SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LOURDES GONZALEZ,

Plaintiff-Appellant

vs.

908-910 WASHINGTON STREET LLC;
S&B PLUMBING & HEATING CORP.;
ABC CORPORATIONS 1-10 (Said Corporation Names Being Fictitious, Actual Names Unknown)

Civil Action

Appellate Court Docket No.
A-001099-24

ON APPEAL FROM:
Superior Court of New Jersey
Law Division, Civil Part
Hudson County
Docket No: HUD-L- 003993-20

SAT BELOW:
Hon. Keri Ann Eglentowicz, J.S.C.

BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT LOURDES GONZALEZ'S APPEAL

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Preliminary Statement

Two erroneous rulings deprived appellant of a fair opportunity to fully present her claim to the jury. Eugene Flinn, who owned 908 Washington Street before transferring it to respondent, changed the heating system inside appellant's apartment and thereby contaminated the potable hot water system with lead. Appellant ingested this contaminated hot water for more than twenty (20) years. Appellant was precluded from obtaining a recovery from Eugene Flinn for his negligent replacement of the heating system because the court would not permit the substitution of Mr. Flinn for a fictitious individual in the caption. The respondent presented no evidence in opposition to the appellant's application to substitute Mr. Flinn for a fictitious individual that established any prejudice to Mr. Flinn from the requested amendment of the pleading. The failure of the court to permit the amendment was plain error entitling appellant to a new trial on this theory against Eugene Flinn.

The second erroneous ruling was the direction of a verdict in favor of respondent on appellant's claim premised upon violations of the Hotel and Multiple Dwelling Act, *N.J.S.A.* 55:13A-1 et. seq., which establishes the standard of conduct for the respondent in this case. The precluded claim against respondent did not require notice to the landlord of the latent hazardous condition inside the apartment as a predicate to liability. The Jury ruled against appellant on the only claim she was

allowed to present to the jury, breach of the warranty of habitability, because notice to the landlord of the latent hazardous condition was required to impose liability.

This matter should be remanded back to the law division for a new trial so that appellant can recover for respondent's failure to satisfy its affirmative duty under the Hotel & Multiple Dwelling Act and case law to make reasonable inspections which would have discovered the hazardous condition that proximately caused appellant's permanent neurological injuries.

Finally, the trial court made erroneous evidential rulings which must be corrected should this court grant appellant a new trial.

Procedural History

The Complaint against 908-910 Washington Street LLC (hereinafter "Washington Street" or "respondent") and S & B Plumbing was filed on November 2, 2020. Pa1. On November 30, 2020, Eugene Flinn was served with the Complaint against Washington Street. Pa12. S & B Plumbing was served on December 8, 2020. Pa13. On July 6, 2021, the complaint was administratively dismissed for lack of prosecution. Pa14. The Complaint was reinstated on January 6, 2023. Pa15.

Washington Steet and S & B Plumbing filed Answers to the Complaint on January 31, 2023. Pa17 and Pa27. On February 13, 2023, Washington Street filed a Motion to Enforce Settlement and Dismiss Complaint. Pa37. The motion was granted on March 3, 2023, by the Hon. Veronica Allende, J.S.C. Pa90.

On April 4, 2023, an Amended Notice of Motion for Leave to Appeal Judge Allende's dismissal of plaintiff's Complaint against Washington Street was filed. Pa98. On September 13, 2023, the Appellate Division reversed the dismissal of plaintiff's Complaint and reinstated the Complaint against Washington Street. Pa100.

On March 8, 2024, plaintiff voluntarily dismissed S & B Plumbing from the case with prejudice based upon the Statute of Repose, *N.J.S.A.,* 2A:14-1.1. Pa110.

On April 26, 2024, Washington Street filed a Notice of Motion to Enforce Settlement and/or Dismissing the Complaint with Prejudice. Pa111. The Hon. Kalimah H. Ahmad, J.S.C denied Washington Street's motion on May 24, 2024. Pa273. However, the Order was not published on e-courts until July 3, 2024. Pa279.

On July 12, 2024, plaintiff filed a Notice of Motion Pursuant to *Rule* 4:26-4 to Amend the Complaint to substitute Eugene Flinn for a Fictitious Party in the Complaint. Pa381. This motion was denied without prejudice by the Hon. Joseph A. Turula, P.J.Civ. on August 2, 2024. Pa347.

On August 27, 2024, Washington Street filed a Motion for Reconsideration of Judge Ahmad's May 24, 2024, Order. Pa349. That motion was denied on October 8, 2024. Pa438.

On August 28, 2024, Washington Street filed a Motion to Bar the Net Opinion of plaintiff's medical expert, Dr. Osinubi. Judge Ahmad denied respondent's motion to bar the testimony of Dr. Osinubi on October 10, 2024. Pa445.

The trial in this matter was conducted on October 21-23 and October 28-30, 2024, before the Hon. Keri Ann Eglentowicz J.S.C.[1] On October 21, 2024, Judge Eglentowicz denied the plaintiff's Motion *In Limine* to substitute Eugene Flinn for a fictitious individual named in the caption. Pa449. On October 29, 2024, Judge Eglentowicz dismissed Court I of the Complaint pursuant to Rule 4:37-2(b). Pa451; 6T11.17 to 6T20.4. The jury rendered a verdict in favor of Washington Street on October 30, 2024, and an Order of No Cause of Action was filed on December 12, 2024. Pa464.

On December 18, 2024, a Notice of Appeal was filed. A Second Amended Notice of Appeal to include the previously omitted Order of the Hon. Keri Ann Eglentowicz, J.S.C. directing a verdict against appellant on Count I of the Complaint was filed on May 22, 2025. Pa453.

[1] 1T refers to the October 21, 2024 transcript of trial proceedings.
2T refers to the October 23, 2024 transcript of trial proceedings.
3T refers to the October 24, 2024 transcript of trial proceedings.
4T refers to Vol. 1 of the October 28, 2024 transcript of trial proceedings.
5T refers to Vol. 2 of the October 28, 2024 transcript of trial proceedings.
6T refers to the October 29, 2024 transcript of trial proceedings.
7T refers to the September 13, 2024 transcript of motion proceedings.
8T refers to the May 23, 2024 transcript of motion proceedings.

Statement of Facts

A. The claim.

The appellant filed this action to recover for permanent brain injuries resulting from her chronic lead poisoning that occurred while she was a tenant in Unit #3 of 908-910 Washington Street, Hoboken, New Jersey. Pa1. The appellant moved into Unit #3 with her mother and sisters in 1974. 2T103.1-5; 2T133.7-13. After her mother died, she lived in Unit #3 with her disabled sister and her daughter, Chance. 2T134.1-3.

Eugene Flinn purchased 908 Washington Street on May 31, 1996. Pa288. Shortly after purchasing the building, he removed the steam radiator heating system and installed a Bradford White Genesis Aqua Heat domestic hot water (DHW) baseboard heating system.[2] 2T107.7-16; 2T136.10-12. The hot water heater located inside Unit #3 supplied hot water for the baseboard heating units and domestic hot water service. 3T41.7 to 3T42.5 However, the plumber who installed the heating system in 1996 used lead containing solder to connect the copper pipes for the baseboard heaters which contaminated the DHW system for more than 20 years before it was discovered in October 2018.[3] 3T60.23 to 3T61.5.

[2] This is a contested fact as Eugene Flinn testified that the heating system in Unit 3 was changed prior to his ownership of 908 Washington Street.

[3] Defendant S&B Plumbing was voluntarily dismissed by plaintiff because of the Statute of Repose, *N.J.S.A*., 2A:14-1.1.

The appellant had three legal theories at trial against the respondent and Eugene Flinn, whom appellant sought to substitute for a fictitious party in the caption. The first legal theory for recovery was against Eugene Flinn for the negligent installation of the baseboard heaters which contaminated the DHW service. The second legal theory was against respondent for negligence in failing to provide appellant with potable hot water in violation of the Hotel and Multiple Dwelling Act, *N.J.S.A.* 55:13A-1 et. seq. and the enforcing administrative regulations which requires landlords to (1) provide potable water to tenants, *N.J.A.C.* 5:10-15.1, and (2) provide a premise free of hazards to the health and safety of the occupants of the leased premises. *N.J.A.C.* 5:10-6.1. The third and final theory for recovery against the respondent was for breach of the warranty of habitability which required that appellant prove notice to the landlord of the existence of the latent hazardous condition before recovery could be had.

B. Facts relevant to the denial of appellant's applications pursuant to *Rule* 4:26-4 to Substitute Eugene Flinn for a fictitious party.

Eugene Flinn purchased 908 Washington Street on May 31, 1996. 2T166.1-5; Pa288. He transferred ownership of 908 Washington Street and 910 Washington Street to 908-910 Washington Street, LLC on June 9, 2001. Pa292. The new combined property contained four residential rental units on the second and third floors and commercial space on the first floor and basement.

The appellant was a tenant at 908 Washington Street, Unit 3, since she was 7 years old or approximately 1974. 2T133.10-13. She filed a Complaint against respondent after she found out in January 2019 that she suffered lead poisoning from the potable hot water service in Unit 3. 2T140.4-6. The respondent was the owner of Unit 3 when the Complaint was filed on November 2, 2020. Pa292. However, the Complaint named John Does 1-10 as fictitious individuals who owned 908-910 Washington Street, Unit 3, during the period of appellant's tenancy. Pa1. The fictitious defendants are described in the Complaint, *inter alia*, as individuals who owned 908-910 Washington Street LLC, Unit 3. Pa1**.**

The respondent answered appellant's interrogatories on January 24, 2024. This discovery revealed that Eugene Flinn purchased 908 Washington Street from Ann Roberts on May 31, 1996. Pa288. On June 8, 2001, Eugene Flinn transferred ownership of 908 Washington Street and 910 Washington Street to 908-910 Washington Street, LLC. Pa292. The chain of title establishes that, during the period from May 1996 to November 2020 when the Complaint was filed, the owners of 908 Washington Street, Unit 3, were Eugene Flinn and 908-910 Washington Street, LLC.

On April 26, 2024, respondent filed a Summary Judgment motion to Enforce Settlement and/or Pursuant to *N.J.S.A.* 2A:14-2 to Dismiss the Complaint With Prejudice. Pa111. The Court issued an Order denying the respondent's motion. See

Order dated May 24, 2024. Pa273. The Order filed May 24, 2024, was first posted on e-courts on July 3, 2024**.** Pa279**.**

On July 12, 2024, the appellant filed a motion pursuant to *Rule* 4:26-4 to Amend the Complaint to substitute Eugene Flinn for a fictitious John Doe individual defendant so he could be identified as a direct defendant in this matter. Pa283. In its application, appellant informed the court of the identity of interests between 908-910 Washington Street, LLC and Eugene Flinn. Pa283 to Pa284 ¶1.

The appellant also informed Judge Turula of the fact that the trial date would not be affected by the granting of the motion because no additional discovery would be required by defendant Eugene Flinn. Pa284 ¶1. The reason no additional discovery would be needed was because Eugene Flinn was served with process and was therefore aware of the appellant's Complaint since its filing and had participated in all discovery, including the attendance at all depositions and all court proceeding. Pa12 and Pa284 ¶1.

Opposition to appellant's motion to substitute Eugene Flinn for a fictitious defendant was filed by respondent. Pa312 to Pa338. This opposition included a Certification from Eugene Flinn. In his Certification, Mr. Flinn claimed to be "prejudiced by plaintiff's 23-year delay in bringing a claim for compensatory damages for the claim asserted in the proposed Amended Complaint as the policies of insurance issued to me, and all persons defined as a named insured, are no longer

available or enforceable." Pa338 ¶7. Mr. Flinn did not complain about the loss of any evidence or witnesses during the period of the filing of the Complaint and the filing of the motion to substitute parties, or the need for additional discovery. Pa337 to Pa338.

On August 2, 2024, the appellant's motion was denied without prejudice by the Hon. Joseph A. Turula, P.J.Cv. Pa347. The reason for the denial of the appellant's motion was that the appellant did not explain how adding a party would not further delay the trial date, or how this amendment was not futile as the individual to be named was a member of a limited liability company which insulates him from personal liability. Pa348. However, in her moving papers the appellant specifically advised Judge Turula that the Amended Complaint would not require additional discovery and therefore would not impact the trial date. Pa284 ¶1. Additionally, appellant's opinion that additional discovery would not be needed was confirmed by respondent's opposition to the motion which did not request additional discovery but objected to the amendment because of the inability to locate insurance policies. Pa312 to Pa337.

Despite the timely filing of the Complaint, Judge Turula also expressed concern that Mr. Flinn would be prejudiced because the events that formed the basis of the appellant's claim occurred many years ago. Pa348. Respondent did not specifically object to the amendment on that basis.

Appellant refiled the application to add Eugene Flinn as an individual defendant *in limine*. Appellant responded to all the reasons relied on by Judge Turula for the denial of the previous motion without prejudice. 1T63.9 to 1T66.5. However, appellant's motion *in limine* was denied by the trial court on October 21, 2024. 1T67.24 to 1T72.23: Pa449. The trial court found that appellant did not provide sufficient reasons and analysis to satisfy her burden of proof to overturn Judge Turula's Order, 1T69.12, and adopted Judge Turula's previous findings. 1T70.2-9. The trial court also found that appellant was not diligent in seeking the amendment because Mr. Flinn was easily identifiable as the owner of the building based upon public records and was named as a defendant in a previously filed landlord/tenant action in which appellant was one of the plaintiffs. 1T71.17-24; 1T72.3-10.

C. Facts relevant to trial court's Order of involuntary dismissal of Count I of plaintiff's Complaint under the Hotel and Multiple Dwelling Act, *N.J.S.A*. 55:13A-1 et.seq.

Appellant read portions of the deposition testimony of Eugene Flinn to the jury. Mr. Flinn testified that he purchased 908 Washington Street in 1996. 2T166.1-5. 908 Washington Street had two apartments located on the second and third floors. 2T166.7-10; 2T166.17-21. His wife purchased 910 Washington Street in 1995. 2T169.18-20; 4T54.12. 910 Washington Street also has two apartments, one on the second and another on the third floor. 2T168-21 to 2T169.1.

In approximately 1999, 908 Washington Street was merged into 910 Washington Street. 2T167.11-16. Mr. Flinn merged the two buildings by obtaining a variance to break through the common wall on the first floor and the basement. 2T167.22 to 2T169.2. The purpose of the merger was to expand the floor space of the existing Amanda's Restaurant into the first floor of both 908 and 910 Washington Street; and the basement of 908 Washington Street was used for the restaurant kitchen and the basement of 910 Washington Street was used for a wine cellar, private dining room, a rest room and coat closet. 2T168.3-13.

Mr. Flinn formed 908-910 Washington Street, LLC on April 19, 2001. 2T169.2-9. On June 8, 2001, Mr. Flinn and his wife transferred 908 Washington Street and 910 Washington Street to 908-910 Washington Street, LLC. 2T169.14-18; Pa292. The purpose of this transfer was to put the ownership of the Restaurant and the apartments above it all into one entity. 2T169.19-23.

D. Facts relevant to trial court's exclusion of relevant testimony of appellant's medical expert.

Plaintiff called as a witness at trial Omowunmi Y.O. Osinubi M.D., an expert in occupational and environmental medicine, who submitted plaintiff to objective medical testing and testified to the cause of her neurological injuries. Based upon her environmental assessment and the tests performed on plaintiff, Dr. Osinubi concluded that plaintiff suffers from permanent brain damage resulting from her chronic

exposure to lead contaminated water for more than twenty (20) years and lead contaminated dust from the peeling lead paint inside the apartment. 4T145.12 to 4T148.20; Pa406 to Pa410.

In her Summary of Clinical Findings and Effects of lead Exposure, Dr. Osinubi concluded that plaintiff's chronic exposure to lead caused lead reproductive toxicity resulting in three spontaneous abortions and the preterm delivery of her daughter. Pa425. She casually related appellant's reproductive toxicity to cumulative exposures to lead from deteriorating lead-based paint and hot water lead contamination. Pa435.

Respondent moved to exclude Dr. Osinubi's opinion on reproductive toxicity as extremely prejudicial and upsetting. 4T9.13 to 4T10.6; 3T13.8-9. The Court, *sua sponte*, after the review of Dr. Osinubi's report, raised the issue of the admissibility of her opinions regarding appellant's exposure to lead paint. 4T16.10-15. The issue of the admissibility of Dr. Osinubi's opinion that lead paint dust was a proximate cause of appellant's injuries was previously decided by Judge Ahmed. Pa445. The trial court reversed Judge Ahmad's ruling and found that Dr. Osinubi's opinions on reproductive toxicity and opinions regarding the contribution of lead paint in Unit #3 to appellant's lead poisoning were to be excluded from evidence. 4T57.2-18; 4T53.4-6.

Legal Argument

I. Hon. Joseph A. Turula, P.J.Civ. and the Trial Judge erred in denying the plaintiff's motions pursuant to *Rule* 4:26-4 to substitute Eugene Flinn for a fictitious defendant named in the Complaint. (Pa347 and Pa449).

a. Standard of Review**.**

The standard of review for the denial of appellant's Motion to Substitute Eugene Flinn for a Fictitious Defendant Pursuant to *Rule* 4:26-4 and Motion *in Limine* to Substitute Eugene Flinn for a Fictitious Defendant Pursuant to *Rule* 4:26-4 is *de novo*. See *Claypotch v Heller, Inc.* 360 N.J. Super. 472 (App. Div. 2003).

b. Legal Argument.

A plaintiff may sue a person or entity as "John Doe" if the plaintiff knows a cause of action exists against the defendant but does not know the defendant's identity. *See Krzykalski v Tindall*, 232 N.J. 525, 537-38 (2018). Our court rules provide that "if the defendant's true name is unknown to the plaintiff, process may be issued against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification." *R.* 4:26-4. The rules also direct the plaintiff to "amend the complaint to state defendant's true name" at a time "prior to judgment." *Krzykalski, supra.*

Amendment under *Rule* 4:26-4 is a prerequisite to recovery: "[n]o final judgment shall be entered against a person designated by a fictitious name." *Id*. Indeed, the fictitious name rule acts to "suspend the running of the statute of

limitations until the actual identity of a defendant is discovered." *Lawrence v. Bauer Publ'g & Printing Ltd.*, 78 N.J. 371, 375-76 (1979).

Rule 4:26-4 requires a plaintiff to demonstrate due diligence in ascertaining defendant's true name and substituting it upon learning the defendant's identity. "The purpose of the requirement that a plaintiff exercise due diligence in ascertaining the true name of a fictitiously named defendant and promptly serve an amended complaint with the defendant's correct name is to prevent undue prejudice as a result of delay in that defendant being made aware of the action." *Claypotch v Heller, Inc.* 360 N.J. Super. 472, 482 (App. Div. 2003). However, absent evidence that "the lapse of time has resulted in a loss of evidence[,] impairment of ability to 'defend' or 'advantage' to plaintiffs, [j]ustice impels strongly towards affording the plaintiffs their day in court on the merits of their claim[.]" *Farrell v. Votator Div. of Chemtron Corp.,* 62 N.J. 111, 122 (1973).

"In our judicial system, 'justice is the polestar and our procedures must ever be moulded [sic] and applied with that in mind'". *Salazar v MKGC Design*, 458 N.J. Super. 551, 557 (App. Div. 2019)(citing *New Jersey Highway Auth. V Renner*, 18 N.J. 485, 495 (1955). "There is an absolute need to remember that the primary mission of the judiciary is to see justice done in individual cases. Any other goal, no matter how lofty, is secondary." *Id*., (*citing*, *Santos v Estate of Santos*, 217 N.J. Super. 411, 416 (App. Div. 1986)).

Appellant acknowledges that *Rule* 4:26-4 requires that a plaintiff exercise due diligence in ascertaining the true name of a fictitiously named defendant and promptly serve an amended complaint with the defendant's true name and cannot represent to this Court that the motion to substitute Eugene Flinn could not have been filed sooner. Appellant's motion to substitute Eugene Flinn was filed in July 2024 because the chain of ownership was first revealed in January 2024 when respondent served its answers to appellant's interrogatories. After the disclosure of the chain of ownership, the respondent filed a motion for summary judgment. That motion was denied on May 24, 2024, but not published to appellant until July 3, 2024. Immediately upon receipt of the Court's ruling denying respondent's dispositive motion, appellant filed the motion to substitute Eugene Flinn for a fictitious John Doe individual named in the Complaint on July 12, 2024.

Claypotch, however, instructs us that the purpose of the due diligence requirement is to prevent undue prejudice because of the delay in the substituted defendant being made aware of the action. *Claypotch, supra*, 360 N.J. Super. at 482. Here, Eugene Flinn was aware of this lawsuit since its inception as he is an owner of the named defendant 908-910 Washington Street, LLC and was served with the Summons and Complaint. Pa12. Eugene Flinn participated in all discovery in this matter, attending all depositions and motion hearings.

At the time of the filing of the Complaint, appellant knew that 980-910 Washington Street, LLC was the owner of Unit #3 but did not know that Eugene Flinn owned 908 Washington Street individually from 1996 to 2001, when the heating system in Unit #3 was changed. That is why 908-910 Washington Street LLC was named as the defendant in this action, and individual John Doe defendants were named in the Complaint to protect the plaintiff should there be ownership of the property by any individuals during the relevant time of plaintiff's exposure.

There was no prejudice in the defense of this action suffered by Eugene Flinn by the filing of the motion to substitute him for a fictitious defendant in July 2024 because no additional discovery was necessitated by this amendment. We know this is true because the respondent never asserted that there would be a need for additional discovery if Eugene Flinn was substituted for a fictious defendant in the caption in either the opposition to appellant's motion or in opposition to the *in limine* motion at trial. Pa312 to Pa337; 1T66.8 to 1T67.23. As an owner of 908-910 Washington Street LLC, Eugene Flinn's interests were aligned with the respondent, and he benefited from any defense that was developed by respondent.

The respondent cannot contest the fact that Mr. Flinn was aware of the filing of the Complaint as soon as service was effectuated on 908-910 Washington Street, LLC, or that he has participated in the defense of this matter since its inception. The respondent's sole allegation of prejudice to Mr. Flinn is that the company that

purchased his former insurance broker's practice, Acrisure Insurance Agency, only maintains records of policies for seven years and therefore, Mr. Flinn could not obtain copies of the historic policies he purchased to insure 908 Washington Street. Pa338.

The prejudice to a defendant referenced in the case law is prejudice in defending against the Complaint that is sought to be amended, not the inability to locate insurance coverage. Prejudice to the defendant must result from the loss of evidence, impairment in the ability to defend or an unfair advantage to plaintiffs occasioned by the substitution. *See Farrell v. Votator Div. of Chemtron Corp.,* 62 N.J. 111, 122 (1973). Even if it was relevant information, which appellant contends it is not, the respondent never produced any evidence that the insurance policies were destroyed between November of 2020 when the Complaint was filed and July 2024 when the motion to substitute Eugene Flinn for a fictitious party in the caption was filed. In fact, the relevant property insurance policies for the period of 1996 to 2001 would have been destroyed, pursuant to Acrisure' document retention policy, years before appellant filed this action.

Having known about this lawsuit from its inception and having participated in the defense of the respondent, Mr. Flinn suffered no prejudice in his ability to defend against appellant's action and respondent provided no evidence to the trial court of

the loss of evidence or advantage to appellant that would have been caused by the substitution of Mr. Flinn pursuant to *Rule* 4:26-4.

In contrast, appellant was severely prejudiced by the Court's failure to permit the identification of the fictitious defendant in this matter. Washington Street only owned Unit #3 since June 2001. The appellant alleges that Mr. Flinn changed the steam radiator heating system in the apartment to a baseboard hot water system shortly after he purchased the property in 1996. "[I]t is well settled law that if [a] landlord voluntarily makes repairs himself, or by a servant, he is liable for injuries resulting from the negligent manner in which the work is done." *Caruso v Monschein*, 24 N.J. Super 55, 58 (App. Div. 1952).

The significance to appellant of pursuing this negligence cause of action against Mr. Flinn is that notice to the landlord is not a requirement. Actual or constructive notice does not apply in cases, such as this one, where the landlord created the condition. *Coleman v. Steinberg*, 54 N.J. 58 (1969). The inability of appellant to prove that respondent had notice of the latent condition of the lead contamination of the DHW system is the probable reason the jury rendered a verdict of no cause of action at trial.

Based upon our Court Rules and guidance from our Supreme Court, the amendment of the Complaint to name a fictitious defendant can be made anytime up until judgment. The issue is prejudice. In the absence of prejudice, Judge Turula

and/or the trial court should have permitted the substitution of Eugene Flynn for a fictitious defendant in the caption. The failure to do so constituted plain error and entitles plaintiff to a new trial on this claim.

II. The Trial Court committed error in dismissing appellant's claim against respondent under the Hotel and Multiple Dwelling Act, *N.J.S.A.* 55:13A-1 et. seq. (Pa451).

a. Standard of Review.

The trial court's grant of respondent's motion for an involuntary dismissal was premised upon the construction of the definition of "multiple dwelling" in the *Hotel and Multiple Dwelling Act*, *N.J.S.A*. 55:13A-7(k) and therefore the standard of review is *de novo*. *Twp. Of Holmdel v. N.J. Highway Auth.,* 190 N.J 74, 86 (2007). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan*, 140 N.J. 366, 378 (1995).

b. Legal Argument.

At the end of the appellant's case, the trial judge directed a verdict pursuant to *R.* 4:37-2(b) against appellant on Court I of the Complaint under the *Hotel and Multiple Dwelling Act*, *N.J.S.A.* 55:13A-1 et. seq (hereinafter the "Act"). The trial court found that appellant did not carry her burden of proof of establishing that 908-910 Washington Street was a multiple dwelling as defined in the Act**.** The Act defines the term "multiple dwelling" as "any building or structure of one or more stories . .

.in which three or more units of dwelling space are occupied, or are intended to be occupied by three or more persons who live independently of each other." *N.J.S.A.* 55:13A-7(k).

The Act was enacted in 1967 as remedial legislation to protect the health and welfare of the public to ensure that they have safe dwelling units. The Act is to be liberally construed to effectuate its purpose. *N.J.S.A.* 55:13A-2.

Prior decisions of this Court have found in almost identical factual situations that two adjoining buildings with four apartments combined constitute a multiple dwelling subject to the Act. In *Bunting v Sheehan*, 156 N.J. Super. 14, (App. Div. 1976), the issue presented was whether the premises known as 16-18 Vanderventer Avenue in Princeton New Jersey was a "multiple dwelling" within the meaning of the Act. The two halves of the building were separated by a fire wall that ran from the basement to a point one foot below the roof line. Each had its own heating unit and for several years prior to the purchase of each half by the appellant, they had been owned separately and individually taxed. *Bunting, supra,* 156 N.J. Supra. at 16-17.

Building No. 16 had office space on the first floor and apartments on each of the second and third floors. Building No. 18 had an apartment on the first floor, three bedrooms on the second floor that shared a bathroom on the third floor which had two bedrooms. The bedrooms were rented to graduate students. The court concluded

that 16-18 Vanderventer contained eight dwelling units and was a multiple dwelling within the meaning of the *N.J.S.A* 55:13A-3(k).

In *Rothman v. Dept. of Cmty Affairs*, 226 NJ. Super. 229 (App.Div. 1979), the issue was whether common ownership was a requirement for finding that the buildings at issue constituted a multiple dwelling. *Rothman* involved three separate buildings located in Cliffside Park. Each building contained four housing units. However, appellant claimed that each building was converted into two separate buildings, each containing two units, when Rothman Realty Corporation conveyed one half of each building to appellants Leonard and Mildred Rothman. *Rothman, supra*, 226 N.J. at 230.

The court noted that the structure of the appellants' buildings was similar to the multiple dwelling found in *Bunting*. "Each building consists of four apartments. Two apartments are on each side of the buildings, which are divided in the center by a fire wall. Each half of the buildings has a separate address." *Id.* at 233. The court found, however, that contrary to appellant's contentions, common ownership of a building is not an element of the definition of a "multiple dwelling" under *N.J.S.A.* 55:13A-3(k) and that each building at issue constituted a multiple dwelling under *N.J.S.A.* 55:13A-3(k). *Id.* at 234-235.

908-910 Washington Street is a multiple dwelling as defined by the Act. Like in *Rothman*, each half of 908-910 Washington Street has a separate address and is

commonly owned. Although the court found that common ownership is not a pre-requisite to finding a property is a multiple dwelling under the Act, this fact was significant to the determination of the Commissioner of Consumer Affairs. *Rothman*, 226 N.J. Super. at 233-234.

Like *Bunting* and *Rothman*, there was a common wall separating 908 from 910 Washington Street. However, that wall was removed from the first floor and basement when the buildings were "merged" to expand the seating in the first-floor restaurant and permit the renovation of the kitchen along with the creation of a private dining area and wine cellar in the basement. T2167.22 to 169.2.

The trial judge in this case cited the correct standard for the review of a *Rule* 4:37-2(b) application then promptly ignored all the facts which supported the denial of the motion. Under *Rule* 4:37-2(b) the trial court will grant a motion for a directed verdict only if, accepting the non-moving party's facts and considering applicable law, no rational jury could draw from the evidence presented that the moving party is entitled to relief. 4T13.13-18. However, she failed to analyze respondent's motion according to the dictates of the Act which requires liberal construction of this remedial legislation. *N.J.S.A.* 55:13A-2. (The Act is to be liberally construed to effectuate its purpose).

Despite the evidence presented by appellant which exceeded the evidence presented in *Bunting* and *Rothman*, the trial court focused upon the fact that appellant

did not produce any evidence that 908-910 Washington Street was registered with the Department of Community affairs and was subject to the inspection requirements under the Act. 6T18.24 to 6T19.7. Registration of the building with the Department of Community Affairs is the obligation of the property owner, not the tenant. To find that the absence of registration is a fact militating against a finding that the Act applies to a hazard found in a dwelling is to reward a property owner for non-compliance with the Act at the expense of the tenant who is in the class of individuals the Act was intended to protect.

The trial court found that the deed did not combine the buildings. 6T18.22-23. However, although the properties retained separate legal descriptions, they were transferred to 908-910 Washington Street, LLC in the same deed. Pa124.

The trial court found that there was no testimony or evidence that the buildings had been combined. 6T19.10-12. But Eugene Flinn testified that he "merged" the buildings together by obtaining a variance that allowed him to break through the common wall of the first floor and basement. 2T167.11 to 2T169.2. The trial court found that this change had no effect on the dwelling units above the first floor because there was no connection between the other floors. 2T19.16-19. Nonetheless, in its current state with the common wall on the first floor and basement removed, it would be impossible for the respondent to sell 908 Washington Street and 910 Washington Street separately.

In granting the respondent's application, the trial court also found that the fact that the buildings were separate structures, acquired separately, as supporting her ruling. 6T19.11-13. The prior separate ownership of two halves of a building that is taxed separately was not an impediment to the court in *Bunting* finding that the Act applied. *Bunting Supra*, 156 N.J. Super. at 16-17.

The decision of the trial court to dismiss appellant's first count at the conclusion of appellant's case was clearly erroneous and entitles appellant to a new trial to present her claim under the Act to a jury.

c. Plaintiff's claim under the Act.

The dismissal of Court I was a miscarriage of justice because a violation of the Act is evidence of negligence that can be presented to a jury. The jury question is whether the respondent satisfied its duty of care to appellant to make the premises safe, which includes the duty to make reasonable inspections to discover defective conditions. *Handleman v Cox*, 39 N.J. 95, 111 (1963). A violation of the Act constitutes evidence that respondent failed to satisfy its duty to make reasonable inspections.

"A statute which establishes a standard of conduct may be considered as evidence of negligence on behalf of one whose benefit it was enacted if its breach was the efficient cause of the injury of which [s]he complains". *Ellis v Caprice*, 96 N.J. Super. 539, 661-662 (App. Div. 1967). A violation of the Act can be considered

by the jury on the issue of defendant's negligence. *Id.* at 547. (relying on the Tenement House Law, *N.J.S.A* 55:3-18, the predecessor to the Act); *Trentacost v Brussel*, 82 N.J. 214, 230 (1979)(the statutory and regulatory scheme governing the habitability of multifamily dwellings establishes a standard of conduct for landlords. It is thus available as evidence for determining the duty owed by landlords to tenants.)

The Commissioner of the Department of Community Affairs is directed by *N.J.S.A.* 55:13A-7 to "issue and promulgate . . . such regulations as he may deem necessary to assure that any . . . multiple dwelling will be . . . maintained in such manner as is consistent with, and will protect the health, safety and welfare of the occupants . . ." Like the Act, the Administrative Regulation promulgated thereunder are to be liberally interpreted to secure the beneficial purposes thereof. *N.J.A.C.* 5:10-1.5. The owner of a multiple dwelling under the Act is responsible for providing the occupants therein with potable water. *N.J.A.C.* 5:10-15.1. Potable water is defined as "water free from impurities present in amounts sufficient to cause disease or harmful physiological effects." It is the duty of the owner of any multiple dwelling to keep the premises, at all times, free of hazards to the health and safety of the occupants of the premises. *N.J.A.C.* 5:10-6.1. This would include the hazard of lead contaminated domestic hot water in Unit #3.

Consequently, the respondent owed a duty to provide potable hot water to plaintiff pursuant to the Act, and the breach of that duty constitutes evidence of negligence that the jury must consider when deciding whether the respondent in this case satisfied its duty to make reasonable inspections to discover defective conditions. *Terrey v Sheridan Gardens*, Inc, 163 N.J. Super. 404, 410 (Ap. Div. 1978).

The fact that the landlord had no notice of the lead contamination of the hot water system prior to its discovery by plaintiff in 2018 is not a defense to plaintiff's claim under the Act. A property owner cannot "sit passively by without liability for a dangerous condition unless it was somehow bought to their attention." *Cantando v Sheraton Poste Inn*, 249 N.J. Super 253, 296, (App. Div. 1991). Respondent had a duty to make reasonable inspections to determine that Unit #3 had safe drinking water. Eugene Flinn admitted that he never tested the water quality in the apartment. 6T64.18.22.

The appellant was denied the opportunity to present her claim under the Act to the jury. The trial judge's ruling constitutes a miscarriage of justice entitling appellant to a new trial at which it can present her claim based upon the *Hotel and Multiple Dwelling Act, N.J.S.A.* 55:13A-1 et. seq.

III. The trial court's exclusion of the opinions of appellant's medical causation expert on reproductive toxicity (3T9.12-14.20;3T27.12-29.7;3T30.1-4;3T40.150.2;3T53.3-7) and appellant's exposure to lead paint was an abuse of discretion. (3T57.2-18; 3T53.4-6).

a. The standard of review.

The standard of review of a trial court's evidential rulings is limited to examining the decision for abuse of discretion. *Primmer v Harrison*, 472 N.J. Super. 173, 187 (App. Div. 2022).

b. Legal Argument.

i. Exclusion of Opinion on Reproductive Toxicity.

It was an abuse of discretion by the trial court to exclude Dr. Osinubi's opinion on appellant's reproductive toxicity caused by her chronic lead exposure. The respondent's objection was that this testimony would be extremely prejudicial and upsetting. Reproductive toxicity was an element of plaintiff's damage claim. Dr. Osinubi took a history from the appellant in connection with her medical analysis. Pa366. This information, along with her documented history of chronic low level lead exposure, was relied upon in formulating her opinion that plaintiff's history of three spontaneous abortions and premature birth of her daughter was causally related to appellant's chronic lead exposure. Pa425.

This opinion was not a surprise to the respondent. It was reported in Dr. Osinubi's expert report and was the subject of her deposition testimony. Appellant requested a *N.J.Evid.R.* 104 hearing so the trial court could fully understand the basis for her opinion that appellant's chronic lead exposure caused her reproductive toxicity resulting in three spontaneous abortions and a premature birth. 4T11.17. That request was ignored.

The trial court was concerned that Dr. Osinubi did not review medical records regarding these spontaneous abortions. 4T13.20-23. If a hearing was held, Dr. Osinubi could have explained that taking a history from the patient is an accepted methodology in the field of occupational medicine and therefore is reliable. The failure to collect and review medical records of spontaneous abortions, if they even existed, is a fair subject for cross examination, but not a basis for preclusion.

The trial court precluded Dr. Osinubi's testimony on reproductive toxicity without performing a proper analysis of its admissibility other than agreeing with respondent that the testimony would be prejudicial and upsetting. 4T9.12-4T14.20; 4T27.12-4T29.7; 4T30.1-4; 4T49.1-4T50.2; 4T53.3-7. Damage claims are frequently upsetting, but they are not prejudicial to a defendant. They are just part of the *prima facia* case for a plaintiff. To exclude a damage claim because the doctor relied upon the testimony of the patient rather than medical records does not make her opinion

unreliable. See, *N.J.Evid.R.* 702[4] (the methodology and factual basis underlying an expert's opinion must be sufficiently reliable). The trial judge failed to perform a proper analysis of Dr. Osinubi's testimony on reproductive toxicity and therefore the exclusion of this testimony was an abuse of discretion.

ii. The trial court's exclusion of Dr. Osinubi's testimony on the appellant's exposure to lead paint in the apartment was an abuse of discretion.

Dr. Osinubi was qualified by the trial court as an expert in environmental and occupational medicine. 4T64.9 – 4T75.12. By the time she was retained to evaluate the plaintiff, the appellant was no longer a tenant in Unit #3 and the apartment was renovated. 6T60.19-25. Dr. Osinubi could not test the paint inside the apartment because it was no longer there at the time of her retention. However, because 908 Washington Street was built before 1978, Dr. Osinubi held the opinion that it was more likely than not that there was lead paint inside Unit #3. 4T24.23 to 4T25.1; Pa406 to Pa410. This opinion was shared by the respondent. 4T20.23 to 4T21.1.

The trial judge raised the issue *sua sponte* of whether Dr. Osinubi could testify about a lead exposure resulting from exposure to lead paint dust inside the apartment, despite the fact that Judge Ahmad had already ruled on this issue. Pa445. The trial

[4] *N.J.Evid.R*. 702 incorporates the standard articulated by the New Jersey Supreme Court in *State v. Kelly*, 97 N.J. 178 (1984). *See In Re Accutane Litig*., 234 N.J. 340, 349 (2018). That baseline for admissibility states (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. *Id.* (citing *State v Kelly,* 97 N.J. at 223).

court was troubled by the fact that the paint had never been tested and questioned whether lead paint dust was in the case because it was her opinion that the issue in the case was limited to the potable water supply. 4T25.8-16. The trial judge decided to limit the appellant's case even though Dr. Osinubi opined in her expert report that the lead paint dust inside Unit #3 contributed to appellant's lead exposure. The presence of lead paint dust inside Unit #3 was also discussed in her deposition and the respondent's motion to exclude testimony on this issue was previously denied by Judge Ahmad. Pa445. The trial court excluded Dr. Osinubi's testimony regarding lead paint in Unit #3 because it was highly prejudicial and inflammatory and not related to the contamination of the DHW supply. 4T28.23 to 4T29.3.

Once again, the trial judge failed in her duty to perform an analysis under *In Re Accutane Litig*., 234 N.J. 340, 349 (2018). The trial court improperly limited the scope of appellant's evidence without proper justification. Dr. Osinubi's conclusion that there was lead paint inside Unit #3 because the building was constructed prior to 1978, the date when lead was taken out of paint, was reliable based upon her training and experience. It was the role of the jury to evaluate the credibility of this evidence. The exclusion of Dr. Osinubi's testimony on appellant's exposure to lead paint dust was an abuse of discretion and should be reversed.

Conclusion

For all the foregoing reasons, appellant respectfully requests that this Court remand this matter to the trial court for a new trial on the issues of Eugene Flinn's liability for appellant's injuries and respondent's liability premised upon violations of the Act, and the reversal of evidence rulings that excluded the testimony of portions of appellant's medical causation expert.

Caruso Smith Picini, PC
Attorneys for Plaintiff/Appellant
Lourdes Gonzalez

S/Richard D. Picini
_____
By: Richard D. Picini

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LOURDES GONZALEZ, Plaintiff-Appellant/ Cross-Respondent vs. 908-910 WASHINGTON STREET, LLC; Defendant-Respondent/ Cross- Appellant S & B PLUMBING & HEATING CORP.; Defendant ABC CORPORATIONS 1-10 (Said Corporation Names Being Fictitious, Actual Names Unknown)	Civil Action Appellate Court Docket No. A-001099-24 ON APPEAL FROM: Superior Court of New Jersey Law Division, Civil Part Hudson County Docket No.: HUD-L-003993-20 SAT BELOW: Hon. Keri Ann Eglentowicz, J.S.C.

BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT/CROSS APPELLANT
908-910 WASHINGTON STREET, LLC

ON THE BRIEF:

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PRELIMINARY STATEMENT

Plaintiff has already had two bites at the proverbial apple. In 2018, plaintiff previously presented her claims in front of a jury against this defendant landlord for emotional distress caused by landlord's failure to repair multiple conditions in her Hoboken apartment including the same heat /hot water systems that is the subject of this suit. Plaintiff settled her claims in *Gonzalez1* HUD-L-2062-16, during the trial, for $55,000 and two years free rent in exchange for the release of any and all claims. The quality of the hot water was a condition within the contemplation of the parties at the time of the 2018 settlement. Da1; Da17. In this second lawsuit plaintiff pursued claims for bodily injury and mental anguish because of alleged lead poisoning caused by ingesting the hot water from the same 28-year-old heat/hot water systems. The cold water was not at issue. After a seven day trial, the jury returned with a verdict of No Cause.

In this untimely appeal, plaintiff seeks a remand to allow her to empanel her third jury for a "do over" because she neglected to sue the prior landlord who owned the building from 1996 through 2001 and also failed to demonstrate that this Hoboken building, with only two apartments over a retail space, was subject to the Hotel and Multiple Dwelling Act *N.J.S.A. 55-13A.* The Act only applies to a building with three or more units. Defendant seeks that this court affirm the orders and rulings of the trial court denying plaintiff's motion to add a fictitious party on

the eve of trial and dismissing Plaintiffs claims under *N.J.S.A. 55:13A*. There is no basis to remand and disturb the jury verdict of No Cause.

Alternatively, defendant cross appeals and seeks a reversal of the pretrial orders denying defendant's motion to dismiss plaintiff's complaint based upon the prior settlement or the statute of limitations. The lower court erred in failing to dismiss plaintiff's complaint before trial. Defendant seeks a dismissal of plaintiff's complaint with prejudice.

The court may also dismiss this appeal as plaintiff did not timely file the Notice of Appeal. Plaintiff sat idly for 49 days after Judgment was entered.

PROCEDURAL HISTORY

On November 2, 2020 plaintiff appellant/cross respondent Lourdes Gonzalez (hereinafter plaintiff Gonzalez) filed a complaint against her landlord defendant respondent/ cross appellant 908-910 Washington St. LLC (hereinafter defendant 908-910 Washington Street) and a plumber defendant S&B Plumbing & Heating Corp. Pa1.

The complaint, Pa1, asserted chronic lead poisoning of plaintiff Gonzalez from her long-term ingestion of a lead contaminated hot water supply in her Hoboken apartment. The cold-water supply was not at issue. Pa3. The complaint was based on theories of: violation of the Hotel and Multiple Dwelling Act (Count One); Negligence (Counts Two and Four); breach of the warranty of habitability (Count Three), and claims against John Does and ABC Corps (Count Five). Pa1 to Pa11.

Defendant 908-910 Washington Street filed an answer to the complaint on January 31, 2023 asserting the defense that plaintiff's claim was barred by a prior settlement agreement between the parties and general denials. Pa17 to Pa24.

Defendant S&B Plumbing also filed an answer to the complaint on January 31, 2023 asserting general denials to plaintiff's complaint. Pa 27.

On February 13, 2023, before discovery commenced, defendant 908-910 Washington Street filed a motion to enforce settlement and to dismiss the complaint based upon a prior lawsuit plaintiff had filed against the defendant landlord. Pa37 to Pa78

Defendant's motion asserted that prior to the filing of the November 2, 2020 complaint, plaintiff was represented by another lawyer, who also filed an action on behalf of plaintiff Gonzalez, HUD-2062-2016 (*Gonzalez1*), seeking damages, resulting from defendant landlord's alleged failure to provide adequate heating, plumbing and water supply. The prior case was settled in the middle of a jury trial and the parties exchanged a settlement agreement and mutual general releases based on the landlord's payment of $55,000 and the agreement to allow plaintiff to remain in the apartment rent free for two years until May 31, 2020. Pa64 to Pa78.

An Order of March 3, 2023 was entered granting defendant's motion dismissing plaintiff's complaint with prejudice as against defendant 908-910 Washington Street only. Pa90.

Plaintiff filed a Notice of Motion for Leave to Appeal the March 3, 2023 Order, Pa98, and Leave to Appeal was granted. Pa253.

On September 13, 2023 the Appellate Division reversed the order of dismissal as to defendant 908-910 Washington Street remanding for further proceedings with the instruction that the remaining question for the Appellate Court

was whether the instant lawsuit arises from or is in any way related to the subject matter of *Gonzalez1* and within the contemplation of the parties. Pa107; Pa100 to Pa109.

Defendant 908-910 Washington Street resumed participation in the lawsuit and discovery following the appellate opinion. Da27.

By order of the court dated November 22, 2023, the case was given a discovery end date of April 5, 2024 and a trial date of September 10, 2024. Da27 to Da28.

On March 8, 2024 plaintiff entered into a settlement with defendant S&B Plumbing and filed a stipulation of dismissal with prejudice as to the defendant plumber only. Pa110.

On April 26, 2024 defendant 908-910 Washington Street filed a motion to enforce the prior settlement and/ or dismiss plaintiff's complaint with prejudice based on the statute of limitations. Pa111 to Pa253; Da1 to Da14.

On May 14, 2024 plaintiff opposed defendant's motion to enforce the prior settlement and/or dismiss plaintiff's complaint with prejudice based on the statute of limitations. Pa254 to Pa267.

By way of an Order dated May 24, 2024, the lower court denied defendant's motion to enforce the prior settlement and/or dismiss plaintiff's complaint with prejudice based on the statute of limitations. Pa273.

On July 12, 2024 plaintiff filed a *R. 4:26-4* fictious party motion to amend her complaint to add the person who was her prior landlord 28 years earlier; plaintiff motioned to add Eugene Flinn, who was in the Hoboken apartment's chain of title from May 31, 1996 through June 8, 2001. Pa281 to Pa303.

Plaintiff's fictitious party motion was filed less than two months before the scheduled September 10, 2024 trial date. Da28.

Defendant 908-910 Washington Street opposed plaintiff's motion to add a fictitious defendant. Pa312 to Pa346; Da15 to Da19.

On August 2, 2024 the court entered an order denying plaintiff's *R. 4:26-4* fictious party motion. Pa347.

On August 27, 2024, defendant filed a motion for reconsideration of the May 24, 2024 Order denying defendant's motion to dismiss plaintiff's complaint based on the statute of limitations or alternatively to enforce the prior settlement. Pa349 to Pa356; Da20 to Da21.

Plaintiff opposed the motion for reconsideration. Pa361.

Defendant's motion for reconsideration of the May 24, 2024 Order was denied. See Order of October 8, 2024. Pa438.

The case was assigned out for trial on October 21, 2024 before the Hon. Keri Ann Eglentowicz, J.S.C. 1T4:1 to 5:1.

Plaintiff filed an *in limine* motion to renew her prayer for relief for an order pursuant to R. *4:26-4* to substitute Eugene Flinn for a fictitious defendant. Judge Eglentowicz denied plaintiff's motion to add a fictious defendant on the day of trial. 1T67:24 to 72:23; Pa 449.

The seven-day trial was conducted from October 21, 2024 through October 30, 2024. Pa 466.

Early in the proceedings, before witnesses were called, defendant raised the issue that 908-910 Washington Street did not constitute a multiple dwelling under the Hotel and Multiple Dwelling Act because the building was only two residential units over a commercial space. 2T11:18 to 12:1. Plaintiff asserted she was entitled to proceed on this theory "and if the defendant wants to make a motion for a directed verdict on that claim at the end of plaintiff's case, they're welcome to do so." 2T9:1 to 13.

At the close of plaintiff's case on October 28, 2024, defendant moved to dismiss Count One of plaintiff's Complaint, based the Hotel and Multiple Dwelling Act, per R. *4:37-2. 5T239:14 to 15*.

While accepting as true the evidence presented by plaintiff and legitimate inferences drawn therefrom, the trial court dismissed Count One of plaintiff's Complaint based the Hotel and Multiple Dwelling Act. 6T11:17 to 20:4.

After the presentation of the defense witnesses, the jury returned with a verdict of No Cause of Action. Pa466.

Following the mandate of *R. 4:47* the court clerk entered the jury's verdict and Judgment in favor of defendant on October 30, 2024. Pa466. Entry in the Civil Docket on 10/30/2024 is confirmed by eCourts transaction ID LCV20242840728. Da26.

On November 6, 2024 defendant submitted a proposed formal order for judgment for the court's signature. Da29 to Da32.

Plaintiff did not object to the proposed form of order which did not grant additional relief from the clerk's entry of Judgment on October 30, 2024. Da26.

Plaintiff did not file a motion for a new trial or take any other actions that would toll the October 30, 2024 entry of judgment before filing a Notice of Appeal. Da26.

For 49 days after the clerk's entry of Judgment on October 30, 2024 plaintiff sat idly. Da26.

On December 18, 2024 plaintiff filed an untimely Notice of Appeal referencing an Order of 12/04/2024 (memorializing judgment for No Cause); 8/2/24 Order and 10/21/24 Order (regarding the fictitious defendant motions); and 10/29/24 ruling (directed verdict motion). Da33 to Da44. Unlike the clerk's Judgment, Judge

Eglentowicz's signed 12/04/2024 Order was never entered in the Civil Docket. Da22 to Da26.

On December 20, 2024 the parties were advised by eCourts Appellate communication that plaintiff's Notice of Appeal was filed. The appeal was deficient due to the following: failure to add all parties listed in the caption to the appeal as plaintiff had not listed the settling defendant S&B Plumbing on the Notice of Appeal. Da45.

On December 20, 2024 defendant 908-910 Washington Street filed a Notice of Cross Appeal of the trial court's entry of the May 24, 2024 Order denying defendant's motion to dismiss plaintiff's complaint with prejudice based on the prior settlement and/or statute of limitations and the November 8, 2024 reconsideration motion. Da46 to Da58.

On December 27, 2024 plaintiff filed an amended notice of appeal to include a 12/12/2024 order (entered on the Civil Docket 12/20/2024 LCV 20243255037 memorializing judgment for No Cause) Da26, and relisted the 08/02/2024, 10/21/2024 Orders and 10/29/2024 ruling originally identified in the December 18, 2024 Notice of Appeal. Da59 to Da70.

More than five months after judgment was entered and after plaintiff filed her Notice of Appeal, A1099-24, plaintiff sent correspondence to the trial judge dated April 16, 2025 requesting a formal written order regarding the court's *R. 4:37-2*

ruling dismissing plaintiff's claims based on the Hotel and Multiple Dwelling Act in Count One of the Complaint. Da86 to Da88.

The trial court signed plaintiff's Order regarding the directed verdict motion dated April 17, 2025 despite a lack of jurisdiction pursuant to *R. 2:9-1*. Pa451.

On April 29, 2025 Plaintiff filed a motion for leave to file a second amended notice of appeal and to extend time to cure deficiencies. M-4798-24. Da72 to Da79.

Defendant 908-910 objected to plaintiff's appellate motion. M-4798-24. Da80 to Da84.

On May 19, 2025 the Appellate Court granted plaintiff's motion to file a second amended notice of appeal. Da85.

On May 23, 2025 plaintiff filed an amended Notice of Appeal to include a 12/12/2024 order (entered on the Civil Docket 12/20/2024); the 08/02/2024, 10/21/2024 Orders and 10/29/2024 ruling and added the 04/17/2025 order along with "various evidential ruling at trial" that are not identified by date or transcript reference. The court's 10/29/2024 directed verdict ruling was deleted from the amended NOA. Pa453 to Pa466.

Plaintiff did not file a *R 2:4-4* Motion for an Extension of Time for Appeal and review despite being on notice of defendant's position that plaintiff Gonzalez's appeal was out of time. Da80 to Da84; Da45.

STATEMENT OF FACTS

Plaintiff Lourdes Gonzales previously pled that she began her tenancy at 908 Washington Street unit 3, Hoboken in 1974 as a minor when her mother, Matilde Hererra, entered into a lease with a former owner of the building. Pa47.

On 06/08/2001, Defendant 908-910 Washington Street, LLC purchased the building 908 Washington Street, Hoboken consisting of a retail restaurant and two apartments above the retail space from Eugene Flinn. As admitted by plaintiff in *R. 4:46-5* response to paragraph 3 Statement of Facts Pa114 and Pa254.

The heat/hot water systems preexisted the 1996 purchase of the building by Eugene Flinn. Pa126; 6T65:9 to 12.

Plaintiff provided an expert report asserting that the heating system in the apartment had a single hot water tank that provided the hot water to the faucets and to the baseboard heaters. The heating system was piped in an open loop configuration that permitted mixing of the hot water that supplies baseboard heaters and potable hot water fixtures. As admitted by plaintiff in *R. 4:46-5* response to paragraph 5, Pa114 and Pa254.

The tenants to apartment unit 3 first expressed concern involving the tenants drinking of the perimeter baseboard heat water on September 9, 2011 by reporting the same to Hoboken's Health Officer Frank Sasso. As admitted by plaintiff in *R. 4:46-5* response to paragraph 6, Pa114 and Pa255; Da1.

On November 15, 2011, defendant landlord received correspondence from attorney Lewis Cohn, Esq. advising that he represented plaintiff. As admitted by plaintiff in R. *4:46-5* response to paragraph 9, Pa114 and Pa255; Pa144.

On January 3, 2012 defendant received another letter from plaintiff's attorney stating that defendant landlord was to cease and desist even sending correspondence to the plaintiff tenants and that Mr. Cohen would provide the landlord notice of "any problems" experienced with the plumbing in the apartment. As admitted by plaintiff in R. *4:46-5* response to paragraph 11, Pa114 and Pa255; Pa147.

In May of 2016, Mr. Cohn drafted a complaint to pursue numerous claims against defendant 908-910 Washington Street as a "preemptive strike against the landlord." As admitted by plaintiff in R. *4:46-5* response to paragraph 12, Pa115, Pa255 and Pa154.

Mr. Cohn explained that plaintiffs potentially faced a dispute in Landlord/ Tenant Court but should file their own Complaint in the Hudson County Law Division because it did not have limited jurisdiction and the parties could assert "whatever claims we want" and "to make life generally uncomfortable for defendant and his attorney" so they will want to settle. As admitted by plaintiff in R. *4:46-5* response to paragraph13, Pa114 and Pa255; Da4 to Da5.

On August 22, 2016 Mr. Cohn filed the complaint, HUD 2062-16, on behalf of plaintiff Gonzalez along with her two sisters against defendant alleging multiple theories against Eugene Flinn and this defendant 908-910 Washington Street. Pa45

The Complaint in *Gonzalez 1*, among its many claims, describes an antiquated and inadequate plumbing system that defendant failed and refused to update Pa51, asserted the defendant was engaged in an ongoing course of discriminatory and unconscionable conduct for the purposes of evicting the tenants or causing them to vacate the leased premises *N.J.S.A. 10:5.1* (New Jersey Law Against Discrimination) Pa55; defendants violated *N.J.S.A. 46:8-43* establishing a landlord's notice requirement for posting lead levels in drinking water Pa58; and breached the implied warranty of habitability by virtue of the failure to provide an adequate plumbing and water supply Pa60.

During the course of discovery in *Gonzalez1*, plaintiff Lourdes Gonzalez was present during the deposition of co-plaintiff Emily Vermeal who testified on April 25, 2017 that the heat/hot water systems in the Hoboken apartment was poisoning the tenants for 25 years. Da12 to Da13.

In December 2017, during the course of discovery in *Gonzalez 1*, plaintiff's lawyer Mr. Cohn received information about witness David Vermeal a fireman and furnace/boiler installer. Mr. Cohn was informed that a single tank was supplying both drinking water and perimeter baseboard heat. The concern was raised to Mr.

Cohn "My family had been drinking water that was coming from the perimeter baseboards heating system in the apartment. Since about 1995/1996." Concern for health issues was raised further documenting the contemplation of the parties in *Gonzalez1* included the quality of the water. Da 20 to Da21.

Gonzalez 1 was listed for trial in May of 2018. Pa172.

Plaintiffs' counsel prepared a trial notebook and pre-marked exhibits for plaintiffs' case in chief identifying the evidence to be offered at trial. Pa138 to Pa150.

Plaintiff's counsel pre-marked, as P-29, plaintiff Vermeal's September 9, 2011 letter to Hoboken's Health Officer Frank Sasso expressing concern about the tenants drinking perimeter baseboard heat water and the tenant's failure to complain about the condition because of a fear of the landlord's intimidation. Da1; As admitted by plaintiff in *R. 4:46-5* response Pa116 paragraph 25 and Pa257.

As part of plaintiffs' pretrial submission in *Gonzalez1* Mr. Cohn also prepared PLAINTIFFS' REQUEST TO CHARGE THE JURY. Pa 160 to Pa165.

The jury verdict sheet prepared by Mr. Cohn for plaintiff's compensatory claims under the Law Against Discrimination, *N.J.S.A. 10:5.1,* asked the jury to determine if plaintiffs proved evidence of unlawful discrimination on the basis of the conditions of the third-floor apartment at 908 Washington Street and requested damages for the same. [emphasis added]. Pa166.

Plaintiffs' request to charge the jury asserted that plaintiffs claim they suffered personal injury in the form of emotional distress resulting in "pain and suffering" caused by defendants' discriminatory acts. Plaintiffs' testimony standing alone, without the need for experts, was sufficient to support an award of emotional distress damages. Pa163 to Pa164.

The proposed charge also asked the jury to determine if because of the condition of the apartment defendants as landlords also breached the implied warranty of habitability and requested an additional award of damages for the same. Pa169.

In *Gonzalez1* a jury was seated and plaintiffs presented testimony; however, on May 23, 2018 before plaintiffs closed their case in chief, a settlement was reached. Pa176; Pa192.

The parties placed the settlement on the record whereby the parties agreed to execute a mutual general release in exchange for a two-year rent free lease of apartment unit 3 and defendants' payment of $55,000. Pa176 to Pa179.

On October 15, 2018, plaintiff Lourdes Gonzalez certified that home inspector Frank Libero was hired "to document the condition of the apartment." Pa247; Pa244 to Pa249.

On October 15, 2018 the home inspector Libero recommended the water should be tested. Plaintiff was advised to stop drinking the water because the tenants were consuming perimeter baseboard heating water. Pa247.

A water test was conducted on October 27, 2018. The lead levels in the cold-water supply in the apartment were non-detectable. The report dated October 31, 2018 revealed lead in the hot water only. As admitted by plaintiff in *R. 4:46-5* response to paragraphs 43,44 & 45, Pa119 and Pa258.

As of December 20, 2018 plaintiff still had not executed the settlement agreement and lease for the resolution of *Gonzalez1;* a revised draft of the parties' settlement agreement, withholding claims for future litigation, was proposed by the plaintiffs. As admitted by plaintiff in *R. 4:46-5* response to paragraph 52, Pa120 and Pa258; Pa339 to Pa346; Pa344.

The revised release document shows plaintiff crossed out language at paragraph 5.1 of the General Release removing language that plaintiff was settling claims that were "in any way related to the subject matter" of the action. Plaintiff further tried to add the language that she was only settling "the specific allegations in the Complaint and no other causes of action or otherwise." Compare Pa344 and Pa67.

This limited release offered by plaintiff Gonzalez was rejected. The parties in *Gonzalez1* executed the document titled "Settlement Agreement and Mutual General Releases" that did not include the language that would hold back future claims. Pa64 to Pa78. Plaintiff's counsel stipulated the release was signed on December 21, 2018. Pa217.

Approximately two years later, on November 2, 2020 plaintiff Lordes Gonzalez filed the instant action, HUD 3993-20 (*Gonzalez2*), for personal injuries caused by drinking her apartment's hot water supply which was allegedly contaminated by the baseboard heaters. Pa1 to Pa11.

On October 21, 2024 the parties appeared for trial. Pa466. Plaintiff testified on her own behalf on October 23, 2024. Plaintiff testified that she was born in 1967. 2T126:17. Plaintiff was not questioned about any reproductive toxicity issues. 2T125:22 to 163:24.

On plaintiff's case in chief, testimony was read into the record from a prior deposition of Eugene Flinn. 2T165 to 170:3. The description of the number of apartments in the building 908 Washington Street was tucked into an answer read from the sworn testimony of Flinn about his managerial responsibilities, 2T166:7-10; 2T166:17-21. Pb10.

The restaurant floor space was expanded in 1998. 2T167:5 to 25. Plaintiff previously admitted that the building defendant purchased in 2001 consisted of two

apartments over a retail space. Pa114 paragraph 3. The fact finder was given no additional information that would address the framed component structural parts of the building.

Plaintiff did not call the home inspector Frank Libero as a witness at trial. Libero previously rendered a report with the opinion that many homes built before 1978 have lead based paint but that he never tested for the presence of lead paint or lead dust in the building 908 Washington Street. Pa407.

After testimony by all witnesses the jury returned with a verdict of No Cause of Action on October 30, 2024. Pa466.

LEGAL ARGUMENT – POINT 1

THE 12/12/2024 ORDER MEMORIALIZING THE JURY VERDICT DID NOT TOLL THE CLERK'S ENTRY OF JUDGMENT *R.4:47* THEREFORE PLAINTIFF'S APPEAL IS UNTIMELY AND MUST BE DISMISSED IN ITS ENTIRETY WITH PREJUDICE. (Da69; Pa466).

Plaintiff's appeal is untimely and must be dismissed in its entirety with prejudice. This motion requires the court to examine the court rules *R. 2:4-1(a)* governing the time for appeal and *R. 4:47* entry of judgment. Consistent with *R. 2:4-1(a)* appeals from final judgments shall be taken within 45 days of their entry.

R. 4:47 provides:

> … judgment shall be entered as follows:
>
> (a) Unless the court otherwise orders, the clerk shall forthwith prepare, sign and enter the judgment without awaiting further direction by the court: (1) upon a general verdict of a jury; …
>
> (b) Where the decision of the court grants other than monetary relief, or is reserved or where a special verdict or a general verdict accompanied by answers to interrogatories is not convertible pursuant to paragraph (a), the court shall promptly approve the form of judgment and the clerk of the court shall enter it.
>
> The notation of a judgment in the Civil Docket constitutes the entry of the judgment, and the judgment shall not take effect before such entry unless the court in the judgment shall, for reasons specified therein, direct that it take effect from the time it is signed, but no such direction shall affect the lien or priority of the judgment. The entry of the judgment shall not be delayed for the taxing of costs.

These provisions establish the framework to analyze the timeliness of plaintiff Gonzalez's appeal and demonstrate that plaintiff's appeal was untimely filed. Court

Rule R. *2:4-1(a)* directs that an appeal from a final judgment be taken within 45 days of its *entry. Court Rule 4:47,* governing the entry of judgments, mandates the clerk to enter judgment upon a general verdict of a jury and explains that the notation of a judgment in the Civil Docket constitutes the entry of the judgment. Following the mandate of the court rule, after plaintiff Gonzalez's seven-day trial, the clerk prepared and signed the document titled: "STATEMENT OF VERDICT JUDGMENT" and promptly entered the jury's verdict of No Cause and Judgment in favor of the defendant in the Civil Docket. Pa466; Da26. The entry of this valid form of Judgment prepared and signed by Court Clerk Patricia Ortega started the clock ticking for plaintiff's time to appeal. Plaintiff Gonzalez would have this court ignore the entry of the clerk's Judgment docketing the jury verdict of No Cause on 10/30/2024 in direct opposition to the plain language of the court rule mandate. Whereas here judgment was entered on 10/30/2024, plaintiff's Notice of Appeal was untimely when she filed her NOA forty-nine days later. Plaintiff's untimely appeal must be dismissed with prejudice.

The language of R. 2:4-1(a) and R. 4:47 states unambiguously that the timeliness of an appeal is to be determined with reference to the date on which the judgment is docketed, not the date on which it is signed by the court. *Pogostin v. Leighton, 216 N.J. Super. 363, 369-370 (App. Div. 1987).* With the advent of eCourts, there is no longer any guessing of when the entry of judgment occurred. In

the case at bar, the clerk entered judgment as required by the Rules of Court on 10/30/2024 after the jury verdict of No Cause as identified by transaction ID LCV20242840728. Da26. Plaintiff filed her Notice of Appeal on Wednesday 12/18/2024 forty-nine days after Judgment was entered on the Civil Docket. Da33 to Da35. The forty-five day period permitted by *R. 2:4-1* fell on a Saturday, 12/14/2024, so the time to appeal was extended by rule to Monday 12/16/2024. When plaintiff missed the Monday 12/16/2024 filing date, her Notice of Appeal was out of time.

A week after the trial, defendant submitted a proposed formal order for judgment for the court's signature. The form of order for Judge Eglentowicz's signature granted NO additional relief from the Clerk's entry of judgment and did not specify any reasons for disturbing the effective date of the Judgment already entered on the Civil Docket on 10/30/2024. Da29 to Da32. Plaintiff asserted no objection to the proposed form of order. Da26. The court rules are clear, only where the signed formal order of the court grants other relief and is not convertible to paragraph (a) of *R. 4:42-2* does the entry of the clerk's Judgment fail to start or toll the clock ticking for plaintiff's time to appeal. Pressler & Verniero, *Current N.J.Court Rules*, comments 1.1 and 3 on *R.4:47*. Plaintiff's appeal is untimely because it was not filed within 45 days of the entry of the 10/30/2024 judgment and

the court's signed order granted no additional relief beyond the jury verdict. Plaintiff's appeal must be dismissed in its entirety with prejudice.

This court must give due deference to the entry of judgment by the clerk pursuant to R. 4:47(a). See *Johnson v. Cyklop Strapping Corp, 220 N.J. Super. 250, 258 foot note 6 (App. Div. 1987)*("no form of judicially signed order is even necessary pursuant to *R. 4:47(a)*. To fail to recognize the entry of the judgment by the clerk ignores the mandate of the rule titled "ENTRY OF JUDGMENT." The case of *Weed v. Casie Enterprise, 279 N.J. Super. 517, 526-527 (App. Div. 1995)* is also instructive. After a six-day trial, the *Weed* jury found No Cause of Action in favor of defendants on November 17, 1993. The time for plaintiffs to appeal the jury verdict commenced on November 17, 1993, because that is the date the final judgment was entered. However, the judgment was no longer final as to all issues and all parties when defendant filed its application for fees on November 29, 1993. In the case at bar, however, no additional actions were taken that required the trial judge to adjudicate any issues after the *R. 4:42(a)* Judgment was entered. No motions were filed that would have extended plaintiff Gonzalez's time to appeal. Plaintiff sat idly. Therefore, plaintiffs appeal was untimely.

While the Court Rules recognize that timely motions for rehearing *R. 1:7-4*; judgment notwithstanding the verdict *R. 4:40-2*; and/or a new trial *R. 4:49-1* would toll the time for appeal with the remaining time beginning to run from the date of the

entry of the order disposing of such motion(s), plaintiff raised no issues nor filed any motions that required the deliberate adjudication by the trial judge after the jury rendered its verdict. Plaintiff Gonzalez took no timely actions that would toll the time of the entry of the 10/30/2024 Judgment. Following the jury verdict plaintiff sat idly by for forty-nine days and the clock ticked past the *Rule 2:4-1* time for filing of an appeal of the 10/30/2024 Judgment. Plaintiff's appeal is untimely and must be dismissed in its entirety with prejudice.

Plaintiff submitted her Notice of Appeal to the Appellate Division on 12/18/2024. Da33 to Da35. The Notice of Appeal was filed but found deficient due to a failure to add all parties listed in the caption to the appeal. Da45. The original NOA references an Order dated 12/04/2024; however, that order that was never entered on the Civil Docket. Da26. The *Pogostin Court* makes it clear that *entry* of the Judgment in the Civil Docket starts the time running for the appeal. *Pogostin v. Leighton, 216 N.J. Super. 363, 369-370 (App. Div. 1987).* At the time that plaintiff filed her Notice of Appeal, Judgment was already entered on the Civil Docket on 10/30/2024 in a valid form recognized by *R. 4:47(a)*. Plaintiff clearly was not waiting for entry of the trial judge's formal signed order because the signed order by Judge Eglentowicz was not entered in the Civil Docket until 12/20/2024 LCV 20243255037. Da26. Again, the advent of eCourts makes it easy for the parties to see the Entry Date of all Superior Court matters. The judge's signed Order of

12/12/2024 does not disturb the entry of the 10/30/2024 Judgment nor give reasons why the Judgment should be extended to the date of the court's signing so as to toll the time plaintiff had to file this appeal. Plaintiff's appeal is therefore untimely and must be dismissed in its entirety with prejudice.

This court has always guarded its jurisdiction scrupulously. *Rule 2:4-1* requires a party seeking an appeal to act expeditiously because the time to appeal is 45 days from the entry of the final judgment. See *In re Appeal of Syby, 66 N.J. Super. 460, 464-465 (App. Div. 1961).* There are not infinite judicial resources. Defendant is entitled to repose. Plaintiff's brief, filed on 05/30/2025, offers no good cause explanation for expanding the time for appeal. It simply ignores the entry of the *R. 4:47(a)* final judgment on 10/30/2024. In the procedural history plaintiff's brief asserts at Pb4:

> The jury rendered a verdict in favor of Washington Street on October 30, 2024, and an Order of No Cause of Action was filed on December 12, 2024. Pa464 [Incorrect page referencing the 12/04/2024 Order. See Da69 for 12/12/2024 Order and Da26 for 12/20/2024 entry date.]
>
> On December 18, 2024, a Notice of Appeal was filed. A Second Amended Notice of Appeal to include the previously omitted Order of the Hon. Keri Ann Eglentowicz, J.S.C. directing a verdict against appellant on Count I of the Complaint was filed on May 22, 2025. Pa453.

Plaintiff does not demonstrate that this appeal was timely filed. The Amended Notice of Appeal referenced at Pa453 added a directed verdict order dated

04/17/2025. That order was not "previously omitted." It did not exist at the time plaintiff untimely filed her Notice of Appeal on 12/18/2024. The reason given for amending the Notice of Appeal is: "We needed to obtain the 04/17/25 order which is subject to appeal." Pa453. In a letter to the trial court dated 04/16/2025 plaintiff's counsel explained that he believed the appellate court was requesting a formal written order to perfect this appeal. The letter to the trial court states, "The appellate division has given plaintiff fifteen days to cure this deficiency." Da86. The appellate clerk gave plaintiff 15 days to cure the deficiencies in the brief and appendix. A judge sitting in the Appellate Division did not enter an order offering to share jurisdiction with the trial court after the 12/18/2024 NOA was filed. *R. 2:9-1. Manalapan Realty v. Township Committee, 140 N.J. 366, 376 (1995)*. Plaintiff seeks to appeal an order that the trial judge did not have jurisdiction to enter. Further, the brief offers no explanation why after leaving the courthouse on 10/30/2025 plaintiff simply sat idly for 49 days. Plaintiff presented no additional actions requiring the trial judge to adjudicate any issues after the *R. 4:42(a)* judgment was entered. The 10/30/2024 Judgment was never tolled.

Counsel of record does not say why he failed to move for *R. 2:4-4* relief as required by the rules, even after being apprised (if he did not know it before) of the defendant's position that plaintiff Gonzalez's appeal was out of time. Da81; Da88. Ignoring the entry of the valid 10/30/2024 *R. 4:47(a)* Judgment does not establish

good cause. As stated by the *Syby Court*, there cannot be a casual assumption that the 45-day rule of limitation will not be enforced. There is a fundamental policy consideration of the need for assurance to litigants of finality in litigation and its relation to the expiration of the time allowed for appeal. *In re Pfizer's Estate, 6 N.J. 233 (1951)*. Plaintiff fails to show good cause for extending the time of appeal. This untimely appeal must be dismissed with prejudice.

Plaintiff has already adjudicated this matter twice.[1] In this untimely appeal plaintiff seeks a remand to allow her to empanel her third jury to present claims for alleged injuries caused by the same heat/hot water system in her Hoboken Apartment which she vacated in 2020. This case is ripe for a procedural dismissal without the court having to consider the substantive issues raised on appeal and cross-appeal. Defendant seeks a plain meaning reading of court rules *R. 2:4-1(a)* governing the time for appeal and *R. 4:47* entry of judgment. This appeal was not filed within 45 days of the valid entry of the 10/30/2024 Judgment. Plaintiff's appeal must be dismissed with prejudice.

[1] Plaintiff settled in the middle of the *Gonzalez1* jury trial HUD-L-2062 for claims of emotional distress caused by multiple conditions affecting the Hoboken apartments habitability including drinking water from the same combined heat/hot water systems in this lawsuit. Pa50; Pa163; Da1. The second jury returned with a verdict of No Cause for plaintiff's claims of bodily injury and mental anguish caused by the more than 28 year old hot water system. Pa1 to Pa11; Pa466.

LEGAL ARGUMENT – POINT 2

THE LOWER COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO SUBSTITUTE EUGENE FLINN FOR A FICTITIOUS DEFENDANT BECAUSE THE BUILDING'S OWNER WAS EASILY IDENTIFIABLE BASED ON PUBLIC RECORDS ON FILE IN HUDSON COUNTY.

(1T67:24 to 72:23; Pa449; Pa347)

On the eve of trial, more than 28 years after plaintiff Gonzalez alleged the combined heat/ hot water systems were installed in the Hoboken apartment, Plaintiff filed a motion to add her former landlord to this lawsuit. Pa281 to Pa303. The lower court correctly denied plaintiff's motion to substitute Eugene Flinn as a fictious defendant because the Hoboken building's owner from 1996 to 2001 was easily identifiable based on the public records on file in Hudson County. Citing to *Baez v. Paulo, 453 N.J. Super. 422, 439 (App. Div. 2018)* and *Viviano v. CBS, Inc., 101 N.J. 538, 548 (1986)* the trial judge correctly stated the law that if plaintiff cannot ascertain the identity of a someone at fault for their injuries, plaintiff may resort to the naming of a fictitious defendant pursuant *R. 4:26-4*. The *Baez* Court held a plaintiff relying on a fictitious pleading must demonstrate two phases of due diligence in order to gain the tolling benefits of the rule. First, a plaintiff must exercise due diligence in endeavoring to identify the responsible defendants before filing the original complaint naming John Doe parties. Second, a plaintiff must act with due diligence in taking prompt steps to substitute the defendant's true name,

after becoming aware of that defendant's identity. The lower court correctly found that plaintiff Gonzalez failed to trigger the relief afforded by the fictitious defendant rule, *R. 4:26-4.* Defendant directed the court to the deed, Pa288, submitted by the plaintiff, that Eugene Flinn purchased 908 Washington Street from Ann Roberts on May 31, 1996. The finding of the trial court that, "Eugene Flinn was identified and or easily identifiable as the owner of the building for the period of 1996 to 2001, based on public records" 1T72:1 to 7 is fully supported by the record below. Pa285; Pa288. The court further supported the finding that the owner of the property was easily identifiable based upon the plaintiff's own 2016 Complaint in *Gonzalez1* wherein she plead, at paragraph 21, that Eugene Flinn purchased the building in 1996. Pa49. The lower court denied plaintiff's motion to substitute Eugene Flinn as a fictious defendant because the trial court correctly found there was no showing that plaintiff exercised due diligence in ascertaining the owner of the building from 1996 to 2001.

The standard of review for a motion made on the eve of trial requires this court to find an abuse of discretion *Globe Motor Car Co. v. First Fid. Bank, N.A., 291 N.J. Super. 428 (App. Div. 1996)*(Court perceived no mistaken exercise of discretion in denial of plaintiff's leave to amend complaint on the eve of trial and almost three years after plaintiff filed complaint).

Plaintiff is seeking damages related to the installation of combined heat/hot water systems that Gonzalez states occurred at least 28 years before she filed the motion in July of 2024 to add Flinn as a defendant to the lawsuit. Pa281; Pb24. Plaintiff's argument that there would be no prejudice if the court permitted a late amendment substituting Eugene Flinn for a fictitious defendant, is without basis. In response to plaintiff's motion to add a fictitious party, defendant submitted 102 pages of documents in opposition the motion. Defendant's opposition included the defense that the systems providing heat and hot water preexisted the 1996 purchase of the building by Eugene Flinn. Pa315. Defendant could not investigate who installed the systems because the prior owner of the property is dead. Da19. However, contrary to Appellate Division *Rule 2:6-1*, plaintiff neglected to include the document demonstrating witnesses were deceased in her appendix despite the same being part of the record below. The trial court correctly denied plaintiff motion based on the court's concern of prejudice based on the 28-year time lapse causing a loss of evidence. Pa347. 1T67:24 to 72:23.

Defendant argued the statute of limitations, N.J.S.A. *2A:14-2*, should apply to both defendant and Flinn. 1T66:21 to24. Pressler & Verniero, *Current N.J. Court Rules*, comment 2 on *R.* 4:26-4 (citing *Matnyska v. Fried, 175 N.J. 51, 53 (2002*)(the rule will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the statute of limitations). The trial court

did not address the Statute of Limitations issue but correctly found that more discovery would have been needed because plaintiff failed to act with due diligence in taking prompt steps to substitute the Flinn as a fictitious defendant consistent with the second prong of *Baez v. Paulo, 453 N.J. Super. 422, 439 (App. Div. 2018)*. Eugene Flinn's interests did not align with defendant 908-910 Washington Street's interest because plaintiff alleged Eugene Flinn installed the combined heat/hot water systems and supervised the same in 1996 shortly after he purchased the property. Pb18. Contrary to Counts Two and Four of her Complaint, but extremely favorable to defendant 908-910 Washington Street, plaintiff argued that Flinn, not defendant 908-910 Washington Street, created the alleged dangerous condition. Pa5; 1T63:10 to 15; 1T57:13 to 23. Plaintiff failed to act with due diligence and the lower court correctly denied plaintiff's motion to add Eugene Flinn as a direct defendant under the fictitious party rule.

Eugene Flinn is not a party to this appeal nor was he a party to the litigation instituted under Docket No. HUD-L-3993-20. Because the interests of Flinn and defendant 908-910 Washington Street do not align, Flinn would be entitled to separate counsel, to file an answering pleading, obtain discovery and serve his own expert reports. Defendant 908-910 Washington Street would be forced to suffer the additional costs of this "do over" litigation because plaintiff never timely asserted her legal theory for recovery of against Flinn for the negligent installation of

baseboard heaters. Pb6. The lower court correctly denied plaintiff's motion to add Eugene Flinn as a direct defendant under the fictitious party rule. This court must affirm the lower court orders of 08/02/2024 and 10/21/2024 denying plaintiff's *R. 4:46-4* fictitious party motions because plaintiff failed to act with due diligence.

LEGAL ARGUMENT – POINT 3

THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S CLAIMS UNDER THE HOTEL AND MULTIPLE DWELLING ACT, N.J.S.A. 55-13A, AS PLAINTIFF FAILED TO PROVIDE EVIDENCE THAT THE BUILDING MET THE BASIC DEFINITION OF A MULTIPLE DWELLING. (6T11:17 to 20:4; Pa451)

While accepting as true the evidence presented by the Plaintiff and the legitimate inferences drawn there from the trial court correctly granted defendant's motion to dismiss Count One of Gonzalez's complaint. Plaintiff did not sustain the burden of proof to demonstrate the Hotel and Multiple Dwelling Act *N.J.S.A. 55-13A* applied to the building 908 Washington Street. The scant evidence submitted at trial showed that there were only two apartments in the building where plaintiff lived. 2T166:7 to 10. The court found that plaintiff failed to provide evidence establishing that plaintiff resided in a building that met the basic definition of a multiple dwelling as defined by the Act. The term "multiple dwelling" is defined in *N.J.S.A. 55:13A-3(k)*:

> any *building* or structure of one or more stories and any land appurtenant thereto, and any portion thereof, in which three or more units of dwelling space are occupied, or are intended to be occupied by three or more persons who live independently of each other. (Emphasis added).

While reading from the deposition testimony about Eugene Flinn's managerial experience, the fact finder could glean the building at 908 Washington Street only had two apartments and therefore failed to meet the basic definition set forth in N.J.S.A. *55:13A-3(k).* 2T166:7 to 10. The trial judge correctly focused on the term "building" in the Act as defined by N.J.A.C. *5:10-2.*2:

> "Building" means a structure built, erected and framed of component structural parts designed for the housing, shelter, enclosure and support of individuals, animals or property of any kind which is enclosed within exterior walls on all sides.

The trial court held that the limited evidence presented by plaintiff failed to show that 908 Washington Street and 910 Washington Street were a single structure "built, erected and framed of component structural parts" so as to fall under the basic definition of a multiple dwelling to require compliance with the Act. The trial court correctly dismissed Count 1 of plaintiff's complaint.

The standard of review for this R. *4:37-2* motion is denovo. *Brill v. Guardian Life Ins., Co., 142 N.J. 520, 536 (1995)*(Appellate Court performs a denovo review to determine whether the evidence presents a sufficient disagreement to require submission to the jury).

The trial court delivered a careful analysis of plaintiff's very limited evidence offered at the time of trial in light of *Bunting v. Sheehan, 156 N.J. Super. 14, 15-16 (App. Div. 1976)* and *Rothman v. Dep't of Cmty. Affairs, 226 N.J. Super. 229, 232 (App. Div. 1988)* in support of the decision that Hotel and Multiple Dwelling Act *N.J.S.A. 55-13A* did not apply to the case at bar.

The *Rothman* Court was presented with three buildings, each of which contained four housing units. By definition the Hotel and Multiple Dwelling Act applied because each building contained more than three housing units. The landowner in *Rothman* conveyed one half of the building to a separate entity and unsuccessfully tried to argue that separate ownership converted the structure into two separate buildings. The *Rothman* Court held, common ownership is not an element of the basic definition of a multiple dwelling. The only statutory condition for the classification of a building as a "multiple dwelling" is that it contains three or more units of dwelling space which are occupied or intended to be occupied by three or more persons who live independently of each other. *Rothman*, 226 *N.J. Super.* at 230-231. Judge Eglentowicz correctly distinguished this decision from the case at bar because the building located at 908 Washington Street only had two apartments. 2T166:7 to 10. The building located at 910 Washington Street also only had two apartments. 2T168:14 to 25. The common ownership of these two buildings by defendant 908-910 Washington Street is not an element of the basic definition of

a multiple dwelling under the Act. The trial court correctly dismissed Count One of plaintiff's complaint.

In *Bunting*, the building on 16-18 Vanderventer Avenue was described as a single structure enclosed within four exterior walls with a single unpierced roof thereon. It was of no moment to the court that an interior fire wall, extending from the cellar to a point one foot below the roof line, separated the single building into two halves. The court looked at the actual framed structural component parts making special note of the single unpierced roof. *Bunting, 156 N.J. Super. at 16-17.* The trial court in the instant case noted that plaintiff failed to address the structural requirements set forth in the case law reviewed. In Gonzalez's appellate brief at Pb22, plaintiff argues "that a wall was removed from the first floor and basement when the buildings were merged; however, this statement does not match the deposition testimony read at trial. The deposition testimony only states defendant broke through the first floor and basement. 2T167:22 to 169:2. Plaintiff's lay witness testified, "At one point they made two openings from 908 Washington Street to 910 Washington Street." 2T106:18 to 23. There was no testimony or evidence that walls were removed. The term "merge" is not a legal term nor found in the definition of "Building" as set forth in *N.J.A.C. 5:10-2.2.* Plaintiff's counsel indicated that he had a handful of questions for Mr. Flinn, 3T79:11 to 20, but chose not to call this witness or any witness that would address structural components of the separate buildings.

Plaintiff's counsel indicated that he has a "really nice picture" but it was not produced or offered in evidence. 5T243:19 to 20. Plaintiff also never produced a witness that the buildings were under the jurisdiction of the Department of Community Affairs before plaintiff rested. The trial court correctly held that plaintiff failed to meet the burden of proof to establish that plaintiff resided in a building that met the basic definition of a multiple dwelling as defined by the Act.

As this appellate panel has the benefit of the entire record below, it should also be noted that in response to the defendant's summary judgment motion statement of facts, *R. 4:46-5*, plaintiff admitted at paragraph 3 that building 908 Washington Street consisted of a retail restaurant and two apartments above the retail space. Pa114; Pa254. A building with only two apartments is not subject to the Hotel and Multiple Dwelling Act *N.J.S.A. 55-13A*. The trial court correctly dismissed Count One of the plaintiff's complaint. The trial court's *R. 4:37-2(b)* dismissal of Count One at the close of plaintiff's case on October 29, 2024 is fully supported by the record because plaintiff failed to prove evidence that the building met the basic definition of a multiple dwelling. The Judgment and jury's 10/30/2024 verdict of No Cause of Action must be permitted to stand.

"It is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." *Hayes v. Delamotte, 231 N.J. 373, 387 (2018*). Before filing

her notice of appeal, 12/18/2024 plaintiff did not obtain an order formalizing the trial court's granting of defendant's motion to dismiss Count One of Gonzalez's complaint at the close of plaintiff's case. *R. 4:37-2(b)*. Plaintiff sat idly without moving to perfect her appeal. The plaintiff actually deleted the Court's directed verdict ruling of October 29, 2024 from her Amended Notice of Appeal and replaced the same with the Order of 04/17/2025. Pa453. That Order was entered without jurisdiction. The undersigned is cognizant that this court may overlook technical difficulties to reach the merits of an appeal. However, contacting a trial judge, who no longer has jurisdiction over the case, should not be encouraged and has the potential to open the flood gates to never-ending appellate litigation where successful parties are without repose. The plaintiff seeks review of a 04/17/2025 order the did not exist at the time this appeal was filed and was entered by a court without jurisdiction to act. Whereas here plaintiff failed to perfect her appeal, she is not entitled to the relief claimed.

LEGAL ARGUMENT – POINT 4

THE TRIAL COURT CORRECTLY EXCLUDED DR. OSINUBI'S TESTIMONY ON REPRODUCTIVE TOXICITY AND EXPOSURE TO LEAD PAINT WHERE THE ALLEGED INJURY OCCURRED BEFORE DEFENDANT OWNED THE PROPERTY AND PLAINTIFF FAILED TO CALL THE HOME INSPECTOR AT TRIAL TO LAY A FOUNDATION FOR LEAD PAINT TESTIMONY. (Plaintiff fails to identify the place in the record where the opinion or ruling in question is located as the citations listed in 3T have nothing to do with argument raised.)

This Court need not consider the arguments raised in Point 3 of plaintiff Gonzalez's brief as plaintiff fails to identify the evidential ruling that she is appealing. The Amended Notice of Appeal, Pa453, identifies "various evidential rulings at trial" with no date or trial transcript records referenced. No disposition date for evidentiary rulings is listed on the Amended Notice of Appeal. Pa456. The plaintiff's "Table of Judgments, Orders or Rulings" Pbviii contain transcript references to 3T that have nothing to do with plaintiff's medical expert Dr. Osinubi's testimony as required by *R. 2:6-2*. This Appellate Court's review is conditioned upon the identification in the notice of appeal of the disposition being appealed as required by *R. 2:2*-3 and *R. 2:5-1*. It is not and cannot be the function of this Court to wander unguided through volumes of documents attempting to discern the significance of the contents of the record. That is the function of an advocate. With plaintiff's failing to identify the opinion or ruling in question, this court may elect to forgo review.

Should the court decide to review the evidential rulings suggested in plaintiff's brief, Pb27, the defendant is guessing that plaintiff seeks review of the court rulings at 4T47:18 to 57:18 and 2T42:14 to 50:1. The standard of review for evidential rulings is limited to examining the decision for abuse of discretion. *Townsend v. Pierre, 221 N.J. 36, 42 (2015).*

The court correctly ruled that plaintiff's expert, Dr. Osinubi, would not be permitted to testify on the issue of reproductive toxicity. 4T47:18 to 57:18. When on the witness stand, 2T 125:22 to 163:24 plaintiff Lourdes Gonzalez did not testify about her reproductive issues. The expert was relying solely on an earlier out of court history taken from plaintiff. Dr. Osinubi failed to review any obstetric records before she issued her report and gave her August 2024 deposition. No supplemental expert report was issued showing that Dr. Osinubi reviewed Hackensack University Medical Center obstetric records after her deposition. 4T44:13 to 46:9. The opinion was speculative. The expert's report also identified that plaintiff said she suffered multiple spontaneous abortions/miscarriages while plaintiff was in her 20s. Pa366. Plaintiff was born in 1967. 2T126:17. The trial court correctly noted that plaintiff was out of her 20s before defendant 908-910 Washington Street owned the building. 4T52:4 to 53:7. The expert's opinion was not relevant to claims of damages against defendant and speculative on the issue of reproductive toxicity and correctly barred. The lower court's ruling must be affirmed.

The court also correctly ruled that Dr. Osinubi could not testify about lead paint in the apartment. 2T42:14 to 50:1. Dr. Osinubi never inspected plaintiff's apartment personally. The medical expert relied upon the report of home inspector Frank Libero of United Inspection Consultants. Pa406 to Pa412. Frank Libero never tested for the presence of lead paint or lead dust but stated the opinion that many homes built before 1978 have lead based paint. Pa410. Plaintiff never called Frank Libero for testimony at trial. 2T35:7 to 42:2. The trial court correctly ruled that without the testimony of the home inspector being subject to cross examination at trial, plaintiff's medical expert could not rely on the same. *James v. Ruiz, 440 N.J. Super. 45, 60 (App. Div. 2015)* (hearsay statements by an absent declarant, without affording the opposing party a chance to cross-examine that person before the fact-finder are properly excluded). Because plaintiff chose not to call the home inspector as a witness at the time of trial, the court also correctly ruled that Dr. Osinubi could not testify about lead paint in the apartment.

Plaintiff presents no basis for this court to grant the relief requested in this appeal. The jury's verdict of No Cause should be permitted to stand. The lower court's rulings must be affirmed.

LEGAL ARGUMENT-POINT 5

THE TRIAL COURT ERRED IN FAILING TO DISMISS PLAINTIFF'S COMPLAINT PRIOR TO TRIAL BASED UPON A SETTLEMENT AND RELEASE OF CLAIMS IN A 2016 LAWSUIT (GONZALEZ 1) AGAINST THE SAME DEFENDANT LANDLORD WHEREIN PLAINTIFF COMPLAINED ABOUT DRINKING THE APARTMENT'S WATER CONNECTED TO THE SAME 28-YEAR-OLD HEAT/ HOT WATER SYSTEM THAT IS THE SUBJECT OF THIS LAWSUIT. (Pa273; Pa438).

As set forth in the Orders of 05/24/2024 and 10/8/2024 the trial court erred in failing to dismiss plaintiff's complaint prior to trial based upon a settlement and release of claims in the 2016 lawsuit HUD-2026-2016 (*Gonzalez1*). Pa64 to Pa78. The prior lawsuit against the same defendant landlord 908-910 Washington Street arose from multiple conditions affecting the habitability of the Hoboken apartment including drinking the water from the same heat/hot water system that is the subject of this lawsuit. See pre-marked trial exhibit from *Gonzalez1* (Plaintiff's Trial Exhibit 29) at Da1. A letter directed to the Hoboken Health Department complained the tenants were drinking perimeter baseboard heat water. Before discovery commenced in the suit that is the subject of this appeal/cross appeal, the trial court entered a 03/03/23 Order dismissing the lawsuit against the defendant landlord based on the settlement in *Gonzalez1*. Pa90. Plaintiff was granted leave to appeal and the 03/03/23 order was reversed. A-2463-22. Pa100. The case was remanded to the trial court with the instruction that the remaining question for the Appellate Court was whether plaintiff's second lawsuit arises from or is in any way related to the

subject matter and within the contemplation of the parties. The exact language from the appellate division on remand asserts:

> The remaining question is whether plaintiff's second suit arises from or is in any way related to the subject matter of her first suit. This is a fact question, which the *Bilotti* Court framed neatly when it concluded that a general release "ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." [emphasis in the original opinion] Pa107.

In denying the defendant's motion to dismiss plaintiff's complaint, the Hon. Kalimah H. Ahmad, J.S.C. failed to follow the legal instructions contained in the appellate division's opinion on remand. Pa273 to Pa278. Judge Ahmad's Statement of Reasons for denying defendant's motion underscores that the court was incorrectly looking for an exact match of claims between prior suit of *Gonzalez1* and the instant action. "Unlike Gonzalez II, Plaintiff made no claim for personal injuries resulting from lead poisoning in Gonzalez I." Plaintiff admitted she made a claim for emotional distress in Gonzalez1, stating, "But an emotional injury is not necessarily a physical injury and certainly not a claim for lead poisoning". Pa262. On remand the appellate division did not instruct the trial court to find an exact match of claims between the two lawsuits, the appellate court requested a more robust record to examine the claims and demands due at the time of the execution of general release and whether those claims arose from or were in any way related to the subject

matter and were in the contemplation of the parties. arises from or is in any way related to the subject matter. The attorneys combed through dusty boxes filled with stacks of papers from the prior lawsuit, *Gonzalez1*, to develop the record on remand. Pa136. The record clearly demonstrates that the parties in *Gonzalez1* made claims for personal injury damages in the form of emotional distress caused by the condition of the apartment including drinking water that was connected to the 28 year-old heat/hot water systems in their Law Against Discrimination (LAD) claims. *N.J.S.A. 10:5-1*. Pa262; Pa163 to Pa166. The lower court failed to follow the legal instructions contained in the appellate division's opinion on remand. The orders of 05/24/2024 Pa273 and 10/08/2024 Pa438 denying defendant's motion to dismiss plaintiff's complaint prior to trial based upon a settlement and release of claims must be reversed**.**

In an action for breach of a settlement agreement the Court considers the record before the motion court, denovo, under the summary judgment standard prescribed by *Rule 4:46-2(c). Globe Motor Co. v. Igdalev*. *225 N.J. 469 (2016)*(The parties' intent, in an appropriate setting, is a purely legal question that is particularly suitable for decision on a motion for summary judgment.)

Plaintiff was represented by counsel at the time she executed a release in the *Gonzalez1* suit. Pa68. Plaintiff's acceptance of $55,000.00 and two years of living in the apartment rent free supports a reversal of the lower court's orders because

valuable consideration was exchanged for a full and final settlement and release of all claims. Pa64 to Pa78. The trial court erred in failing to dismiss plaintiff's complaint prior to trial based upon a settlement and release of claims in a 2016 lawsuit HUD-2026-2016 (*Gonzalez1*). Defendant seeks a reversal of the 05/24/2024 and 10/8/2024 Orders and a dismissal with prejudice of the lawsuit.

There is strong public policy in New Jersey which favors the settlement of litigation. *See Nolan v. Lee Ho, 120 N.J. 465, 472 (1990)*. In so favoring settlement, courts have recognized "the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." *Dep't of Pub. Advocate, Div. of Rate Counsel v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985)*. Accordingly, "courts will strain to give effect to the terms of a settlement whenever possible." *Ibid.* The Appellate Division in *Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974)* held, "barring fraud or other compelling circumstances, our courts strongly favor the policy that the settlement of litigation be attained and agreements thereby reached, be honored." *Id. at 136*. This Court must enforce the terms of a Settlement between the parties and dismiss this lawsuit with prejudice.

The lower court was instructed to follow *Bilotti v. Accurate Forming Corp., 39 N.J. 184, 204-05 (1963).* As supported by the pre-marked trial exhibits from the prior lawsuit, HUD-L–2062–16 *Gonzalez1*, plaintiff already sued for claims related

to the tenants' fears of drinking water from the combined heat/ hot water systems. Da1 to Da14; Pa138 to Pa150. Plaintiff's pre-marked trial exhibits in *Gonzalez1* demonstrated plaintiff was prepared to show the jury evidence that tenants contacted the Hoboken health officer because they were concerned about drinking the baseboard heat water. Da1; Pa142 to Pa143. A lawyer's knowledge is imputed to the client. *St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 573 (1982*). The trial court incorrectly accepted only the statement that plaintiff was concerned about the quantity of the water when her lawyer had pre-marked evidence to demonstrate that the issue of the quality of the water in the apartment was raised to the Hoboken health department in 2011.

The trial judge incorrectly found, "The contamination of the hot water system in the apartment was not an issue that was the subject of *Gonzalez I*" Pa277. The related claim of drinking perimeter baseboard heat water as evidenced by the pre-marked trial exhibit from *Gonzalez1* (Plaintiff's Exhibit 29) Da1; Pa142 supported the parties' Law Against Discrimination count by showing the tenants were too afraid to complain about the hot water system due to fear of an unlawful, *N.J.S.A. 10:5-1*, intimidation by the defendant landlord. The plaintiff admits that she pursued an emotional distress claim for the LAD claims. Pa163; Pa262.

The evidence before the lower court also demonstrated that plaintiff Gonzalez was present when her sister testified on 04/25/2017 in *Gonzalez1* that the landlord

had ripped out the heating system and gave them a water system "which he has been poisoning them for 25 years." Da12 to Da14; Pa335; Pa333 to Pa336. Plaintiff admitted at her deposition in this lawsuit that her sister's testimony concerned the same hot water system that she was now complaining about in the instant action. Pa211 to Pa212. Plaintiff Gonzalez testified at her deposition that she did not personally hire someone to investigate her sister's claims about the quality of the water because she did not "know it was to the degree of that." Pa211. Plaintiff clearly contemplated the quality of the water in the 2016 lawsuit. She testified that she relied on her lawyer to get the water tested. Pa220. Pa 215.

Plaintiff's testimony that she relied on her lawyer to investigate and present her claims is a cornerstone of the American legal system. It is the job of the attorney to pursue the claims deemed well founded. The role of the attorney is set forth in *Viviano v. CBS, Inc., 101 N.J. 538, 545-546 (1986).* The genius of prior counsel's claims against the defendant landlord in *Gonzalez 1* is that a Law Against Discrimination claim for emotional distress damages does not require, as a matter of law, expert testimony to corroborate claimant's alleged emotional distress. *Tarr v. Ciasulli, 181 N.J. 70, 89 (2004).* In the comprehensive *Gonzalez1* approach, plaintiffs complained about everything including the kitchen sink. Pa47 to Pa54. The *Gonzalez1* plaintiffs did not have to prove that the domestic hot water and heating systems were faulty, or that plaintiff actually drank the hot water and used

the hot water for all her cooking. Plaintiff did not have to explain that she is a smoker and that lead is contained in cigarette smoke. 2T160:20 to 21; 4T192:10 to 19. Plaintiff and her medical expert did not have to undergo cross examination along with her medical expert. In this lawsuit the pair were questioned on plaintiff Gonzalez's previously sworn testimony that her memory and dizziness were claimed as related to a 2005 accident or more recent car accidents. 2T158:1 to 160:23; 4T170:1 to 175:25. In *Gonzalez1* plaintiff merely had to prove that she could not ask that the landlord repair or renovate a heat/hot water systems that looped through the baseboards and out the hot water faucet without fear of harassment. Da1; Pa234. This suit*, Gonzalez 2*, arises from and is very much related to the claims related to drinking the hot water. Plaintiff's claims in this lawsuit were covered by the general release executed in *Gonzalez 1* because the more robust record demanded by the Appellate Division shows the claims were contemplated by the parties. Defendant was entitled to a dismissal of this lawsuit, HUD-L-003993-20, before the case was tried before a jury based on the prior setllement. This court must reverse the prior orders of 05/24/2024 and 10/08/2024 and enter an opinion that plaintiff's complaint is dismissed with prejudice because claims concerning the quality of the apartment's hot water were raised in the prior suit and within the contemplation of the parties.

The previous Summary Judgment exhibits also included plaintiff Gonzalez's offer to the defendants of a limited release that would hold some of her claims for

future litigation. Pa339 to Pa346; Pa344. Plaintiff sought to remove language at paragraph 5.1 of the General Release. Plaintiff Lourdes Gonzlez offered an amended release that removed language that she was settling claims that were "in any way related to the subject matter" of the action. She further tried to add the language that she was only settling "the specific allegations in the Complaint and no other causes of action or otherwise." Compare Pa344 and Pa67. This limited release offered by plaintiff Gonzalez was rejected. The parties in *Gonzalez1* eventually executed a document titled "Settlement Agreement and Mutual General Releases" that did not include the language that would hold back future claims. Pa64 to Pa78. Plaintiff's counsel stipulated the release was signed on December 21, 2018. Pa217. The Settlement Agreement between the parties from the previous lawsuit *Gonzalez1* contemplated the very claims plaintiff again litigated in the jury trial conducted in October of 2024. Defendant is entitled to a dismissal of this lawsuit with prejudice. The trial court erred in failing to dismiss plaintiff's complaint prior to trial based upon a settlement and release of claims in a 2016 lawsuit HUD-2026-2016 (*Gonzalez1*). Defendant seeks a reversal of the 05/24/2024 and 10/08/2024 Orders and an opinion of this Court dismissing plaintiff's complaint with prejudice.

LEGAL ARGUMENT-POINT 6

THE TRIAL COURT ERRED IN FAILING TO DISMISS PLAINTIFF'S COMPLAINT PRIOR TO TRIAL BASED UPON THE STATUTE OF LIMITATIONS. (Pa273; Pa438).

As set forth in the Orders of 05/24/2024 and 10/08/2024 the trial court erred in failing to dismiss plaintiff's complaint prior to trial based on the statute of limitations. *N.J.S.A. 2A:14-2*. Plaintiff is seeking damages for lead poisoning caused by the installation of the heat /hot water systems in her Hoboken apartment more than two decades before she filed her complaint in this lawsuit. Pa355. In opposition to defendant's pre-trial statute of limitations motion, plaintiff argued that the "baseboard heat/hot water system" had nothing to do with the plaintiff claim for lead poisoning. Pa329; Pa325 to Pa329. When plaintiff filed a later motion with the trial court, asserting the lead contamination of the apartment's hot water occurred in 1996 when the baseboard hot water system was allegedly installed, Pa355, the plaintiff's earlier misrepresentation prompted a motion for reconsideration under *R. 4:49-2*. Plaintiff's 1996 install clarification; however, did not prompt the lower court to apply the statute of limitations. The trial court erred in failing to grant defendant's pre-trial motions to dismiss plaintiff's complaint based on the two-year statute of limitations *N.J.S.A. 2A:14-2*. The Orders of 05/24/2024 and 10/08/2024 must be reversed.

Whether a cause of action is barred by a statute of limitations is a question of law, reviewed denovo. *Catena v. Raytheon Co., 447 N.J. Super.43, 46 (App. Div. 2016).*

In response to defendant's Statement of Facts submitted with the Summary Judgment motion, paragraphs 6 and 25, plaintiff admits that the tenants in unit 3 expressed concern to the Hoboken Health Officer in 2011 because they were drinking the perimeter baseboard heat water. Compare Pa114 with Pa255 and Pa116 with Pa257. Plaintiff admits at paragraphs 9, 10 and 11 that she was represented by Lewis Cohn, Esq. in 2011. Mr. Cohen advised that he would provide the landlord of notice of "any problems" the plaintiff Gonzalez experienced with the plumbing in the apartment. Compare Pa114/5 with Pa 255. Mr. Cohen went on to file a Complaint on behalf of plaintiff Gonzalez against the defendant landlord in *Gonzalez1* in 2016. Pa45. Complaints about the safety and potential health issues related to this hot water system were also made to Mr. Cohn in the course of his representation of plaintiff in *Gonzalez1* in December of 2017. Da20 to Da21; Pa151 to Pa152. Plaintiff Gonzalez, however, fails to show why she waited until 2018 to test the hot water and 2019 to test her blood lead levels when the tenants documented complaints about the system began in 2011. Da1. Dilatoriness is not acceptable by New Jersey's statute of limitations. Defendant is entitled to a dismissal of this suit based on the two-year statute of limitations *N.J.S.A. 2A:14-2*.

Statutes of limitations are designed to stimulate litigants to pursue their causes of action diligently and "to spare the courts from litigation of stale claims." *Chase Securities Corp. v. Donaldson*, *325 U.S. 304, 314, (1945)*. They penalize dilatoriness and serve as measures of repose. *Wood v. Carpenter*, *101 U.S. 135, 139, (1879)*. When a plaintiff knows or has reason to know that she has a cause of action against an identifiable defendant and voluntarily sleeps on his/her rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar the action. *Lapka v. Porter Hayden, 162 N.J. 545 (1998); Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111 (1973).* Because plaintiff Gonzalez failed to act diligently, defendant was entitled to a pretrial dismissal of plaintiff's complaint based on the statute of limitations. The Orders of 05/24/2024 and 10/8/2024 must be reversed.

The trial court erred in applying the discovery rule to expand the statute of limitations beyond two years. *N.J.S.A. 2A:14-2*. Pa442. The "Discovery Rule" is an extraordinary form of relief. *Mancuso v. Mancuso, 209 N.J. Super. 51 (App.Div. 1986)*. It is error as a matter of law to apply the discovery rule without a plenary hearing and simply on the basis that plaintiff or her lawyer did not get around to testing the hot water or plaintiff's blood for more than seven years after making a complaint to the city's health officer. The *Mancuso* Court made clear that a plaintiff

seeking to untimely file an action after the *N.J.S.A. 2A;14-2* two-year statute of limitation expired has "an extraordinarily high burden of demonstrating that she did not and could not have timely known of the existence of the cause of action*". Id. at 58.* In *Mancuso*, the court was presented, with the representation that the causal connection between severe exacerbation of Parkinson's disease and a minor trauma was beyond the ordinary lay and even ordinary medical knowledge. *Id. at 59*. Plaintiff Mancuso's determination not to commence a lawsuit was based on her perception that her treatment would not pierce the existing $200 threshold. *N.J.S.A. 39:6A-8*. The *Mancuso* Court held, "Thus, the point here is not when her injuries became eligible for suit by reason of the aggregation of treatment expense, but rather when she knew or should have known that the only injury she sustained which warranted the expense and burden of litigation had any relation at all to the trauma." *Id. at 59*. Plaintiff Gonzalez admitted that in 2016 she already decided to file a complaint in Hudson County Law Division because it did not have limited jurisdiction, and the parties could assert "whatever claims we want" against her landlord defendant 908-910 Washington Street. See admission to defendant's Statement of Facts paragraph 13. Compare Pa115 to Pa255. The case at bar is not analogous to *Mancuso* and therefore the discovery rule is inapplicable to this case.

In direct contrast to the holding in *Mancuso*, plaintiff Gonzalez convinced the lower court that fears and concerns about the hot water were unsubstantiated or

hearsay. The claim that the hot water system was unsafe was unsubstantiated because plaintiff failed to act diligently and test the water for contamination or test her own blood. Plaintiff testified that she did not believe it was her responsibility to do anything after the issue of the quality of the water was raised. She had hired a lawyer to investigate her claims. Pa215. A lawyer's knowledge is imputed to the client. *St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 573 (1982*). Plaintiff may claim ignorance of anything but the quantity of water issues, but her lawyer was pursuing claims on her behalf related to her fears of the heat/hot water systems and plaintiff's claims for bodily injury were not filed within 2 years of the cause of action. Defendant seeks that this court reverse the trial court's Orders of 05/24/2024 and 10/08/2024 and enter an opinion dismissing this complaint with prejudice because plaintiff had reason to know of a potential cause of action based on the condition of pipes installed in her apartment in 1996 but simply slept on her rights.

With regard to the discovery rule the court may also be guided by *Viviano v. CBS, Inc., 101 N.J. 538, 545-546 (1986). The* Supreme Court held that plaintiff Viviano was not entitled to the benefit of the discovery rule. *Viviano* illustrated that where a plaintiff generally knew of her injury attributable to the acts of another, it behooves the plaintiff to consult counsel promptly. It then becomes incumbent on counsel to investigate the matter, retain experts if required, and institute suit when

the facts suggest a claim is well-founded. *Id. 547-548*. Plaintiff generally knew of and complained about the combined heat/ hot water system as early as 2011. Da1. The lower court erred in denying the motion to dismiss this complaint based on the statute of limitations by disregarding the actions taken by plaintiff's counsel on her behalf. *Viviano* recognizes the important role a lawyer has in the investigation of potential claims and directing the lawsuit. Since 2011, plaintiff Gonzalez was represented by counsel. Pa144. The file of her attorney, Lewis Cohn, demonstrates an investigation of the multiple claims made on behalf of the plaintiff concerning the condition of the apartment including the installation of a combined heat/hot water system more than two decade ago and the complaints that this system caused health issues. Da1; Pa143; Pa221 lines 20 to 21. It is uncontested that plaintiff, through her attorney, pursued an emotional distress claim based on the condition of the apartment and its allegedly antiquated heat/ plumbing systems in the prior complaint *Gonzalez1.* Pa163. *Viviano* does not instruct this Court to ignore evidence if it does not have the plaintiff's fingerprints on the document. *Viviano* makes it incumbent on the plaintiff's lawyer to fully investigate the plaintiff's claims. Plaintiff does not plead that her first attorney's investigation in *Gonzalez1* of the heat/hot water systems should have been more thorough and should have included a blood and hot water testing. *R. 4:30A*. Plaintiff Gonzalez testified that she was satisfied with the services of her first attorney. Pa184. The considerations of individual justice as well as the

broader considerations of repose, coincide to bar this action. *Lapka v. Porter Hayden, 162 N.J. 545 (1998); Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111 (1973).* The defendant is entitled to repose. The lower court erred in failing to grant a dismissal of the lawsuit pre-trial based on the statute of limitations. Defendant seeks a reversal of the lower court's Orders of 05/24/2024 and 10/08/2024 and an opinion by this Court that plaintiff's complaint is dismissed with prejudice.

CONCLUSION

Plaintiff's appeal is untimely because it was filed 49 days after the entry judgment. Defendant seeks a dismissal of the appeal in its entirety with prejudice. This case is ripe for a procedural dismissal without the court having to consider the substantive issues on appeal and cross appeal.

Alternatively, this court must affirm the lower court orders of 08/02/2024 and 10/21/2024 denying plaintiff's *R. 4:46-4* fictitious party motions because plaintiff failed to act with due diligence. This court must allow the 10/30/2024 Judgment and Jury verdict of No Cause to stand.

Additionally, the trial judge did not have jurisdiction to enter the 04/14/2025 order. Should this court agree to review this order, defendant seeks that this court affirm the trial court's reasons as set forth in the ruling of October 29, 2024. Pursuant to *R. 4:37-2(b),* the trial court correctly dismisses Count One at the close of plaintiff's case because plaintiff failed to prove evidence that plaintiff resided in a building that met the basic definition of a multiple dwelling to require compliance with *N.J.S.A. 55-13A.* The Judgment and jury's 10/30/2024 verdict of No Cause of Action must be permitted to stand.

Alternatively, should the court reverse any of the orders in plaintiff's prayer for appellate relief, a remand must be denied because plaintiff's case should not have gone to trial. Defendant seeks a reversal of the lower court's Orders of 05/24/2024 and 10/08/2024 and an opinion by this Court that plaintiff's complaint is dismissed with prejudice based upon the prior settlement of the parties and/or the statute of limitations.

Respectfully submitted,

/s/Janet Kalapos Corrigan

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Attorney for Defendant/Respondent/
Cross-Appellant
908-910 Washington Street, LLC

Dated: 06/26/2025

LOURDES GONZALEZ,

Plaintiff-Appellant/
Cross-Respondent,

vs.

908-910 WASHINGTON STREET LLC,

Defendant-Respondent/
Cross-Appellant,

S&B PLUMBING & HEATING CORP.,

Defendant

ABC CORPORATIONS 1-10
(Said Corporation Names Being
Fictitious, Actual Names Unknown)

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001099-24

Civil Action

ON APPEAL FROM:
Superior Court of New Jersey
Law Division, Civil Part
Hudson County
Docket No: HUD-L- 003993-20

SAT BELOW:
Hon. Keri Ann Eglentowicz, J.S.C.

APPELLANT/CROSS RESPONDENT LOURDES GONZALEZ'S REPLY BRIEF IN FURTHER SUPPORT OF APPEAL AND IN OPPOSITION TO DEFENDANT-RESPONDENT/CROSS-APPELLANT'S BRIEF (Pa1 – Pa466)

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Preliminary Statement

The interests of justice compel this Court to consider this appeal even if the Court determines that the Notice of Appeal was filed two days late.

Respondent has not justified the dismissal at trial of Count I of appellant's Complaint because 908-910 Washington Street meets the definition of a multiple dwelling under the Hotel and Multiple Dwelling Act.

The trial court should have permitted the amendment of the Complaint to substitute Eugene Flinn for a fictitious individual because respondent did not identify any prejudice that Mr. Flinn would have suffered from the amendment of the pleading in July 2024.

Gonzalez1 did not involve a claim for bodily injury or the contamination of the domestic hot water system. Consequently, the settlement of *Gonzalez1* and execution of the Settlement Agreement and General Mutual Release does not bar the prosecution of this action.

Appellant was not aware that she suffered injury from the contamination of the domestic hot water system until January 2019 and therefore her cause of action did not arise until she discovered her injury. The filing of her action in November 2020 was timely and not barred by the statute of limitations.

Point I. The Draconian and Ultimate Sanction of Dismissal of This Appeal is Not Warranted and Would Be Contrary to Justice

A dismissal of the instant appeal based on a procedural defect and not based on the merits of the matter would be contrary to justice.

The Judiciary strives to follow a policy in favor of generally deciding contested matters on their merits rather than based on procedural deficiencies. See State v. Lawrence, 445 N.J. Super. 270, 275-76 (App. Div. 2016) (citations omitted). As was observed in Lawrence, "enforcement of procedural rules must always be exercised with an eye to secure a just determination and maintain fairness in administration of cases; not solely to secure a completed disposition." Id. (quotations omitted). This is because "[c]ases should be won or lost on their merits and not because litigants have failed to comply precisely with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available." Irani v. K Mart Corp., 281 N.J. Super. 383, 387 (App. Div. 1995). "This is especially true where there 'has been no showing of prejudice' on part of the opposition." Lawrence, 445 N.J. Super. at 276 (quoting Mayfield v. Cmty. Med. Assocs., P.A., 335 N.J. Super. 198, 207 (App. Div. 2000)).

As this Court has also stated, "There is an overriding policy which is firmly imbedded in our law which disfavors the procedural dismissal of cases .

. . ." State in the Interest of D.J.C., 257 N.J. Super. 118, 121 (App. Div. 1992). "Procedural dismissal is a choice of last resort not one of first instance." Id. (emphasis in original).

In addition, this Court has admonished as follows. "No eagerness to expedite business, or to utilize fully the court's time, should be permitted to interfere with our high duty of administering justice in the individual case." Pepe v. Urban, 11 N.J.Super. 385, 389 (App.Div.1951).

Appellant filed her Notice of Appeal on December 18, 2024, six (6) days after the entry of the Final Judgment of No Cause of Action was filed by the trial court on December 12, 2024, well within the forty-five days allowed to appeal from a final judgment pursuant to R. 2:4-1(a). Pa964; Da33. Appellant was not aware that the clerk entered Judgment on October 30, 2024, or the potential impact of that event, and was awaiting the entry of the Order submitted by respondent to the trial judge before filing her Notice of Appeal.

The question arises that if the December 12, 2024, Order of the trial judge had no relevance to the finality of the action then why did respondent submit it for execution? Additionally, this Court granted appellant's motion to file a second amended notice of appeal on May 19, 2025, over respondent's objection that the Appeal was untimely (Da80-84) and the appeal should not be dismissed at this time.

If appellant had any concept that the Notice of Appeal filed six (6) days after the December 12, 2024, Order for Judgment of No Cause of Action was possibly two days late, as respondent contends, appellant would have filed a motion pursuant to R. 2:4-4 for an Extension of Time for Appeal. The filing of this appeal two days late would have caused the respondent no prejudice and would likely have been granted by this Court.

Appellant respectfully requests relaxation of Rule 2:4-1 in the interests of justice, R. 1:1-2, or the acceptance of this appeal *nunc pro tunc*. See Frantzen v Howard, 132 N.J. Super. 226, 227 (App. Div. 1975); Tiffin v Southeastern Pennsylvania Transp. Authority, 462 N.J. Super., 172, 177 fn.4 (App. Div. 2020). Applying these principles here, there should be no doubt that the interest of justice requires that this appeal should not be dismissed so that appellant's day in court is not irretrievably lost.

Point II. Respondent has not identified any prejudice that would have been occasioned by the substitution of Eugene Flinn for a Fictitious Individual in the Caption and the Orders of Judge Turula and the trial judge should be reversed. (Pa347 and Pa449)

Respondent ignores the fact that appellant filed a motion before Judge Turula in July 2024. In respondent's opposition to that motion, they did not identify any prejudice caused by any loss of evidence, impairment in the ability to defend against appellant's claim or advantage to appellant that would have been caused by the amendment sought in July 2024 after the filing of the

Complaint in November 2020. See, Farrell v Votator Div. of Chemtron Corp., 62 N.J. 111, 122 (1973). In the absence of prejudice caused by the delay in the amendment of the pleading, "[j]ustice impels strongly towards affording the plaintiffs their day in court on the merits of their claim[.]" Farrell v. Votator Div. of Chemtron Corp., 62 N.J. 111, 122 (1973).

In opposition to this appeal, respondent asserts prejudice to Mr. Flinn contending that the hot water system was installed before he purchased the property in 1996, that the prior owner of the property is dead, and that Judge Turula's ruling, adopted by the trial court, expressed a "concern about the actual prejudice has [sic] the events alleged happened many years ago." Pa348.

Appellant respectfully submits that it was improper for Judge Turula to *sua sponte* offer an opinion as to potential prejudice to Mr. Flinn because the events happened many years ago when the perceived prejudice that Judge Turula was concerned about was not caused by the delay in naming Mr. Flinn as a defendant but was an unfortunate fact of appellant's claim against him. Even if the allegations now asserted by the respondent qualify as prejudice to Mr. Flinn, this alleged prejudice was not caused by the delay in seeking to substitute Eugene Flinn for a fictitious individual in the caption. It is only prejudice caused by the delay in the identification of the fictitious defendant which would justify

the denial of the application to substitute Mr. Flinn for a fictitious individual, not the difficulty of Mr. Flinn having to defend against appellant's claims.

Respondent, at the trial level and on appeal, has been unable to articulate any prejudice caused by the delay in seeking to substitute Eugene Flinn for a fictitious individual in the caption because Mr. Flinn was served with and aware of the filing of this action against respondent from its inception and participated in all discovery. It is not credible to assert that Mr. Flinn would have taken any action or retained any experts in the defense of this action that he did not do for respondent, a limited liability company he owned with his wife. If there was a need for additional discovery, respondent would have asserted that in opposition to appellant's motion filed in July 2024. Mr. Flinn submitted a certification in opposition to appellant's motion and never asserted the need for additional discovery. Pa337. The Orders denying appellant's motion to substitute Eugene Flinn for a fictitious individual in the caption should be reversed and this matter remanded back to the law division for trial.

Point III. The Record on Appeal Clearly Establishes that the Entire First Floor and Basement of 908-910 Washington Street was Utilized for Amanda's Restaurant and the Merger of the two buildings made 908-910 Washington Street subject to the Hotel and Multiple Dwelling Act, N.J.S.A. 55: 13A-1 et. seq.(Pa451; 4T11.17-4T20.4)

Respondent opposes appellant's appeal from the trial court's dismissal of appellant's claim under the Hotel and Multiple Dwelling Act, N.J.S.A. 55: 13A-

1 et seq. (hereinafter the "Act") asserting that there was a failure of proof that the common walls on the first floor or the basement were removed. Db at 34. A fair reading of the trial record reflects that Eugene Flinn obtained a variance to expand the dining room of his Amanda's Restaurant into the first floor of 908 Washington Street and used the basement of 908-910 Washington Street for a private dining room, wine cellar, coat room and bathrooms. 2T167.11 to 2T169.2. Appellant's fact witness corroborated the joinder of the buildings. 2T106.18 to 2T107.4.

Whether the wall was removed, which it was, is not a prerequisite to the joinder or merger of the building or the applicability of the Act. The buildings were clearly joined because the variance allowed Mr. Flinn to operate Amanda's Restaurant within the footprint of both buildings. The merger of the two buildings brought it under the Act which is remedial legislation designed to protect the health and welfare of the public and ensure that the public has safe dwelling units. The Act is to be liberally construed to effectuate its purpose. N.J.S.A. 55:13A-2. It will be for this Court to determine whether, accepting appellant's facts and considering the applicable law, no rational jury could draw from the evidence presented that the non-moving party is entitled to relief. Rule 4:37-2(b).

Respondent is critical of appellant because appellant did not call a witness from the Department of Community Affairs ("DCA") to establish its jurisdiction over 908-910 Washington Street. It is axiomatic that it is the role of the judge to interpret the law and a witness from the DCA was not needed for the trial court to rule on the applicability of the Act to facts presented at trial as the opinion of the DCA would not be controlling. See, Rothman v. Dept. of Cmty Affairs, 226 NJ. Super. 229, 233-234 (App.Div. 1979) (the court in Rothman found that common ownership is not a pre-requisite to finding a property is a multiple dwelling under the Act when this fact was significant to the determination of the Commissioner of the DCA). Appellant provided sufficient facts to submit to the jury the issue of respondent's violation of the Act as evidence of the negligence of respondent in failing to provide appellant with potable hot water as it was required to do under the Act. The directed verdict on Count I of the Complaint must be reversed.

Point IV. The trial courts' evidential rulings were erroneous.

a. Dr. Osinubi should have been permitted to testify on the issue of reproductive toxicity.(3T9.12-14.20: 3T27.12-29.7; 3T30.1-4; 3T40.1-3T50.2; 3T53.3-7)

Respondent provides this court with no persuasive reason to affirm the trial court's exclusion of Dr. Osinubi's expert testimony on the reproductive toxicity caused by appellant's lead exposure. This opinion was excluded

because it was too prejudicial to defendant. 4T9.12-4T14.20; 4T27.12-4T29.7; 4T30.1-4; 4T49.1-4T50.2; 4T53.3-7. Not because plaintiff did not testify about her spontaneous miscarriages or that this opinion was a net opinion. It was not a net opinion because Dr. Osinubi's opinion on reproductive toxicity was based upon the history of appellant's reproductive health.

Dr. Osinubi was qualified by the Court to testify as an expert in occupational and environmental medicine. Her opinion on appellant's reproductive toxicity was well within her field of expertise. Respondent could have cross examined Dr. Osinubi on the issues raised by respondent in this appeal. The jury could have decided what weight to give to Dr. Osinubi's opinions. To bar the testimony Dr. Osinubi on appellant's reproductive toxicity because it was too prejudicial to the respondent was clearly error and should be reversed.

b. Dr. Osinubi should have been permitted to testify that appellant's exposure to lead paint dust was a significant contributing factor to appellant's lead exposure. (3T57.2-8; 3T53.4-6)

As an expert witness, Dr. Osinubi could rely upon the facts or data contained in the Home Inspection Report prepared by Frank Libero because it was the type of material reasonably relied upon by experts in her field. N.J.E.R. 703. Appellant did not need to call Mr. Libero as a witness. The Home Inspection Report concluded that "in a house this age lead paint was definitely

used." Pa407. Dr. Osinubi should have been permitted to rely upon Mr. Libero's finding in her testimony regarding lead exposures to appellant. Consequently, James v Ruiz, 440 N.J. Super. 45 (App. Div. 2015) does not preclude Dr. Osinubi's reliance upon the Home Inspection Report. 440 N.J. Super. at 65 ("a testifying expert may refer to 'facts or data' provided by another source, even though expressed through a hearsay statement").

However, Dr. Osinubi's testimony was not dependent upon Mr. Libero's report. Her experience in occupational and environmental medicine qualified her to formulate her opinion that it was more likely than not that Unit 3 built before 1978 contained lead paint. The trial court's exclusion of this evidence was an abuse of discretion. The jury should have been permitted to consider Dr. Osinubi's opinion and determine what weight to give it. To exclude Dr. Osinubi's testimony on an additional source of lead exposure to appellant from Unit 3 was an abuse of discretion and should be reversed.

Point V. *Bilotti* is Controlling Law and the Trial Court Correctly denied Respondent's Motion.

"A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands **due at the time of its execution** and **within the contemplation of the parties**." Bilotti v Accurate Forming Corp., 39 N.J. 184, 204 (1962). (Emphasis added). In Bilotti, the appellant, who was a shareholder and employee of several companies that were

managed together, was discharged from employment by the other shareholders. When attempts to buy out his interest in the corporations failed, the remaining shareholders voted to issue more stock to themselves, thereby diluting Mr. Bilotti's ownership interest. Mr. Bilotti filed suit against the defendant corporations and shareholders to set aside the stock option action, for moneys owed him by the manufacturing companies, and for mismanagement of corporate property. Bilotti, supra at 190.

Eventually, Mr. Bilotti agreed to settle his action for the value of his one-fifth interest in the book value of the corporations. After receiving payment, he signed a release "discharging all claims against defendants which plaintiff 'ever had, now has or which he...hereafter can, shall or may have, for upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.'" Bilotti, supra at 191.

Several months later, Mr. Bilotti learned that defendant had misrepresented the book value of the companies thereby defrauding him out of the true value of his one fifth interest. He filed suit and the defendants asserted the release as a bar to his claim. Admittedly, much of the Supreme Court's decision deals with an anachronistic analysis of whether Mr. Bilotti's suit based upon fraud in the execution of a release should have been brought in the law division or chancery division. The old rule was that a fraudulently procured

release had to be set aside through an action in chancery before the renewal of the original claim in the law division. Bilotti, supra at 202.

However, the New Jersey Supreme Court decided that the correct analysis on the applicability of the release as a bar to a subsequent action should focus on the purpose of the release, and whether it had any relevance or effect at all in the present suit. The Supreme Court concluded that Mr. Bilotti's current action related to fraud in the valuation of the company stock and was not an attempt to relitigate the claims asserted in the first action which was settled. "[T]he release, as a matter of actual mutual intent, was designed only to discharge the claims asserted in that earlier suit and any other claims already existing and, along with the dismissal of that action, simply for the purpose of wiping the slate clean of that litigation...its only efficacy would be limited to the discharge of prior claims, and it would have no relevance in the present suit." Bilotti, supra at 203.

Bilotti is factually similar to the matter *sub judice* as the fraud in Bilotti was discovered after the settlement of his action against the shareholders, just as appellant discovered her lead poisoning after the settlement of Lourdes Gonzalez et. al. v Eugene Flinn, et. al., HUD-L 002062-16 (hereinafter "*Gonzalez1*"). The toxic tort claim presented by appellant in this matter did not accrue until after the Settlement of *Gonzalez1* and execution of the Settlement Agreement and Mutual General Release ("Settlement Agreement") (Pa64) and

therefore is not barred by the settlement of *Gonzalez1* in May 2018 or the executed release on December 21, 2018, with an effective date of May 23, 2018. See, Mancuso v. Mancuso, 209 N.J. Super. 51, 55 (App. Div. 1986)("The discovery rule, as developed by the New Jersey courts over the last several decades, is a technique by which the date of accrual of the cause of action is deferred from the customary date of the actual infliction of the injury until the date upon which the injured person knows or should, by the exercise of reasonable diligence, know that he has sustained an actionable injury."). Appellant first discovered that the lead contamination of the hot water service caused her an elevated blood lead level in January 2019. Pa82 ¶10. Consequently, the Supreme Court's analysis in Bilotti and adoption of the general rule that a claim which did not preexist a release of a prior claim is not covered by that release, is directly relevant to the issue presented.

The release of the lead poisoning claim was also not within the contemplation of the parties to the Settlement Agreement as appellant testified that in *Gonzalez1* she was not concerned with the quality of the water service to the apartment, just the fact that the hot water was not hot enough or sufficient to serve the needs of the apartment. Pa81 ¶5. At the time of the settlement of *Gonzalez1* on May 23, 2018, appellant was not aware that the hot water system was contaminated with lead, or that she was suffering bodily injury because of

lead contamination. Pa81 ¶6. Consequently, upon signing the Settlement Agreement, her lead poisoning claim did not exist and was not within the contemplation of appellant to be included in the Settlement Agreement. The Settlement Agreement is therefore not a bar to this action.

a. Appellants claim for lead poisoning did not arise out of *Gonzalez1.*

Gonzalez1 was not an action to recover for bodily injury arising out of the condition of Unit 3. *Gonzalez1* was filed to defend against an eviction action filed by respondent and to obtain a new lease for Unit 3 located in respondent's building. Pa81 ¶3. *Gonzalez1* contained five (5) counts. *Gonzalez1* alleged that respondent violated the Law Against Discrimination (LAD); the Consumer Fraud Act; The Truth in Renting Act; the New Jersey Security Deposit Act and for violations of the implied warranty of Habitability. Pa81 ¶4. Respondent claims that appellant's emotional distress claim was premised upon her LAD claim, not as a result of any condition of the apartment. Therefore, respondent's argument that appellant's lead poisoning claim resulting from a contaminated domestic hot water system arises out *Gonzalez1's* LAD emotional distress claim and is therefore barred by the Settlement Agreement is unpersuasive.

b. Da1 does not support respondent's argument that *Gonzalez1* was about the contamination of the potable water system in Unit 3.

Respondent relies upon Da1 as proof that appellant knew that the domestic potable water system in Unit 3 was contaminated. Da1 is an e-mail from

appellant's sister, Emily Vermeal, to Hoboken's Health Officer, Frank Sasso. Even a cursory review of this "evidence" reveals that appellant did not author Da1, appellant is not copied on Da1, and the subject of Ms. Vermeal's concern was her belief that "my mother has been drinking perimeter baseboard heat water" not the appellant.

Ms. Vermeal's concern in contacting Mr. Sasso was about the open-loop configuration of the heating system which she believed was installed without a permit. Da269 ¶6. Mr. Sasso had the heating system inspected in 2011 and it was reported that the DHW and heating system was installed according to code. Da269 ¶7. After the inspection, Hoboken issued a permit for the already installed heating system and Mr. Sasso never required Mr. Flinn to make any changes to the system. Da269 ¶8.

Lead contamination of the water in Unit 3 is not mentioned in Da1. The possible contamination of the domestic potable water system in Unit 3 is not mentioned. Personal injury to the appellant is not mentioned. There is no evidence in the record on appeal that appellant's attorney in *Gonzalez1* introduced Da1 into evidence. Da1 provides no support for respondent's argument that this action arises out of *Gonzalez1* and is therefore barred by the Settlement Agreement.

c. *Gonzalez1* did not include any claim for bodily injury caused by the contamination of the potable water system in Unit 3.

Emily Vermeal was the lead plaintiff in *Gonzalez1*. Pa267 ¶1. Lead contamination of the hot water system was not part of *Gonzalez1*. Id. ¶2 ¶10. Plaintiffs in *Gonzalez1* never tested the DHW system and the lead contamination was not discovered until October 2018, after *Gonzalez1* was settled. Pa270 ¶11. If Ms. Vermeal knew that the DHW system was contaminated with lead, she would not have agreed to a settlement of *Gonzalez1* that did not include the correction of this problem. Pa270. Id.

Ms. Vermeal did testify at deposition in *Gonzalez1* to her opinion that the DHW system in Unit 3 was poisoning her family for 25 years. However, it was just her opinion and not a claim in *Gonzalez1*. Contamination of the DHW was not pleaded, and there was no evidence of contamination of the DHW system developed during discovery in *Gonzalez1*, and no expert witness opinion was obtained to present a claim for lead contamination in *Gonzalez1*. Frank Sasso issued a permit for the DHW system after its inspection in 2011. Ms. Vermeal was reasonable to rely upon the position of Hoboken Health Department that the DHW system was code compliant and there were no citations to be issued. Her fears being allayed, there was no reason for her to test the quality of the water in Unit 3. Because the contamination of the DHW in Unit 3 was not a claim in *Gonzalez1*, it should not be precluded by the Settlement Agreement. Pa270.

d. The proposed amendments to the Settlement Agreement had nothing to do with the lead contamination of appellant which was not discovered until January 2019 and the revisions to the Settlement Agreement were not proposed by appellant.

Gonzalez1 was settled on May 23, 2018. Respondent is correct that the Settlement Agreement that included the release was not signed until December 21, 2018. Pa270 ¶ 13. However, the delay in execution was the result of the actions of the lead plaintiff, Emily Vermeal. Ms. Vermeal testified that there were many reasons for the delay in the signing of the Settlement Agreement which included the vacation schedules of the attorneys involved, and Ms. Vermeal's health issues. The principal reason Ms. Vermeal did not want to sign the Settlement Agreement was that she was not satisfied with the provisions of the two-year lease which was part of the consideration for the settlement. There were provisions included in the lease which Ms. Vermeal feared that Mr. Flinn would use against her and her family. That is why she attempted to revise the language of the Settlement Agreement. She wanted to make sure that if Mr. Flinn unreasonably attempted to enforce the offensive provisions of the lease, he could be sued. Pa271.

Appellant did not try to revise the lease. The proposed revisions were offered by her sister Emily Vermeal and those revisions had nothing to do with any potential lead poisoning case which appellant did not know existed until January 2019. Pa83 ¶12. The Orders of Judge Ahmad should not be reversed.

Point VI. Appellant's action is not barred by the Statute of Limitations.

The lead solder used to install the copper pipes for the Bradford White Aqua Heat DHW/baseboard heating system caused contamination of the potable hot water in Unit 3 for twenty-two (22) years. However, plaintiff did not discover the contamination until October 2018 when the home inspector hired by her sister tested the water inside Unit 3. Plaintiff did not have a cause of action against defendant until she learned in January 2019 that she had been poisoned by the lead contamination of the DHW and lead containing paint inside the apartment. See, Viviano v CBS, Inc., 101 N.J. 538, 546 (1986).

The "critical" piece of evidence that defendant relies on is Pa142, Da1. It purports to be an e-mail written to Frank Sasso, a licensed health inspector at the Hoboken Health Department, **not by plaintiff Lourdes Gonzalez**, but by her sister, Emily Vermeal, who was not living in Unit 3 at the time. It represents Ms. Vermeal's consternation that the Bradford White Aqua Heat DHW/baseboard heating unit installed in Unit 3 provided both DHW and baseboard hot water heat to Unit 3. However, there is nothing wrong with the design of the Bradford White Aqua Heat unit which heated water for baseboard heat and potable use. This fact was obvious to Mr. Sasso because he did not test the water following Ms. Vermeal's letter and confirmation that the installation complied with the building code.

Plaintiff's expert examined the Bradford White Aqua Heat unit and found no issue with it. The source of the lead contamination was the use of lead solder to install the piping that created the loop that heated Unit 3. If lead solder was not used, the contamination would not have occurred. Consequently, Ms. Vermeal's visceral objection to the installation of the Bradford White Aqua Heat unit had no basis in fact when she expressed her concern to Mr. Sasso. She had no knowledge that the pipes were causing lead contamination of the DHW system. **Her letter to Mr. Sasso does not even mention the word lead**. If the health department chose not to investigate the quality of the water based upon Ms. Vermeal's complaint, what obligation did Ms. Vermeal, or for that matter, appellant Lourdes Gonzalez, have to test the water in 2011? The more relevant question is why did Mr. Flinn not test the water in Unit 3 that he was renting for financial gain?

The "discovery rule" has long been accepted in the jurisprudence of New Jersey. "Under that rule, a cause of action does not accrue 'until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim' . . . a cause of action accrues when the plaintiff knows of his or her injuries and facts sufficient to attribute those injuries to the fault of another.'" Viviano v CBS, Inc., 101 N.J. 538, 546 (1986)(emphasis added).

Appellant's claim against respondent did not accrue until she learned that her blood was poisoned by the DHW in Unit 3. This did not occur until January 2019. Therefore, the Complaint filed on November 2, 2020, in this matter was timely filed. Pa1.

Conclusion

For all the foregoing reasons, and those set forth in Appellant's Brief in Support of Appeal, appellant/cross respondent respectfully requests that this Court deny respondent/cross appellant's appeal and remand this matter to the trial court for re-trial.

Caruso Smith Picini, PC
Attorneys for Appellant/Cross Respondent
Lourdes Gonzalez

By: Richard D. Picini
Richard D. Picini, Esq.

Dated: August 12, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LOURDES GONZALEZ, Plaintiff-Appellant/ Cross-Respondent vs. 908-910 WASHINGTON STREET, LLC; Defendant-Respondent/ Cross- Appellant S & B PLUMBING & HEATING CORP.; Defendant ABC CORPORATIONS 1-10 (Said Corporation Names Being Fictitious, Actual Names Unknown)	Civil Action Appellate Court Docket No. A-001099-24 ON APPEAL FROM: Superior Court of New Jersey Law Division, Civil Part Hudson County Docket No.: HUD-L-003993-20 SAT BELOW: Hon. Keri Ann Eglentowicz, J.S.C.

REPLY BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT/CROSS APPELLANT 908-910 WASHINGTON STREET, LLC

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REPLY TO OPPOSITION TO DEFENDANT'S LEGAL ARGUMENT – PT 1

THE 12/12/2024 ORDER MEMORIALIZING THE JURY VERDICT DID NOT TOLL THE CLERK'S ENTRY OF JUDGMENT *R.4:47* THEREFORE PLAINTIFF'S APPEAL IS UNTIMELY AND MUST BE DISMISSED IN ITS ENTIRETY WITH PREJUDICE. (Da69; Pa466).

This appeal is out of time whereas here entry of Judgment occurred on 10/30/2024 and plaintiff filed her Notice of Appeal outside the jurisdictional time allowed by *R. 2:4-1*. "Where the appeal is untimely, the Appellate Division has no jurisdiction to decide the merits of the appeal." *Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017)*. Having failed to file a *R. 2:4–4* motion to extend the time to file her Notice of Appeal, plaintiff requests a "relaxation of *Rule 2:4-1*." Prb4. This creative request is not supported by court rule. The time to appeal may not be extended except on motion. *R. 2:4-4*. Plaintiff appears to be attempting to expand this court's jurisdiction and avoid a showing of good cause and the absence of prejudice as would be required by formal motion. See *In re Appeal of Syby, 66 N.J. Super. 460, 464-465 (App. Div. 1961)*. Sitting idly for 49 days after a seven-day trial with a jury verdict of No Cause and the entry of a valid *R.4:47* Judgment does not support good cause. Plaintiff Gonzalez's assertion that she was not aware the clerk entered judgment in favor of defendant on October 30, 2024, Prb3, is not supported by the record or a certification as would be required by a motion to extend. Plaintiff uploaded the 10/30/2024 *R. 4:47(a)* Judgment when she filed her Notice of Appeal 49 days after the entry of the Judgment on the Civil Docket. Pa

466. The argument that plaintiff was unaware of the judgment, mandated by court rule *R. 4:47*, also flies in the face of the terms and conditions of an attorney's required participation in the eCourts system. Every attorney consents to electronic service of court generated documents[1]. The clerk's Judgment was entered on the Civil Docket on 10/30/2024 LCV20242840728 and again appeared by way of an attachment to defendant's general correspondence on 11/06/2024 LCV20242899579. Plaintiff's Notice of Appeal filing, Da33 to Da44, shows both eCourts transaction IDs on the *R. 4:47(a)* Judgment. Da44; Da26. Plaintiff's assertion that she was not aware of the potential impact of the clerk's Judgment, only demonstrates ignorance of the law rather than good cause. Pressler & Verniero, *Current N.J.Court Rules*, comments 1.1 and 3 on *R.4:47*(it is a judgment's entry on the Civil Docket which triggers the time for appeal). The assertion that plaintiff was awaiting the entry of the order submitted by respondent to the trial judge before filing her notice of appeal, Prb3, is also not supported by the record. Plaintiff filed her NOA on 12/18/2024 two days before the 12/12/2024 order was entered on the Civil Docket on 12/20/2024 LCV20243255037. Da 26. Plaintiff confuses the order's "Filed Date" when the judge signs an order, and the

[1] See NJCourts user agreement. www.njcourts.gov/sites/default/files/attorneys/attorney-resources/useragreement.pdf

"Entry Date" when the order is served by eCourts and becomes a public record. Plaintiff sat idly without triggering any of the events that would have tolled the clerk's valid entry of Judgment. *R. 2:4–3(e)*. This appeal is therefore untimely and must be dismissed.

The entry of the 12/12/2024 order on 12/20/2024 did not reset or stop the clock from ticking on plaintiff's time to appeal because a valid form of Judgment had already been entered on the Civil Docket 52 days earlier. Upon the general verdict of the jury finding No Cause in defendant's favor, the record does not demonstrate that any other relief was contemplated by the trial judge. *Rule 4:47(a)* provides that judgment be forthwith entered by the clerk, without awaiting further direction by the court "unless the court otherwise orders." Nothing in the record suggests that such an order was given by the trial judge. See *Kustka v. Batz, 236 N.J. Super. 495, 498-499 (App. Div. 1989)* finding the attorney-generated judgment order was not considered a judicial decision but rather a mere ministerial act which did not substitute for the mandated clerk's action required by *R. 4:47(a)*. Additionally, if the 12/12/2024 Order was supposed to change the effective date of the previously entered valid *R. 4:47(a)* Judgment, which it did not, that change was required to be specifically stated by the trial judge consistent with *R. 4:42-1(a)5*. Compare also *Brescher v. Gern, Dunetz, Davison & Weinstein, P.C., 245 N.J. Super. 365, 370 (App. Div. 1991)* (this was not a case where the Clerk either

prepared, signed or entered the judgment therefore subparagraph (a) did not apply). Plaintiff Gonzalez would have this court ignore the entry of the valid R. *4:47(a)* Judgment upon the general verdict of No Cause in favor of defendant on 10/30/2024 in direct opposition to the plain language of the court rule mandate. Plaintiff does not show good cause for extending the time for appeal from the valid form of Judgment prepared and signed by the Court Clerk that started the clock ticking on the time to appeal and therefore there is no basis to "relax" *Rule 2:4-1*. This appeal is out of time.

The record also does not demonstrate an absence of prejudice. R. *2:4–4 (a)*. From the existing record the court can glean witnesses that supported defendant's claim that the hot water and heating systems pre-existed both Eugene Flinn and defendant 908–910's purchase of the property died. Da19. Defendant is entitled to repose from further litigation. It is a well-established principle in this State that when the time for taking an appeal has run the parties to the judgment have a vested right therein which cannot subsequently be taken from them. It is of the utmost importance that at some point judgments become final and litigations come to an end. *In re Hill, 241 N.J. Super. 367, 371 (App.Div.1990)*. Plaintiff's admitted purpose of bringing litigation against the defendant was "to make life generally uncomfortable for defendant" so it will want to settle with plaintiff, not because plaintiff was seeking justice. Pa115 (paragraph 13) and admitted at Pa255; Da4 to

Da5. Plaintiff does not show an absence of prejudice to this defendant. There is prejudice when the rules do not apply equally to all parties. Plaintiff's appeal is untimely because it was filed 49 days after the entry of a valid judgment. Defendant seeks a dismissal of the appeal in its entirety. This case is ripe for a procedural dismissal.

Additionally, six out of seven cases the plaintiff cites to support the theory that this appeal should not be dismissed as untimely have nothing to do with an analysis of the jurisdictional requirements of R. *2:4-1* and the 45 day time period for filing an appeal to the Appellate Division as of right from final judgments of the courts.[2] The lone case of *Triffin v. Southeastern Pennsylvania Transp. Authority, 462 N.J. Super. 172, 177 fn4 (App. Div. 2020)* does not support plaintiff's position that *Rule 2:4-1* should be "relaxed" or that the court should

[2] *State v. Lawrence, 445 N.J. Super. 270 (2016)(R.7:13-1* motion for reconsideration to reinstate municipal court appeal, dismissed for failure to timely submit a brief); *Irani v. K-Mart Corp., 281 N.J. Super. 383, 388 (1995*) (complaint was dismissed because plaintiff failed to appear for a trial call App. Div. remanded case for completion of discovery and trial); *Mayfield v. Community Medical Associates, P.A., 335 N.J. Super. 198, 200 (App. Div. 2000*) (defendants moved to dismiss on ground plaintiffs did not comply with the affidavit of merit statute); *State in Interest of D.J.C., 257 N.J. Super. 118, 119 (App. Div. 1992)* (App. Div. reversed order that dismissed complaint for failure to provide discovery and remanded for hearing); *Pepe v. Urban, 11 N.J. Super. 385, 387 (App. Div. 1951)* (App.Div. reversed judgment of trial court because court's failure to assist plaintiffs in procuring attendance of medical witness); *Frantzen v. Howard, 132 N.J. Super. 226, 227-228 (App. Div. 1975)* (court dismissed appeal sua sponte because all issues as to all parties were not resolved).

accept this appeal *nunc pro tunc* [now for then]. Prb4. The *Triffin* opinion was delivered by Clarkson S. Fisher, Jr., P.J.A.D. Plaintiff Robert J. Triffin brought an action in the special civil part against defendants Southeastern Pennsylvania Transportation Authority (SEPTA), Howard Ellis, and Richard Burnfield, seeking damages on a dishonored check. An oral ruling was entered dismissing the claim against SEPTA before the trial commenced on a September 17, 2018 listing. Approximately two weeks later, default judgment was entered against defendant Ellis, and a formal dismissal of the claim against defendant Burnfield was entered on October 19, 2018. Plaintiff Triffin's Notice of Appeal was filed exactly forty-five days after the order was entered dismissing the final claims against the remaining defendant Burnfield. The court found the Notice of Appeal was timely because finality was not achieved in the trial court until all issues as to all parties are resolved. In the instant action, plaintiff Gonzalez sat idly for 49 days following the general verdict of the jury granting a No Cause in favor of defendant. This verdict was entered as a valid *R. 4:47* Judgment in the Civil Docket on 10/30/2024. Unlike the plaintiff in *Triffin*, who filed a notice of dismissal to conclude all issues as to all parties within 18 days of entry of default judgment against only defendant Ellis, plaintiff Gonzalez did nothing within the *Rule 2:4-1* jurisdictional time period. Plaintiff sat idly for 49 days. This matter must therefore be dismissed.

Plaintiff's one sentence argument that the appeal is timely because "this Court granted appellant's motion to file a second amended notice of appeal on May 19, 2025, over respondent's objection that the appeal was untimely (Da80-84)" is without basis in the law. Plaintiff Gonzalez cannot attempt to resurrect an appeal that is already time-barred. To hold otherwise would mean a final judgment will never achieve finality; that would be contrary to existing law. *State, Dept. of Law and Public Safety, Div. of Consumer Affairs v. Contemporary Communities, 337 N.J. Super. 177, 181 (App. Div. 2001)*(Additional filing had no bearing on the finality of the underlying decision; therefore, appellants' appeal was still not timely filed and the court lacked jurisdiction to entertain the matter.) This appeal must be dismissed, because plaintiff Gonzalez failed to file her Notice of Appeal within time allowed by *R. 2:4-1* therefore, this court lacks jurisdiction to entertain the appeal and must be dismissed.

REPLY TO OPPOSITION TO DEFENDANT'S LEGAL ARGUMENT-PT 5

THE TRIAL COURT ERRED IN FAILING TO DISMISS PLAINTIFF'S COMPLAINT PRIOR TO TRIAL BASED UPON A SETTLEMENT AND RELEASE OF CLAIMS IN A 2016 LAWSUIT (GONZALEZ 1). (Pa273; Pa438).

Plaintiff's case should never have gone to a jury. The settlement and release of the prior to 2016 lawsuit, *Gonzalez1*, barred the instant action. Plaintiff's opposition ignores the Appellate Division's interlocutory opinion that provided the rule of law for this case. Pa100 to Pa109. With reliance on *Bilotti v. Accurate*

Forming Corp., 39 N.J. 184, 204-05 (1963) the remaining question for the trial court was whether plaintiff's second suit arises from or is in any way related to the subject matter of her first suit because a general release ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties. Pa107. The complaint in *Gonzalez1* included claims arising from and related to an antiquated and inadequate plumbing system that the defendant landlord allegedly failed and refused to update. Pa 50. Plaintiff admitted that she was complaining about the same hot water system in the first lawsuit that she was now complaining about in this case. Pa212. Plaintiff, however, argues that defendant should be held to a higher standard than that set forth in *Bilotti.*

The Summary Judgment record unequivocally demonstrated that claims related to the quality of the hot water, not merely the quantity, were contemplated by the parties in *Gonzalez 1.* When plaintiff's attorney in *Gonzlez1* placed the trial exhibit tab, P-29, on the document showing complaints directed to the Hoboken health department about drinking the hot water and identified the document as one of plaintiff's exhibits for her case in chief for the May 2018 *Gonzlez1* trial, the parties' contemplation and concern about drinking the hot water was established. Da1. See facts as admitted by plaintiff in *R. 4:46-5* response Pa116 paragraph 25 and Pa257. Plaintiff attempts to hold defendant to a higher standard than *Bilotti* by asserting that the pre-marked trial exhibits in Gonzalez1 had to be "introduced" in

evidence. Prb15. *Bilotti* requires contemplation by the parties of claims arising from or is in any way related to the subject matter of her first suit *not introduction of evidence in the prior suit.* The pre-marked evidence tab shows plaintiff's contemplation of health concerns about drinking the hot water as earlier as 2011. Settlement of the prior to 2016 lawsuit, *Gonzalez1*, barred the instant action.

Plaintiff's second suit arises from and is very much related to the subject matter of her first suit because her emotional distress claim under the Law Against Discrimination, *N.J.S.A. 10:5.1* in *Gonzalez1* was premised on the condition of the apartment. The jury verdict sheet prepared by Mr. Cohn in *Gonzalez1* for plaintiff's compensatory claims under the LAD, asked the jury to determine if plaintiffs proved evidence of unlawful discrimination on the basis of the conditions of the third-floor apartment at 908 Washington Street and requested damages for the same. [Emphasis added]. Pa166. One of the conditions that plaintiff pre-marked for evidence for her case in chief was complaints about the combined domestic hot water system to the Hoboken Health Department. Da1. The robust record presented to the trial court on defendant's motion for Summary Judgment shows that plaintiff was not only seeking "property-based" relief, Pa107, but also included personal injury claims for pain and suffering caused by emotional damages as a result of the condition of the apartment.

Plaintiff Lourdes Gonzalez was also present when her sister testified during a 2017 *Gonzalez1* deposition. The co-plaintiff testified to an allegation that the hot

water system in the apartment was poisoning her family for 25 years. Da16 to Da17. Lourdes Gonzalez testified that she was present at the deposition but did not know the degree of the contamination of the water supply. Pa211 to Pa212. Plaintiff's opposition to this appeal does not deny that the contamination of the water was contemplated in the prior action but suggests that it should have been more fully developed in the *Gonzalez1* discovery. Prb 16. Plaintiff did not hire an expert to investigate her poisoning claims. Pa212 to Pa214. However, plaintiff admits that the *Gonzalez1* Complaint was filed in Hudson County Law Division because it did not have limited jurisdiction and the parties were able to assert "whatever claims we want." Pa115 (paragraph 13); Pa255. *Bilotti* does not require a settling defendant to have the plaintiff's contemplation of a claim in her first lawsuit confirmed by expert opinion. Plaintiff attempts to hold defendant to a higher standard than *Bilotti.* Settlement and release of the prior to 2016 lawsuit, *Gonzalez1*, barred the instant action.

A water test was conducted by the plaintiffs on October 27, 2018. The lead levels in the cold-water supply in the apartment were non-detectable. The report dated October 31, 2018 revealed lead in the hot water only. See facts as admitted by plaintiff in *R. 4:46-5* response Pa119 paragraphs 43, 44 and 45; Pa258. Plaintiff stipulates that she executed the Settlement Agreement and Mutual General Releases

and court approved Lease for *Gonzlez1* on December 21, 2018. See facts as admitted by plaintiff in *R. 4:46-5* response Pa120 paragraph 55; Pa258.

With reliance on the Appellate Division's interlocutory opinion that provided the rule of law for this case, Pa100 to Pa109, defendant established the terms of settlement and release of the prior to 2016 lawsuit, *Gonzalez1*, barred the instant action. *Bilotti v. Accurate Forming Corp., 39 N.J. 184, 204-05 (1963).* The defendant proved plaintiff's second suit arose from and was very much related to *Gonzalez1* because both suits were related to health complaints associated with drinking the hot water from an alleged antiquated plumbing and heating system. The release was executed on December 21, 2018 and the plaintiff contemplated the safety of drinking the hot water in the apartment as early as 2011 as evidenced by the pre-marked evidence in *Gonzalez1*. Da1. Settlement and release of the prior to 2016 lawsuit, *Gonzalez1*, barred the instant action.

REPLY TO OPPOSITION TO DEFENDANT'S LEGAL ARGUMENT – PT 6

THE TRIAL COURT ERRED IN FAILING TO DISMISS PLAINTIFF'S COMPLAINT PRIOR TO TRIAL BASED UPON THE STATUTE OF LIMITATIONS. (Pa273; Pa438).

Plaintiff's complaint should have been dismissed prior to the jury trial based on the statute of limitations. *N.J.S.A. 2A:14-2*. Plaintiff's opposition to defendant's SOL argument begins with the premise that in 1996 lead solder used to connect the copper pipes to heat/ hot water systems in the plaintiff's apartment caused the

contamination of the potable hot water for 22 years. Prb 18. Plaintiff does not address the error caused by the trial court's factual finding that the "lead contamination did not exist when the first case was filed [August 22, 2016]" Pa443 and "did not exist on May 23, 2018" Pa277. Plaintiff's theory of the case asserts the condition existed for more than two decades because lead solder was used. With the lower court's factual finding that the condition did not exist until plaintiff learned of a blood test with elevated lead, there was a failure by the lower court to correctly analyze whether plaintiff knew or had reason to know that she had a cause of action against an identifiable defendant and voluntarily slept on her rights to permit the customary two year period of limitations to expire. Because plaintiff's complaint was filed beyond the two-year period set forth in *N.J.S.A. 2A:14-2*, the defendant was entitled to a dismissal of the lawsuit with prejudice. Plaintiff had health concerns about the apartment's hot water for more than nine years before she filed this lawsuit. In the *R. 4:46-5* response to paragraphs 6 and 25 of defendant's Statement of Facts supporting the motion for summary judgment, plaintiff admitted the tenants first expressed concern on September 9, 2011 related to drinking water that mixed with the baseboard heat system by reporting the same Hoboken's Health Officer Frank Sasso. Pa114 (paragraph 6); Pa255; Pa 116; Pa257. Ignoring this admission, the lower court incorrectly applied the extraordinary form of relief known as the "Discovery Rule." *Mancuso v. Mancuso,*

209 N.J. Super. 51 (App.Div. 1986). It was error as a matter of law to apply the discovery rule simply on the basis that plaintiff or her lawyer did not get around to testing the hot water or plaintiff's blood despite complaints in 2017 that the system was poisoning the tenants for more than 25 years or based on an earlier 2011 complaint to the city's health officer. Da17, Da1. The uncontroverted record demonstrates that plaintiff slept on her rights by choosing to pursue a multitude of claims including an emotional injury claim associated with the heat/hot water systems in *Gonzalez1;* but, chose not to bring a bodily injury claim for lead despite health complaints related to the systems. Plaintiff Gonzalez's second lawsuit should have been dismissed prior to the jury trial based on the statute of limitations.

To deflect from the plaintiff's dilatoriness and failure to act diligently, plaintiff asks the question why the defendant landlord did not test the apartment's hot water supply. Prb19. In response to defendant's Statement of Facts at paragraphs 9, 10 and 11 submitted with the Summary Judgment motion, plaintiff admits that she was represented by Lewis Cohn, Esq. in 2011. Mr. Cohen advised that he would provide the landlord of notice of "any problems" the plaintiff Gonzalez experienced with the plumbing in the apartment. Compare Pa114 (paragraph 11); Pa115 with Pa 255. Mr. Cohen went on to file a Complaint on behalf of plaintiff Gonzalez against the defendant landlord in *Gonzalez1* in 2016.

Pa45. Because the 2016 lawsuit pursued emotional damages, rather than bodily injury damages, plaintiff did not have to supply an expert report analyzing the hot water or plaintiff's blood lead levels. Defendant would have no basis under the court rules to force plaintiff to allow access to the hot water for testing or to force plaintiff to undergo a blood test. *R. 4:10-2*. In *Gonzalez1*, plaintiff's testimony standing alone was sufficient to support her claim for emotional distress damage based on the condition of the third floor apartment. Pa163 to Pa166. After reaching the settlement in *Gonzalez1,* plaintiff asserted under paragraph 31 of the lease, that she had inspected apartment. Pa77. The Court's September 7, 2018 Order in *Gonzalez1* specifically addressed paragraph 31 of the lease finding the plaintiff took the apartment "as is." Pa190. Plaintiff vacated the apartment on May 30, 2020 pursuant to the *Gonzalez1* settlement agreement which allowed her to remain there for two years rent free; however, plaintiff never provided notice of alleged lead levels in the hot water system during her tenancy. See paragraph 47 Statement of Facts Pa119/Pa258; Pa64 to Pa65. It is undisputed that the landlord dismantled and discarded the heat hot water system in June 2020 after the plaintiff left and the apartment was renovated. The discarded system was no longer available for defendant's inspection. Pa103. At each step along the way to this 2020 lawsuit for bodily injury claims allegedly due to chronic lead poisoning from contact with a contaminated hot water supply plaintiff advised that she or her

attorney would, or did, inspect the plumbing. Plaintiff seeks to blame the landlord for her own dilatoriness and failure to act diligently. Plaintiff also seeks to put great weight into the actions of the Hoboken Health Officer whose qualifications, if any, were not demonstrated to this court as would be required under *Mancuso v. Mancuso, 209 N.J. Super. 51, 59 (App.Div. 1986)* (to compel the extraordinary discovery rule the causal connection between injury and accident must be beyond ordinary lay and even ordinary medical knowledge). Plaintiff fails to state why a water test, that can be purchased at Home Depot, was not used in her investigation of her decades long "consternation" and claim that the hot water system was poisoning the tenants for 25 years. Plaintiff voluntarily slept on her rights and allowed the two-year period of limitations to expire. Defendant is entitled to a dismissal of this suit based on the two-year statute of limitations *N.J.S.A. 2A:14-2*.

Respectfully submitted,

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(Resubmitted to comply with
15-page limit. R. 2:6-7.)