimate* as to the length of time *she thought* the "TMS" logs (Theater Management System) at issue were retained and she specifically stated that it was an estimate more than once despite Plaintiff's counsel continuing to push. (Pa110-15-18, Pa111-18-22).

To settle the issue, in opposition to Plaintiff's Motion, AMC filed the Affidavit of the person at AMC who could affirmatively provide that information, Trevor Hart, the Director of Technical Operations Center for AMC. (Da32). Mr. Hart attested to the specific retention policy for the TMS logs at issue, which was 8 days. (Da33 at ¶5).

Appellant also made a representation to the Court that the September 1, 2016, letter from a different former attorney, Peter Spaeth Esq., notified AMC that Plaintiff would be asserting a claim (Pb7 *citing* Pa113 to Pa114). Here, Appellant openly admits to operating on a ***presumption*** that AMC received said letter within three weeks of the date of Plaintiff's accident which was August 13, 2016. (Pb7). However, the letter was not even sent out until 19 days after to be exact and that is merely based on the date assigned to the letter by counsel,

not the date of receipt by AMC. (Pa113). Factoring in the 5-day typical timeframe for mail to be received means ***at the earliest***, AMC cannot be charged with receiving the letter before September 6, 2016, i.e. 24 days after the incident of August 13, 2016. See R. 1:3-3. This is not only more than the 8-day retention policy, but also more than the *estimated* 3 weeks. Again, believing that a deponent's *estimation* on the retention of said logs was factual.

Also noteworthy is that Plaintiff leaves out a few important details: (1) there is absolutely no reference in the letter to the allegation that the equipment failed (Pa113 to114), (2) there is no reference in Plaintiff's Guest Incident Report that the equipment failed (Pa77); and (3) Plaintiff's letter from her attorney could not have possibly arrived prior to the TMS software deleted the logs. Since Mr. Spaeth's request was not made within eight days, or received within three weeks, even if it did reference the TMS system failing, *which it did not*, there is simply no merit to Plaintiff's argument regarding that alleged notice.

Also crucial is how Plaintiff's brief does not provide clear information as to what the TMS software or logs are and also does not properly put into perspective that the TMS logs are not important to the instant litigation, let alone "essential" as erroneously argued by Plaintiff. (Pb12 to Pb13). The uncontroverted evidence, however, has shown that the TMS is essentially a piece

of software that can schedule many different things. (Da33 at ¶3). It sends the schedule to the digital cinema equipment which will interface with another hardware automation system. (Da33 at ¶3). It is a scheduling system that is primarily concerned with whether the schedule was created as opposed to accurately showing that the equipment did what was asked. (Da33 at ¶3). There has been absolutely no evidence that the TMS logs produced any information that was not already contained in any of the other logs or anything specifically about whether the lights functioned properly.

The evidence has further shown that the logs that the TMS created were developed by the company that made the TMS for its own purposes. (Da33 at ¶4). When AMC builds a schedule, it builds a Show Play List ("SPL") which includes the pre-show content which starts 20-30 minutes before a movie, the trailers and the movie. (Da33 at ¶4). The TMS digital cinema equipment has a schedule which will be executed and the TMS asks whether the SPL was executed. (Da33 at ¶4). AMC does not regularly use the TMS logs because it does not have data that would be valuable or useful to AMC. (Da33 at ¶5).

Also in discovery, it was explained by Pete Lude, the Chief Technical Officer for Mission Rock Digital, LLC and former Vice President of Sony Electronics, who was retained as a digital cinema software expert on behalf of AMC, that Digital Cinema Implementation Partners ("DCIP") leases AMC the

equipment for the digital projection of its movies and maintains unfiltered log data required by its distributors. (Pa231 at ¶4). Pursuant to Plaintiff's subpoena upon DCIP, Plaintiff was provided with the Security Log, Performance Log and Event Log from the AMC Brick Plaza for auditorium 5 on August 13, 2016, which were archived by DCIP. (Pa231 at ¶4). As Mr. Lude explained, these are raw log files which showed the content playback start and end and the use of decryption keys to unlock secure content for the date of the movie at issue. (Pa231 at ¶4).

Plaintiff ignores the fact that the Security Log, Performance Log and Event Log which were produced to Plaintiff *are the functional equivalent of the TMS log* which is the subject of this appeal. (Pa231 at ¶5). More technically, TMS is software that allows the ingestion of material (moving the digital file of a new movie into the local storage) and scheduling between all auditoriums in the complex. (Pa231 at ¶5).

According to Mr. Lude, "[t]he TMS log would not include useful information." (Pa232 at ¶6). It would mostly be things like when a movie file was transferred to local storage two days before the movie opened or to tell the ticketing system that "Batman is scheduled in Auditorium 3 on Wednesday at 3 p.m." (Pa232 at ¶6). *It would not contain an accurate representation of when something actually played at a given auditorium.*" (Pa232 at ¶6). Pete Lude

further stated: "[t]he **'gold standard**' for determining what actually played back in a theatre is the Security Log ("SL"), which Plaintiff received. (Pa232 at ¶7 and ¶5). He further explained, this is because the SL: (1) is the only log system designed to precisely record the start and stop times of actual events, including decryption, (2) the log is stored in a secure module that cannot be tampered with, (3) the design and performance of the logging system is fully tested and confirmed by a certification lab, (4) the SL is referenced to a "secure clock" that is extremely precise, tamper-proof, battery back-up and (5) the SL uses block-chain to authenticate the contents of the log so it cannot be tampered with. (Pa232 at ¶7). In Mr. Lude's own words, [y]ou would be hard-pressed to find a log of events that is **more accurate**, **robust and secure** in almost any other application. (Pa232 at ¶7). The Security logging system borrows cryptographic technology from the banking industry. (Pa232 at ¶7). By contrast, the Performance Log, TMS logs and other records are "best effort" logging systems intended primarily to track administrative tasks (like transferring files) and troubleshooting other outside systems." (Pa232 at ¶7).

Consequently, the evidence showed that because Plaintiff was provided with the Security Log, as well as the Performance Log and Event log, in addition to all of the other secure data which she was provided, Plaintiff had not been disadvantaged by not being provided with the TMS log at issue. (Pa232 at ¶8).

Again, it is important to remember, there is absolutely no evidence to suggest that the log at issue would have provided any information on whether the lights malfunctioned. The evidence explains that the TMS is a "scheduling" system that "schedules" the cue for the lights to dim. However, there is nothing to suggest it provides definitive evidence as to whether the lights responded to the cue. Further, in light of the simple fact that there were aisle lights and step lights which provided adequate visual cues for someone walking in the auditorium, whether the TMS system contained any information about the lights, becomes completely irrelevant.

A review of the Security Log by Pete Lude revealed no errors in playback. (Pa232). The Performance Log often had different information because it was not intended to duplicate the accurate record already captured in the Security Log. (Pa232). Plaintiff's software expert also decoded and analyzed the AMC security and performance logs generated by the TMS just as Mr. Peter Lude did. (Pa264).

"Spoilation, as its name implies, is an **act** that spoils, impairs or taints the value or usefulness of a thing" Rosenblit, *supra.,*166 N.J. at 400 (*citing* Black's Law Dictionary 1409 (7th ed. 1999)). "In law, it is the term that is used to describe the hiding or destroying of litigation evidence, generally by an adverse party." Id. at 400-01. A duty to preserve evidence "arises when there is pending

or likely litigation between two parties, knowledge of this fact by the alleged spoliating party, evidence ***relevant*** to the litigation, and foreseeability that the opposing party would be prejudiced by the destruction or disposal of this evidence." Cockerline v. Menendez, 411 NJ. Super. 596, 620 (App. Div.), *certif. denied*, 201 NJ. 499 (2010)(*emphasis added*). "The spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator." Rosenblit, *supra*, at 401-02. If a plaintiff can make a threshold showing that a defendant's recklessness caused the loss of relevant evidence, the jury should be so instructed. Jerista v. Murray, 185 NJ. 175, 202 (2005). The TMS logs at issue were not only available for 8 days, were not relevant to the litigation, contained duplicative information available in other means of discovery provided to Plaintiff and therefore no prejudice could possibly result.

However, without a shred of **actual evidence**, Plaintiff would have this Court believe that AMC had notice that Plaintiff planned to file a lawsuit due to inadequate lighting and technical malfunction of the movie theater equipment and that AMC deliberately destroyed evidence that was pertinent and concealed said act. There is citation to cases in Appellant's brief where it was clear and obvious that a party committed fraud or spoliation but none of those cases mirror what actually happened in our case. The facts here show that: (1) there were

aisle lights and step lights in auditorium 5 that provided visual cues for Plaintiff and Plaintiff and her son acknowledged the presence of those lights (Pa152:29-6 to 16, Pa152:31-4 to 14 and Pa152:31-18 to 25) and (Pa157:25-613); (2) the TMS logs would not contain information that was either important or necessary to Plaintiff's case (Pa232); (3) the TMS logs were automatically deleted 8 days after this incident in accordance with custom and practice and before Mr. Spaeth wrote his letter to AMC in September 2016 (Da33 at ¶5 and Pa113); (4) neither the AMC Incident Report nor the Guest Incident Report completed by Plaintiff's son contained any reference to the cause of Plaintiff's fall being lighting or trailers that did not play (Pa77, Pa93); and (5) Plaintiff's counsel obtained via subpoena from DCIP the available logs, that would have provided any relevant information regarding the functioning of the technical equipment therefore Plaintiff had not been disadvantaged by not being provided with the TMS log which is the subject of this appeal (Pa231-232).

Plaintiff had a string-theory of disputed events that molded into an accusation of spoliation and fraudulent concealment against AMC. Judge Brady saw right through this and based on the evidence before her, said:

> Plaintiff's counsel obtained via subpoena from DCIP the security log, performance log, and event log, and if defendant's expert is able to offer an opinion that there were no errors in the playback based on a review of these documents, then plaintiff's expert who didn't review the TMS logs and neither did the defense expert review the TMS logs would be put in the same footing if they

> reviewed the DCIP, the security log, the performance and event logs, as well. So basically, both experts would be put in the same footing because neither of them reviewed the TMS logs, and so, therefore there would be undue prejudice to the plaintiff because the playing field is fair and even in this regard." (T56-57-6).

Judge Brady went on to state that "if there are these documents that can provide essentially the same information sought by the plaintiff, it does not appear that the TMS logs, their probative value would outweigh the undue prejudice that would be done if I were to grant the amended complaint." (T57-7-16). It is again salient to mention that this motion practice was taking place at the end of 2018 and into early 2019 with a discovery end date of November 20, 2018, an arbitration hearing scheduled for November 27, 2018, and a trial date of January 7, 2018. (Pa11-12). Prejudice to Defendant would have ***surely*** resulted if this motion was granted at this late stage of discovery.

Ultimately, in support of Plaintiff's motion, Plaintiff mischaracterized testimony in an attempt to obtain an inference of spoliation without actual facts or evidence supporting same. Plaintiff attempted to persuade the Trial Court to grant an inference of spoilation based on speculation, conjecture, and assumption of facts not evidence. The Trial Court made no error in denying Plaintiff the amendment that would allow a claim for spoliation because the elements were not met based upon factual evidence. The Trial Court had clearly read and understood the arguments advanced by both parties in their briefs,

addressed the issues of fact and law, and made a ruling that was informed, supported by the record, well within her discretion to make and in the interest of justice.

POINT II

WITH REGARD TO THE ORDER ENTERED JANUARY 11, 2019, THE COURT DID NOT ABUSE ITS DESCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE ORDER ENTERED NOVEMBER 30, 2018, WHICH DENIED PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO INCLUDE A CLAIM FOR FRAUDULENT CONCEALMENT AND SPOLIATION OF EVIDENCE

Plaintiff failed to produce any evidence that the Trial Court based its decision on a palpably incorrect or irrational basis or that it had failed to consider or appreciate the significance of the probative evidence in their Motion for Reconsideration dated December 24, 2018. (Pa187 to PA292). The evidence Plaintiff relied upon and presented has not changed: the Guest Incident Report, Attorney Spaeth's letter dated September 1, 2016, and uncertain deposition excerpts taken out of context. As explicated below, Plaintiff provided the Trial Court with arguments and evidence deemed best to support the claims and the Court was certainly within its right to review and evaluate **that** evidence as well as any evidence submitted in opposition, therefore the Court was within its right to deny the motion.

In the motion for reconsideration, Plaintiff impermissibly sought to expand the record and reargue the motion by citing case law not cited in the

original motion. Plaintiff now dumps the exact same arguments and evidence into an Appellate brief. As discussed, *ad nauseam*, the law in New Jersey is well established that while the granting of a motion to file an amended complaint rests in the Court's sound discretion, denial of the motion is allowed, again, within the Court's discretion. The Court must rule in light of the factual record ***known*** at the time the motion is made and requires a Court to consider whether granting the amendment would nonetheless be ***futile***. Keller v. Pastuch, 94 N.J. Super. 499 (App. Div. 1967); Notte, *supra*., 185 N.J. at 501 (*emphasis added*). In the exercise of its discretion to determine whether justice requires that leave be granted, the Trial Court must consider not only justice to the applicant but also justice to the adverse party. Band's Refuse Removal, Inc. v. Fair Lawn Borough, 62 N.J. Super. 522, 555 (App. Div. 1960). As explicated in Point I and described by Judge Brady on the record *twice* before, the claim which Plaintiff sought to assert was completely unsupported by the evidence submitted by **both** parties and therefore ***futile***.

Plaintiff argues once again that the Trial Court did not follow the standard applicable to a motion to dismiss under R. 4:6-2(e) set forth in the 1987 case Printing Mart-Morristown v. Sharp Electronics Corporation, 116 N.J. 739 ,746 (1987) that a reviewing court should search the "complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned

even from an obscure statement of claim" and considered facts outside of the pleading. Id. at 746. First, Judge Brady was ***not*** deciding a Motion to Dismiss under R. 4:6-2(e) and therefore this case is completely irrelevant. Further, unlike the Printing Mart case, which referred to a pleading that was in a "preliminary stage of litigation," Plaintiff's proposed new claim was sought late in litigation with a discovery end date less than a month from the date the motion was filed and an initial trial date scheduled only months away. (Pa12). The case at that point in litigation was certainly ***not*** in a "preliminary stage of litigation" and therefore completely distinguishable.

In light of all the above, the Trial Court denied the Motion for Reconsideration rightfully so.

POINT III

THE TRIAL COURT DID NOTHING IMPROPER BY EVALUATING THE DISCOVERY PRESENTED IN SUPPORT OF THE MOTION TO AMEND THE PLEADINGS AND DETERMINING THAT MOTION SHOULD BE DENIED

Plaintiff attempts to argue that the Court erred in considering facts outside of the Complaint in deciding the Motion for Leave to Amend, *while completely ignoring the fact* that Plaintiff's own motion papers sought to have the Court consider facts outside the Complaint in order to grant her request for an adverse inference and to have facts specifically deemed uncontroverted for the purposes of motions and trial. (Pa13 to Pa120).

Plaintiff submitted over one hundred pages annexed to the October 24, 2018 Motion to Leave to Amend the Complaint. (Pa13 to Pa120). This is tantamount to throwing everything at the wall and seeing what sticks. Plaintiff's Motion to Amend requested relief that went beyond the motion itself. (Pa12). Plaintiff wanted a count for fraudulent concealment to be added to the complaint, an adverse inference of spoliation, ***and*** asked the Court to deem certain facts as conclusively established. (Pa12). Plaintiff essentially asked the Court for summary judgment on the "facts" within a Motion for Leave to Amend the Complaint. Judge Brady, like this Respondent, had to dissect and decipher the motion's true intent and address even the most curious arguments.

The Trial Court has discretion to deny motions to amend the pleadings and that exercise of discretion requires a two-step process evaluating whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile, that is, whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. Notte, *supra.*185 N.J. at 501. The Trial Court and Judge Brady were presented with evidence beyond the four corners of the pleadings. Plaintiff submitted the evidence that eventually led to the denial of the motion and now looks to the Appellate Court. How can one ask the Court to review evidence if it benefits them, but not when challenged? Plaintiff opened the door and subjected the

claims sought in the amendment to the thorough review by Judge Brady. To say Judge Brady erred is a gross characterization of her work and quite frankly, it is disingenuous.

Judge Brady analyzed the evidence that Plaintiff submitted reviewing it piece by piece. (T54-18 to T57-16). Plaintiff presented the guest incident report as a piece of evidence that allegedly put AMC on notice of litigation, but it was devoid of real details. (Pa77) The guest incident report was written by the Plaintiff's son, her current attorney and trial witness in the case. (Pa77). It did not provide ***any detail*** as to what the Plaintiff (and her son) would one day allege caused Plaintiff's fall. (Pa77). The TMS records sought are part of a program and loop designed to self-delete after 8 days. (Da33 at ¶5). But more importantly, the logs sought provided information about what was scheduled to play on the movie screen. (Da33 at ¶4). Nothing in the incident reporting put AMC on notice to preserve these lost logs which showed nothing more than ***scheduling information***; never mind the fact that it was duplicative scheduling information. (Pa232 at ¶6 and Da33 at ¶3 and ¶4). Plaintiff, like the Trial Court, was supplied with discovery including affidavits, explanations, and expert reports. Simply put, Plaintiff had no evidence to support the accusation being made against AMC but continues to pursue a conspiracy theory.

Plaintiff submitted a letter by Mr. Spaeth as evidence that AMC was on notice of litigation, but this letter was sent well after the eight-day life cycle of the TMS logs and received even later. (Pa113 to 114). Plaintiff deposed a part time employee who cleaned up movie theaters at the time of the accident [Ms. Kristen Puff] and a newly appointed General Manager [Ms. Katie Higgins] with no real firsthand knowledge of the TMS program or life cycle and took their estimations regarding all facts alleged as absolute fact. (Pa80, Pa81-11 to 18, and Pa107, Pa108-13 to 18). Plaintiff deposed AMC employee Hemil Patel also and just as with the others, Plaintiff mischaracterized and generalized testimony in an attempt to obtain a positive outcome regarding its motion to amend. (Pa101 and Pb5 to 6). Again, Plaintiff had and continues to have no proof that AMC destroyed the logs at issue, and every attempt to argument this is without merit.

Judge Brady was within her right to review and consider that evidence at Plaintiff's request, presented in Plaintiff's motions. Judge Brady was within her right to exercise her discretion to deny Plaintiff's motion after finding the evidence presented could not and did not support the claims for fraudulent concealment and spoliation. Judge Brady could not ignore how the evidence presented by Plaintiff simply fell short and how the arguments made during oral argument, did not and could not help make out Plaintiff's claim.

Plaintiff acknowledged the standards to be met for the relief requested but yet could not come close to proving the elements starting with evidence on intentional wrongdoing by AMC. (Pb22). The remedies for fraudulent concealment and spoliation are to punish the wrongdoer and to deter others from such conduct. (Pb22 *citing* to Rosenblit, *supra.* at 401-402, and 407). Appellant relies heavily on the Rosenblit case but ignored the elements of the tort actions as outlined in Plaintiff's own papers. (Pb22). Plaintiff relied upon the same evidence it now wants the Court to ignore because it exposed the proposed amended claims as futile.

Basic application of the facts of this case to the actual evidence shows that AMC did not intentionally withhold any evidence with a purpose to disrupt the litigation. AMC was simply not on notice of Plaintiff's theory of liability based on all of the evidence presented, therefore providing AMC with no information on which to determine what evidence to preserve. (Pa77, Pa113 to 114). Even Plaintiff's attorney letter, which came way later than the 8-day retention of the logs at issue, only stated that the theater was "unlit with the exception of inadequate lighting." (Pa113). This statement in and of itself ***admits*** there was light, just that the lights, in Plaintiff's opinion, were inadequate. Even AMC's employee prepared the Incident Report but did not reference the supposed "cause" of Plaintiff's fall. (Pa93). AMC simply had no reason to preserve the

logs at issue. There was absolutely no evidence of any intentional conduct in what Plaintiff presented to the Trial Court ***twice*** and now to this Court.

Also, Plaintiff's attempt to argue that this appeal should provide any relief due to the fact that Plaintiff had to incur the cost of having to retain an expert, cannot be ignored. Plaintiff's right to sue AMC came with costly obligations. However, those obligations are no grounds for appealing a failed attempt to amend a complaint. Plaintiff cannot possibly blame AMC for the fact that Plaintiff had to incur costs for retaining the experts required to pursue her claim against AMC. A simple claim for inadequate lighting that turned technical due to an overthinking and misunderstanding. Plaintiff alone chose to prosecute this case. Plaintiff alone put that cost upon herself for her own expert costs. There is absolutely no legal or factual support for a claim by Plaintiff that this Court should award any relief for Plaintiff having to incur costs for coming up with an overly complicated theory of liability in an attempt to blame AMC for a fall down accident.

It should not be ignored that the evidence claiming to have been destroyed, hidden, and/or concealed was evidence that was not even relevant to the case. Plaintiff cannot point to any evidence that the logs that self-deleted after 8 days would have provided any definitive information about the lights following the schedule/cues in the auditorium. Please recall that Plaintiff, and her

son/attorney/trial witness, acknowledged there were lights in the auditorium at the time, (Pa152:29-6 to 16, Pa152:31-4 to 14 and Pa152:31-18 to 25) and (Pa157:25-613), and the allegation was that those lights were inadequate. (Da2 at ¶2). There is nothing that even suggests that those logs would have provided information about the adequacy or inadequacy of lights in the auditorium.

The bottom line remains that Plaintiff failed to make a timely request to preserve one set of irrelevant logs produced by the TMS software and nothing can change that. It was not intentional, and it was not fraudulent. This Court, like the Trial Court, can see that no wrongdoing occurred in this case; Respondent has not committed any intentional act such as destruction or hinderance of evidence. In addition, Plaintiff's Motion was made late in discovery and would have prejudiced Defendant. The denial of Plaintiff's October 24, 2018 motion was proper as was the denial of Plaintiff's Motion for Reconsideration. Plaintiff fails to show that Judge Brady abused her discretion based on the facts, case law, and application of both to the Judge's actions. Ultimately, for claims of fraudulent concealment and spoliation, Plaintiff could not and cannot make the threshold showing that AMC did anything intentional to destroy any evidence and therefore, cannot possibly be successful on those claims. Consequently, Plaintiff's requested amendment was ***futile,*** and Judge Brady properly denied the motion.

POINT IV

PLAINTIFF/APPELLANT FAILED TO MITIGATE DAMAGES AND THEREFORE SHOULD NOT BE ENTITLED TO THIS RELIEF AS IT DEFIES JUDICIAL EFFICIENCY

Pursuant R. 1:1-2(a) of the Rules of the Court, "[t]he rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense or delay. Unless otherwise stated, any rule may be relaxed or dispensed by the Court in which the action is pending if adherence to it would result in an injustice." As stated in the Comment to the Rule, this sentence provides "the guiding principle for interpretation and application of the court rules, namely, the achievement of procedural due process in the service of substantial justice on the merits." Pressler, *Rules Governing The Courts of the State of New Jersey* (2019 ed.), comment to R. 1:1-2(a).

It should not be ignored that pursuant to Rule 4:9-2, Plaintiff retained the right to amend the complaint in conformance with the evidence *up to and even at the time of trial*, yet no further motion, application or even a simple request was made to amend the complaint following this 2018 decision now on appeal. Plaintiff did ***nothing*** during or after further discovery and not during or at the two-and-a-half-weeks while on trial before Judge Rea.

Plaintiff here, filed a motion to amend the complaint to add claims of fraudulent concealment and spoliation, which was denied. (Pa185). Plaintiff was free to present any and all evidence claimed to exist at the time of trial and pursue those specific claims of fraudulent concealment and spoliation. Spoliation is not even required to be made as a "claim" pled in the Complaint and if evidence of spoliation was adduced at trial, the jury charge still could have been requested.

Instead, Plaintiff sat on the right to take action, until after 21 trial adjournments, two and a half weeks in court for the trial, 8 days of which were spent before a jury of 7 individuals sacrificing their personal time and thousands of dollars spent in litigation costs, to now demand a second bite at the apple by attempting to plead claims for something that could have been pursued further throughout discovery and at trial (Da82). There is no question Plaintiff received a fair trial. Plaintiff had several attorneys throughout this litigation and at trial, was armed with 2 trial attorneys. Plaintiff had every opportunity to explore the claims of fraudulent concealment and spoliation throughout the remainder of discovery and at trial, even after the motions were denied, but *conveniently* failed to do so.

Plaintiff was not precluded from exploring these supposed claims, especially when the witnesses Plaintiff claims had the "smoking gun," were

subpoenaed by Plaintiff, were made available to testify at trial, with Kristin Puff on call, Katherine Higgins present in court every day of the trial and both Hemil Patel and Brianne Owen testifying live at trial. (Da70 to Da81). Plaintiff was certainly not precluded from eliciting testimony from these witnesses. Plaintiff also was not precluded from requesting the jury charge for spoliation of evidence be read to the jury. Even this was not done. None of this was done. No effort was made by Plaintiff to pursue these claims or to mitigate Plaintiff's supposed damages as a result of the denial of the motions at issue.

The Plaintiff failed to pursue the claims, although the law allowed for it, and instead filed this appeal clearly abusing the system, wasting the Court's time and resources, forcing AMC to spend even more money defending this case and essentially spitting in the face of judicial efficiency. For the fifth time over the 6 long years of ongoing litigation, the relief being sought by Plaintiff, must be denied.

CONCLUSION

For the foregoing reasons, Plaintiff's appeal should be denied and Judge Brady's decisions on the November 30, 2018, and January 11, 2019, motions should be allowed to stand.

WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP
Attorneys for Defendant-Respondent American Multi-Cinema, Inc. d/b/a AMC Brick Plaza 10 i/p/a AMC Entertainment Holdings Inc., AMC Theatres, AMC Loews, AMC Brick Plaza 10

By: Catherine De Angelis
Catherine De Angelis
Rafael A. Soto

Dated: August 23, 2024

THE ESTATE OF JOAN BERKELEY, DECEASED, Plaintiff-Appellant vs. AMC ENTERTAINMENT HOLDINGS, AMC THEATRES, AMC LOEWS, AMC LOEWS BRICK PLAZA 10, JOHN DOES 1-10, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000806-23T2 ON APPEAL FROM ORDERS DATED DATED NOVEMBER 30, 2018 AND JANUARY 11, 2019 ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY (MID-L-778-17) CIVIL ACTION SAT BELOW: HON. CARLIA BRADY, J.C.S.

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Dated submitted: September 20, 2024

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REPLY TO DEFENDANT'S STATEMENT OF FACTS

The defendant's statement of facts included references to documents included in its appendix that were not part of the record before the motion judge when she denied the plaintiff's motion to amend the complaint to include a count for spoliation of evidence. The defendant's appendix is comprised of 82 pages, of which only six pages were part of the record before the motion judge.

The plaintiff filed a motion to strike the offending documents from the appendix and the citations to these documents and related textual context from the respondent brief. Rule 2:5-4(a) mandates that '[t]he record on appeal shall consist of . . . papers on file I the court or courts . . . below . . . . " Appellate courts will generally not "consider evidentiary material which is not in the record below . . . . " Pressler and Verniero, *Current N.J. Court Rules*, comment 1 on R. 2:5-4(a) (2022).

On September 19, 2024, the appellate division entered an Order denying the plaintiff's motion to strike. However, the supplemental portion of the Order stated, "The motion is denied without prejudice to reconsideration by the merits panel."

In fashioning an argument that the TMS logs or "in-house" logs were superfluous to the plaintiff's case, the defendant's statement of facts credits

the opinion of its software expert Peter Lude and discredits the opinion of the plaintiff's software expert David Cartt. (Db 10 – Db12) Both experts had access to the Performance Logs and Security Logs for review and analysis regarding whether there was playback of digital content (commercial ads) on the movie screen at the time of the plaintiff's fall in Auditorium 5 of the defendant's movie theater. The conclusion reached by Mr. Lude was that the Security Logs indicated that there was flawless playback of digital content on the movie screen at the time of the plaintiff's fall. (Pa234 – Pa256) The conclusion reached by Mr. Cartt, however, was that the Performance Logs indicated that there were severe problems with the playback of digital content on the movie screen at the time of the plaintiff's fall. (Pa264 – Pa392)

The TMS logs that the defendant failed to preserve for review might have reconciled the conflicting opinions of Mr. Lude and Mr. Cartt or served as a "tie breaker" regarding whether the Security Logs or the Performance Logs accurately reflected what occurred during the playback of digital content on the movie screen when the plaintiff fell and injured herself.

REPLY TO POINT I OF DEFENDANT'S LEGAL ARGUMENT

Point I of the defendant's legal argument is that the trial court did not abuse its discretion when it denied the plaintiff's motion to amend the complaint to include a spoliation count for the defendant's failure to preserve the TMS or "in-house" logs for review. (Db14). In support of this argument, the defendant posits that the "[p]laintiff ignores the fact that the Security Log, Performance Log, and Event Log which were produced to Plaintiff are the functional equivalent of the TMS log which the subject of the appeal." (Db28)

Once again, the defendant credits the opinion of its software expert Peter Lude and discredits the opinion of the plaintiff's software expert David Cartt. (Db 10 – Db12) While both experts had access to the Performance Logs and Security Logs for review and analysis, Mr. Lude and Mr. Cartt reached opposite conclusions regarding whether there were any problems with the playback of digital content on the movie screen at the time of the plaintiff's fall. Mr. Lude opined that the Security Logs indicated that there was flawless playback of digital content on the movie screen at the time of the plaintiff's fall. Whereas, Mr. Cartt opined that the Performance Logs indicated that there were severe problems with the playback of digital content on the movie screen at the time of the plaintiff's fall. (Pa264 – Pa392)

Under these circumstances, the TMS logs were highly relevant evidence regarding whether the Security Logs or the Performance Logs were accurate regarding whether there was playback of digital content on the movie screen when the plaintiff fell and severely injured herself.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the appellate division reverse the trial court's Order entered November 30, 2018, which denied the plaintiff's motion to amend the complaint to include a claim for spoliation of evidence.

It is further respectfully requested that the appellate division reverse the trial court's Order entered January 11, 2019, which denied the plaintiff's motion for reconsideration of the Order dated November 30, 2018.

It is finally respectfully requested that the merits panel of the appellate division reconsider the Order entered September 19, 2024 denying the plaintiff's request to strike the defendant's appendix and brief under R. 2:5-4(a).

Dated: 9/20/2024

Respectfully submitted,

/s/ Charles C. Berkeley

CHARLES C. BERKELEY