CHRISTOPHER PARKER,

Plaintiff-Appellant,

v.

SCHINDLER ELEVATOR CORPORATION, ABC COMPANIES 1-10 said names being fictitious and JOHN DOES 1-10 said names being fictitious,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1522-24

Civil Action

On Appeal from a Final Order,
Superior Court of New Jersey,
Law Division, Morris County

Sat Below:
Hon. Stephan C. Hansbury, J.S.C., ret. on recall

Date Submitted:
April 14, 2025

BRIEF OF PLAINTIFF CHRISTOPHER PARKER

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PRELIMINARY STATEMENT

This appeal arises out of the dismissal of Plaintiff's Complaint, prior to the discovery end date, based on Plaintiff's former counsel having inserted the wrong address into the Complaint when listing the location of the incident. Counsel listed Defendant's corporate address. The injury occurred nearby, but not at that address. Counsel provided the correct address in response to discovery. In addition to granting summary judgment, the court denied Plaintiff's protective cross-motion to amend the Complaint to insert the correct address.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On February 2, 2024, Plaintiff Christopher Parker, through Cellino Law LLP, filed a personal injury Complaint against Defendant Schindler Elevator Corporation. Pa1. The Complaint identifies Defendant as a corporation conducting business in New Jersey, Pa1 (¶2), that transacted business in the State and/or contracted to supply goods or services in the State, Pa2 (¶5), and which "committed a tortious act" that caused Plaintiff's injury. Pa2 (¶6-7). Counsel below, however, incorrectly listed the address where Defendant "maintained, services, inspected and repaired the elevators" that caused Plaintiff's injury. Pa2 (¶10). Counsel instead listed Defendant's corporate address, 20 Whippany Road in Morristown, Pa2 (¶10), where counsel intended to list the address of the injury.

The Complaint correctly identifies Defendant as the party that "owns, leases, uses or possesses" property, Pa2 (¶8), which managed elevators, Pa2 (¶11), maintained them, Pa3 (¶12), controlled them, Pa3 (¶13), "made sure the elevators operated properly," Pa3 (¶14), and "supervised the maintenance, servicing, inspection and repair" of the elevators that caused Plaintiff's injury. Pa3 (¶15-17).

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[1] The Procedural History and Statement of Facts are inextricably intertwined. Transcripts are designated as follows:

1T = December 20, 2024 oral argument on motions.

The Complaint further states, on August 26, 2022, Plaintiff was on the premises "mentioned" in Paragraph 10, Pa3 (¶18) – the misstated corporate address. On that date, Plaintiff "was inside an elevator which malfunctioned," Pa4 (¶19), and suffered injuries due to a dangerous condition "within defendant's premises[.]" Pa4 (¶20). The Complaint was assigned Track, Pa82, i.e., 300 days for discovery from the filing of the Answer.

On March 18, 2024, Defendant filed an Answer. Pa9; Pa26. Defendant denied the allegation that identified the property address. Pa10 (¶10). Defendant however admitted the averment about having committed a tortious act, Pa10 (¶7), and about Defendant's ownership, leasing, use, or possession of property. Pa10 (¶8). Defendant included three affirmative defenses: failure to state a claim, contributory negligence, and comparative negligence. Pa11. Defendant included a cross-claim against the John Doe defendants. Pa11.

Along with its Answer, Defendant propounded supplemental interrogatories upon Plaintiff. Pa26-33. On October 24, 2024, Defendant moved for summary judgment. Pa14-15. Also on October 24, 2024, Defendant provided its responses to Form C and Form C(2) uniform interrogatories. Pa35-37.[2]

[2] Defendants' responses to uniform interrogatories were due within sixty days of filing its Answer on March 18, 2024, R. 4:17-1(b)(2), i.e., May 17, 2024.

Defendant's Form C responses did not expand on any defenses pending facts "determined through discovery," Pa35 (#3), identified Plaintiff as a person with knowledge (who was not deposed), Pa35 (#4), and deferred disclosure of facts for comparative/contributory negligence as "determined through discovery." Pa35 (#7). On or about October 29, 2024, Plaintiff provided responses to Form A interrogatories, responses to supplemental interrogatories, and produced documents. Pa46-65. The interrogatories identify the proper address of where the injury occurred, Pa48, and the documents include the incident report, which also has the proper address. Pa68; Pa70.

On November 11, 2024, Plaintiff cross-moved to amend the Complaint to continue to identify the same Defendant, same date of occurrence, and same injury, but to change the address from Defendant's place of business to the address identified in Plaintiff's discovery responses. Pa40-41. The cross-motion states Plaintiff has yet to be deposed, discovery does not end for two months and has not once been extended, and Plaintiff identified the correct location in discovery in answers to interrogatories and in documents. Pa43.

On December 20, 2024, the court below conducted oral argument on the motions. 1T. Defendant argued the Complaint "does not state a claim" because "the location of the accident is incorrect." 1T4-6 to -12. Plaintiff's counsel acknowledged the address in the Complaint is the Defendant's place of business, not the accident

location, but the Complaint includes the proper party, i.e., Plaintiff, 1T7-6 to -13, proper Defendant, 1T5-16 to -21, proper date of injury, 1T5-16 to -21, and "defendants knew it was in error because that's the actual location of the defendant's main office[.]" 1T4-21 to -25.

> [D]efendants [sic] are not prejudiced by the fact that the location is incorrect because the correct location that's in the -- in the Form A interrogatories which was served was the correct address. And all -- and the -- the incident report, the workers' compensation lien, all the medical records show that the incident took place at Morristown Hospital [(i.e., the location of the elevator where Plaintiff was injured)]. There's no prejudice to the defendant[.]
>
> [1T6-4 to -10.]

The Court informed counsel, "I don't think prejudice is the issue." 1T6-13 to -15. When counsel further asserted the case includes a cause of action regardless of the location, the court responded, "Well, the problem is a cause of action is – is not the location it occurred." 1T6-25 to 7-1. Counsel further asserted, "I believe that if we took discovery, we would have learned that they knew about this situation," 1T11-10 to -12, referring to the incorrect address inserted into the Complaint.

The court held, "[T]he Complaint was not properly filed" and granted the motion to dismiss while denying the motion to amend. 1T13-2 to -7. "[T]he Complaint did not assert the proper allegations. So, that's the bottom line. And there's really no point in amending because an amendment is not the appropriate way to deal with this," 1T12-9 to -13, per the judge below.

Also on December 20, 2024, the court entered the Order denying leave to amend, Pa72-73, and granting summary judgment. Pa82. To deny leave to amend, the court held it would be beyond the applicable statute of limitations for Plaintiff to file a new lawsuit and leave is denied because the court would not permit the amendment to relate-back to the original filing date. Pa79-80. The court also took issue with Plaintiff's counsel seeking the amendment by way of a cross-motion because the court did not believe the cross-motion bore any relationship to the motion for summary judgment. Pa80. Plaintiff's counsel also failed to include a copy of the proposed amendment, Pa80, though the motion identified the only change would be to the address. According to the court below, Plaintiff was seeking to file a "new" Complaint that, if new, is time-barred. Pa80.

To grant summary judgment, the court held all facts in support of the motion would be deemed admitted because Plaintiff's counsel failed to respond in accordance with Rule 4:46-2. Pa79. Further, Plaintiff opposed the motion by admitting he was not injured "at the accident location alleged in the Complaint." Pa79. Despite contending the error was a clerical error, the court below held Plaintiff's counsel did not address why relation-back should apply to the date of the Complaint, Pa79, and counsel also did not, per the court below, demonstrate diligence sufficient to permit the amendment and to have it relate-back to the date of the Complaint. Pa79. Relation-back would not be applied, per the court, because

the court believed changing the address would be a "distinctly new or different claim." Pa80.

On January 12, 2025, approximately a month after dismissing the case, the first discovery end date occurred. Pa71. On January 27, 2025, Plaintiff filed a notice of appeal, Pa91-92, as amended on January 31, 2025. Pa93-94. On February 4, 2025, appellate counsel entered the case for Plaintiff. Pa96.

LEGAL ARGUMENT

POINT I

THE COURT BELOW ERRED BY DISMISSING PLAINTIFF'S CASE AFTER PRIOR COUNSEL LISTED IN THE COMPLAINT THE WRONG ACCIDENT LOCATION BUT IDENTIFIED THE CORRECT LOCATION IN DISCOVERY (Pa72-81 (motion to amend); Pa82-90 (motion for summary judgment); 1T13-2 to -21.

The court below dismissed Plaintiff's case because Plaintiff's former counsel listed the wrong address in the Complaint for where Plaintiff injured himself. Former counsel identified the proper address in discovery, and prior to the first discovery end date, and prior to the court's decision on summary judgment. The court below erred as a matter of law upon granting summary judgment and abused its discretion in denying leave to amend the Complaint without considering all relevant facts.

This Court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente v. Nat. Union Fire, 224 N.J. 189, 199 (2016). The motion is to be granted only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

For the motion to amend, it "is generally left to the sound discretion of the trial court, . . . and its exercise of discretion will not be disturbed on appeal, unless

it constitutes a 'clear abuse of discretion.'" Franklin Med. v. Newark Pub. Sch., 362 N.J. Super. 494, 506 (App. Div. 2003). "Although deference will ordinarily be given to the factual findings that undergird the trial court's decision, the court's conclusions will be overturned if they were reached under a misconception of the law." D.D. v. UMDNJ, 213 N.J. 130, 147 (2013); see also Repko v. Our Lady of Lourdes, 464 N.J. Super. 570, 573-577 (App. Div. 2020) (de novo review of misinterpretation of relation-back under Rule 4:9-3).

"The exercise of discretion implies conscientious judgment taking into account the law and the particular circumstances of the case and is directed by reason and conscience of the judge to a just result." Sokol v. Liebstein, 9 N.J. 93, 99 (1952). The "exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). It is a fact-sensitive inquiry. Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997). Here, the court below omitted the prejudice-prong.

It is acknowledged that prior counsel failed to respond to each disputed fact in the manner required by Rule 4:46-2(b). The motion judge, however, was not required to accept as true all facts in support of the motion. See generally, Leang v. Jersey City Bd. of Educ., 399 N.J. Super. 329, 356 (App. Div. 2008) (despite mandatory language in the Rule, the court should examine the record to verify the

truthfulness of facts and, if papers filed in opposition raise a genuine issue as to any material fact, albeit not in conformity with the Rule, the court should consider ordering compliance with sanctions, as appropriate), aff'd in part, rev'd in part on other grds 198 N.J. 557 (2009). Instead of accepting as true all facts alleged in the motion, the court should have ordered prior counsel to comply with Rule 4:46-2(b) to assure a record suitable for dismissing a blameless litigant's Complaint. The suitable record would include the facts included in the cross-motion, but in the format we expect pursuant to Rule 4:46-2(b).

Here, with the parties not having reached the first discovery end date, the court should have denied the motion pending either compliance with Rule 4:46 and/or pending further discovery on the issue of Defendant's notice of the proper address. Afterall, Plaintiff listed the wrong address, but Defendant admitted committing a tortious act based on the information in the Complaint. Compare Pa2 (¶7) (as "relevant" to the claim, Defendant "committed a tortious act within the State . . . causing injury to person or property") with Pa10 (¶7) ("Defendant admits the allegations contained in paragraph 7").

If the court below is correct that an address in a Complaint creates an independent cause of action, the decision below should still be reversed and reconsidered. The first reference to the incorrect address is in Paragraph 10 of the Complaint. The Complaint applies the address "hereinafter." There is a still a viable

claim. Looking at the averments prior to the taint, Plaintiff is identified in Paragraph 1, Defendant is identified in Paragraph 2, jurisdiction over Defendant is in Paragraphs 5 and 8, a claim Defendant "committed a tortious act" is in Paragraphs 6 and 7, a claim the "tortious act . . . caus[ed] injury" is in Paragraph 7, and "by virtue of the allegations above" Defendant is "subject to the laws of the State of New Jersey," per Paragraph 9. The Wherefore Clause is independent of Paragraph 10 and identifies the relief sought.

Therefore, for summary judgment, the court possessed as "fact": Plaintiff was injured due to Defendant's tortious conduct; Defendant admitted committing a tortious act; and within the motion papers Plaintiff identified where in discovery Plaintiff identified the correct location for where he injured himself. The court erred in granting summary judgment. At a minimum, the court should have denied the motion without prejudice and pending the completion of discovery.

For the motion to amend, the court below relied heavily on the expiration of the statute of limitations ("SOL"), and the relation-back doctrine. There is a two-year SOL on personal injury claims. N.J.S.A. 2A:14-2. With the injury occurring August 26, 2022, absent the discovery rule, equitable tolling, etc., the earliest SOL was August 27, 2024. Had Defendant timely produced discovery responses, i.e., by May 17, 2024, see footnote 2, it would have been known well before the SOL that the address in the Complaint was incorrect.

While admittedly Plaintiff's Complaint initially created the issue, and not defense counsel, the timeliness of Defendant's discovery responses should have been one of the factors considered by the court below. This fact, as well as the fact Defendant admitted tortious conduct in its Answer, based on the averments in the Complaint, should have been considered under the totality of the circumstances. These facts are considerations on these motions because, with discovery unfinished, the option of denying the motions without prejudice pending discovery existed in lieu of dismissing Plaintiff's case.

Pursuant to Rule 4:9-1, the motion for leave to amend "shall have annexed thereto a copy of the proposed amended pleading." Case law prior to the recent Rules expresses the reason why we seek a copy of the proposed amended pleading:

> An application to amend must be definite and categorical, not vague or unexpressed. Preferably the proposed amendment should be in writing for the convenience of the court and adverse counsel in examining it, but at the least it must be stated at length in open court so as to permit opposing counsel to argue against it, if he so desires, and to give the court a fair opportunity to pass upon its merits intelligently.
>
> [Grobart v. Society for Establishing Useful Mfrs., 2 N.J. 136, 146 (1949).]

Prior counsel did not attach a copy. However, the motion papers clearly identify the only thing sought to be amended. Therefore, Plaintiff complied with the

spirit of the Rule and, again, we respectfully submit in lieu of dismissal the Court should have denied the motion without prejudice so counsel could comply.

For purposes of relation-back to the date of the original Complaint, the claim in the amended pleading is only required to "ar[i]se out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading[.]" R. 4:9-3 (emphasis added). The motion judge erred on this issue too by restrictively considering whether the proposed change arose out of the "conduct" or "occurrence" identified in the original Complaint. Defendant admits tortious "conduct" in its Answer that could have and should have been flushed out in discovery.

> The rule should be liberally construed. Its thrust is directed not toward technical pleading niceties, but rather to the underlying conduct, transaction or occurrence giving rise to some right of action or defense. When a period of limitation has expired, it is only a distinctly new or different claim or defense that is barred. Where the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy remains the same, it should be readily allowed and the doctrine of relation back applied[.]
>
> [Harr v. Allstate Insurance Co., 54 N.J. 287, 299-300 (1969).]

It is respectfully submitted the court below took an approach more restrictive than required by the Rule and case law. The court did not consider the facts as they relate to either the conduct or the occurrence set forth in the original Complaint. For

this reason, too, there should be a reversal and a remand for further consideration before Plaintiff's case is dismissed.

The court below cites an unpublished trial level opinion from Connecticut for the proposition a fall at a different location than set forth in the Complaint constitutes a new cause of action. Valentin v. X Bankers Check Cashing, 2008 WL 642637 (Conn. Sup. Ct. 2008); Pa97-100. In Valentin, the applicable amendment statute was limited to situations in which a party failed to name the proper defendant. The court held, under their facts, Plaintiff named the proper defendant and could not rely on the amendment statute.

In Valentin, the same defendant implicated in the motion to amend secured summary judgment in a prior proceeding because plaintiff included the incorrect location in the Complaint. Id., at *3. The record is silent on whether plaintiff appealed, on what arguments plaintiff raised in opposition, on what facts were known by the parties from discovery regardless of the incorrect location in the Complaint, on whether defendant admitted tortious conduct in its Answer, and on the status of discovery. Granted, an unpublished opinion is not binding, R. 1:36-3, but we distinguish it to underscore the required fact-sensitive inquiry of these motions.[3]

[3] In Valentin, relief was also barred under a provision of the rule that required plaintiff to seek to amend within one year of the court granting summary judgment.

At a minimum, this Court is respectfully asked to reverse and remand for the completion of discovery, even if limited to the issue of Defendant's knowledge of the error with the address. On this record, and with discovery not having concluded (or, for the most part, conducted), Plaintiff should not be shut out of our court system.

CONCLUSION

For the foregoing reasons, we respectfully request the decisions below be reversed and either: (1) there be a remand for reconsideration based on the additional factors identified herein; or (2) a remand for entry of an Order denying summary judgment and denying leave to appeal without prejudice, pending the completion of discovery.

Respectfully submitted,

/s/ Jeff Mandel

Jeffrey S. Mandel

Dated: April 14, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-001522-24T4

CHRISTOPHER PARKER, *Plaintiff-Appellant,* vs. SCHINDLER ELEVATOR CORPORATION, ABC COMPANIES 1-10 said names being fictitious and JOHN DOES 1-10 said names being fictitious, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT SCHINDLER ELEVATOR CORPORATION

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PRELIMINARY STATEMENT

Defendant/Respondent Schindler Elevator Corporation ("Defendant") submits this brief in opposition to the brief filed by Plaintiff/Appellant Christopher Parker ("Plaintiff") in support of his appeal from two orders of the Law Division, Morris County dated December 20, 2024. For the reasons stated herein, this Court should affirm the Orders under review.

Plaintiff submits that although the location specified in the Complaint was incorrect, he provided the correct address in answers to interrogatories. This "corrected" information, however, was provided only after Respondent moved for summary judgment on the basis that Defendant had no records, or any notice, of any elevator incident at the building identified in the Complaint on the day alleged – or at any time during 2022. Six days after Defendant moved for summary judgment, Plaintiff finally served long-overdue discovery responses with the "corrected address."

Plaintiff further asserts: "The Complaint identifies Defendant as a corporation conducting business in New Jersey, Pa1 (¶2), that transacted business in the State and/or contracted to supply goods or services in the State, Pa2 (¶5), and which 'committed a tortious act' ***that caused Plaintiff's injury***. Pa2 (¶6-7)." (emphasis added). Plaintiff then claims Defendant "admitted" that it performed a tortious act "that caused Plaintiff's injury." That statement is simply not correct. In the section of the Complaint where Plaintiff sought to

establish the Superior Court's personal jurisdiction over Defendant, Plaintiff alleged as follows:

> 6. That always herein relevant, defendant SCHINDLER ELEVATOR CORPORATION, committed a tortious act within the State of New Jersey.
>
> 7. That always herein relevant, defendant SCHINDLER ELEVATOR CORPORATION, committed a tortious act within the State of New Jersey causing injury to person or property within the State of New Jersey.
>
> 8. That always herein relevant, defendant SCHINDLER ELEVATOR CORPORATION, owns, leases, uses or possesses real property situated within the State of New Jersey.
>
> 9. That by virtue of the allegations above, defendant SCHINDLER ELEVATOR CORPORATION, is subject to the laws of the State of New Jersey.

Because each of these allegations is accurate, Defendant acknowledged that New Jersey courts possess personal jurisdiction over Defendant. However, there was no allegation in paragraphs "6" through "9" that Defendant engaged in a tortious act which -- as Plaintiff has now falsely added -- "***caused Plaintiff's injury."*** Defendant simply admitted, as a basis for jurisdiction, that it has committed a tortious act "causing injury to person or property within the State of New Jersey. More significantly, at paragraphs "19" through "21" of the Complaint, Plaintiff alleged that Defendant acted negligently toward him, and thereby caused his injuries. Defendant denied each one of those allegations.

The Law Division ruled that, as to the allegations set forth in the Complaint, Defendant had proven its entitlement to summary judgment. As to the cross-motion, the Law Division determined:

(i) it was not a proper cross-motion under Rule 1:6-2;

(ii) it did not conform with practice requirements, as no proposed amended complaint was included; and

(iii) even without those defects, the court would not allow the amendment, in an exercise of its discretion, because the amended cause of action would represent an entirely different cause of action than the one alleged; and Plaintiff had acted without care and in a dilatory fashion in its initial drafting of the Complaint and in responding to discovery.

PROCEDURAL HISTORY

On February 2, 2024, Plaintiff filed a Complaint against Defendant, alleging that Plaintiff suffered an injury as a result of an elevator incident occurring on August 22, 2022 at 20 Whippany Road, Morristown, New Jersey (the "Whippany Road Cause of Action"). [Pa1-7]. Plaintiff alleged:

> 19. On August 26, 2022, plaintiff CHRISTOPHER PARKER was inside an elevator which malfunctioned on the aforesaid premises mentioned in Paragraphs 10 above thereby sustaining injuries and damages as hereinafter alleged.
>
> 20. Plaintiff CHRISTOPHER PARKER injuries and damages referred to herein were caused by defendant's SCHINDLER ELEVATOR CORPORATION, negligence by creating and permitting a dangerous condition ***within defendant's premises***, which the defendant SCHINDLER ELEVATOR CORPORATION, knew, or should have known, existed, and continued to exist within said premises and/or by failing to warn plaintiff CHRISTOPHER PARKER of said dangerous condition.

[Pa4] (emphasis added).

Plaintiff later argued that the reference to Defendant's address was a "clerical error," but the allegations of Paragraph "20" of the Complaint demonstrates that Plaintiff alleged, with specificity and clarity, that he suffered an injury at the Whippany Road location, or "***within defendant's premises***." [Pa4, ¶20 (emphasis added)].

Defendant answered on March 18, 2024, denying the allegations of the Complaint that Defendant's negligence had caused injury to Plaintiff. [Pa9-13]. There is no merit to Plaintiff's argument that Defendant admitted that it "caused Plaintiff's injuries," as asserted in Plaintiff's brief ("Pb"). [Pb at p.3, pp.10-11].[1]

In the section of the Complaint where Plaintiff sought to establish the Superior Court's personal jurisdiction over Defendant, Plaintiff alleged as follows:

> 6. That always herein relevant, defendant SCHINDLER ELEVATOR CORPORATION, committed a tortious act within the State of New Jersey.
>
> 7. That always herein relevant, defendant SCHINDLER ELEVATOR CORPORATION, committed a tortious act within the State of New Jersey causing injury to person or property within the State of New Jersey.
>
> 8. That always herein relevant, defendant SCHINDLER ELEVATOR CORPORATION, owns, leases, uses or possesses real property situated within the State of New Jersey.

[1] The ellipsis, and the cherry-picking of phrases from Paragraphs 6 through 10 of the Complaint -- necessary to massage those allegations in order to create the inaccurate perception of Defendant's so-called admission that it caused injury to Plaintiff -- serve as a tell-tale sign that Defendant never admitted that it caused Plaintiff's injury.

> 9. That by virtue of the allegations above, defendant SCHINDLER ELEVATOR CORPORATION, is subject to the laws of the State of New Jersey.

[Pa2]. Not one of these paragraphs alleged that Defendant had committed a tortious act *which caused an injury to this Plaintiff*. These allegations related solely to personal jurisdiction over Defendant, which is obvious upon review of Paragraph "9". [Pa2].

At Paragraphs "19" through "21" of the Complaint, Plaintiff alleged that Defendant committed a tortious act on the day in question, and now added the allegation that this tortious act injured Plaintiff:

> 19. On August 26, 2022, plaintiff CHRISTOPHER PARKER was inside an elevator which malfunctioned on the aforesaid premises mentioned in Paragraphs 10 above thereby sustaining injuries and damages as hereinafter alleged.
>
> 20. Plaintiff CHRISTOPHER PARKER injuries and damages referred to herein were caused by defendant's SCHINDLER ELEVATOR CORPORATION, negligence by creating and permitting a dangerous condition within defendant's premises, which the defendant SCHINDLER ELEVATOR CORPORATION, knew, or should have known, existed, and continued to exist within said premises and/or by failing to warn plaintiff CHRISTOPHER PARKER of said dangerous condition.
>
> 21. That by reason of the foregoing, plaintiff CHRISTOPHER PARKER was caused to sustain serious, severe, and permanent personal injuries to various portions of his body.

[Pa4].

Defendant specifically denied each of these allegations. [Pa11]. Therefore, it is simply not true, as argued by Plaintiff, that Defendant admitted that it performed a tortious act which injured Plaintiff. [Pa11].

On the same day it filed its Answer, Defendant served written discovery demands on Plaintiff. [Pa26-37]. Defendant's internal review reflected no record of an incident report having been prepared or filed for the elevator on the day in question; and further no record of Plaintiff having been present in the building on the day of the alleged incident. [Pa38-39].

On October 24, 2024, Defendant moved for summary judgment [P14-39], establishing through the Certification of Williams Castro, Defendant's facilities supervisor, that there was no proof of an elevator accident at Defendant's building on the date in question; and no proof that Plaintiff was in the building on the date in question. [Pa38-39].

On October 29, 2024, after Defendant filed its summary judgment motion, Plaintiff finally served his answers to Defendant's written discovery, which had been served in March. [Pa46-70]. In these discovery responses, Plaintiff retracted the facts set forth in the Complaint concerning the Whippany Road Cause of Action and, instead, outlined a new cause of action based on an incident alleged to have occurred at Morristown Memorial Hospital (the "Morristown Memorial Cause of Action"). [Pa46-70]. These discovery responses were the first time Plaintiff asserted the Morristown Memorial Cause of Action.

On November 11, 2024, Plaintiff filed what was styled as a "cross-motion" to "amend" the Complaint seeking to replace the Whippany Road Cause of Action, as alleged in the Complaint, to the new Morristown Memorial Cause of Action. [Pa40-70]. The "cross-motion" was supported by a certification from Plaintiff's counsel with exhibits consisting of Plaintiff's discovery responses which had been served after Defendant moved for summary judgment. [Pa42-70]. No brief was filed in support of the "cross motion"; and the proposed Amended Complaint was not annexed to the motion, in violation of Rule 4:9-1. [Pa40-70].

On that same day, Plaintiff also filed opposition to the motion for summary judgment, which consisted of the same certification of counsel filed in support of the "cross-motion". [Pa42-70]. Plaintiff signed a certification himself which, for some reason, is not included within Plaintiff's Appendix. [Pa42-70]. Plaintiff filed nothing else in opposition to Defendant's summary judgment motion. Also, Plaintiff failed to file a response to Defendant's Statement of Material Undisputed Facts Pursuant to Rule 4:46-2. [Pa42-70].

The Law Division conducted oral argument on December 20, 2024, at which time it denied Plaintiff's "cross-motion" and granted Defendant's motion for summary judgment, providing comments on the record [1T]. On that day, the Law Division docketed orders and decisions which more thoroughly set forth its reasoning. [Pa72-90].

STATEMENT OF FACTS

Plaintiff alleges in his Complaint that he was in a building located at 20 Whippany Road, Morristown, New Jersey, which is Defendant's headquarters building (the "headquarters building") on August 26, 2022. [Pa2-3, ¶10, ¶18]. Plaintiff further alleged that he suffered injury due to a dangerous condition that caused a malfunction of an elevator in which he was traveling. [Pa4, ¶¶19-21]. Plaintiff did not specify the dangerous condition or the alleged malfunction. [Pa1-4, ¶¶1-21].

Through the sworn statement of its facilities supervisor Williams Castro, Defendant established that there is only one elevator in the headquarters building. [Pa38-39]. Mr. Castro further certified that there were no records of an elevator mishap occurring that day. [Pa38-39]. In fact, Mr. Castro reviewed records and determined that there had been no incident involving the elevator at any time during 2022. [Pa38-39].

Mr. Castro further stated that no employee of Defendant or any third party ever advised him of any accident involving the elevator in the headquarters building in 2022. [Pa38-39]. Further, Defendant possessed no written reports of any accident involving the elevator in the headquarters building on August 26, 2022 or any other date in 2022. [Pa38-39]. Finally, Defendant had no records of any repairs to the elevator in the headquarters building at any point in 2022. [Pa38-39].

Accordingly, Defendant sought summary judgment to dismiss the Complaint on the basis that there had been no incident involving the elevator at the headquarters building on August 26, 2022, or any date in that entire year. [Pa38-39].

Plaintiff's filings, in response to the summary judgment motion, admitted that Plaintiff had not been involved in any incident at the headquarters building on August 26, 2022. [Pa40-71].

ARGUMENT

I. Introduction

Plaintiff effectively conceded that Defendant was entitled to summary judgment on the cause of action set forth in the Complaint – an alleged elevator malfunction at 20 Whippany Road, Morristown, New Jersey on August 26, 2022 (the "Whippany Road Cause of Action").

Rather than advance proof to support the Whippany Road Cause of Action, Plaintiff instead sought leave from the Law Division to amend the Complaint to assert a different occurrence which allegedly occurred on the same day at Morristown Memorial Hospital (the "Morristown Memorial Cause of Action").

Defendant filed for summary judgment on October 25, 2024. Five days later, on October 29, 2024, Plaintiff finally served overdue and out-of-time responses to Defendant's discovery requests, which had been served on March

18, 2024. Thereafter, Plaintiff argued – in Certifications -- that he disclosed the Morristown Memorial Cause of Action in his answers to Defendant's discovery. Yet on this appeal, as he did below, Plaintiff attempts to obscure that the disclosure occurred only after Defendant moved for summary judgment.

Moreover, Plaintiff glosses over that the disclosure of the Morristown Memorial Cause of Action first occurred on October 29, 2024 – after the two-year statute of limitations had lapsed. In an effort to gloss over this enormous problem, and avoid calling attention to it, Plaintiff did not argue anything concerning whether the Morristown Memorial Cause of Action could or should "relate back" to the allegations of the Whippany Road Cause of Action. Even so, the Law Division commented on the record about the "relation back" omission problem: "Well, I understand the bigger issue here because the Complaint was filed on February 2, '24 and the incident occurred August 26, '22. So, the bigger picture is not lost on me." [1T12:12-15].

II. The Law Division Correctly Held That Plaintiff's Cross-Motion Was Not a Proper Cross-Motion Under the Rules; Further, Even If Deemed A Cross-Motion, Plaintiff Violated 4:9-1 By Not Attaching A Copy of the Proposed Amended Complaint

[Raised and Decided at Pa72-81; Pa78-79; Pa80; Pa87-88; Pa89]

The Law Division correctly held that Plaintiff did not file a proper cross-motion within the meaning of Rule 1:6-3. The Law Division recognized that the cross-motion bore no relationship to the substance of Defendant's summary

judgment motion. [Pa89]. For this reason, among others, the Law Division denied the cross-motion. [Pa89].

Plaintiff acknowledges on page 5 of its brief that the Law Division, in denying the cross-motion, had ruled that the motion had not been properly filed, writing: "The court also took issue with Plaintiff's counsel seeking the amendment by way of a cross-motion because the court did not believe the cross-motion bore any relationship to the motion for summary judgment." [Pb, p.5]. However, Plaintiff never addressed that point thereafter, and Plaintiff is precluded from introducing new argument in a reply brief.

Because Plaintiff fails to address the Court's determination in this regard, this Court should affirm the denial of the cross-motion on this basis alone. Rule 1:6-3(b) pertains to the filing and service of cross-motions. The rule provides in pertinent part that "[a] cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date *only if it relates to the subject matter of the original motion*." (emphasis added). That rule also provides – because the cross-motion must be related to the substance of the original motion – that the original moving party's reply brief also functions as the opposition brief to the related cross-motion.

Here, the so-called "cross-motion" bore no relation at all to the substance of Defendant's summary judgment motion. *See Van Horn v. Van Horn*, 415 *N.J.Super*. 398 (App. Div. 2010) (cross-motion to disqualify counsel did not

relate, within meaning of Rule 1:6-3, to law pertaining to original motion for counsel fees).

A proper cross-motion would likewise seek summary judgment or partial summary judgment. Applications for summary judgment, and applications to amend a complaint involve dramatically different law. *See, e.g., Brooks v. Township of Tabernacle*, 2022 *WL* 2902811 *6, n. 2 (N.J.App.Div. July 22, 2022) ("Defendants' cross-motion to dismiss the complaint did not relate to plaintiff's motion to amend the complaint"), *certif. denied,* 252 *N.J.* 382 (2002). In fact, the Appellate Division has observed that Rule 1:6-3(b) requires that a cross-motion must "relate to the subject matter of the original motion…" *Pepperman v. Robert Wood Johnson University Hospital New Brunswick*, 2021 *WL* 5356053 *3, n.1 (N.J.App.Div. November 17, 2021), *certif. denied,* 250 *N.J.* 494 (2022).

Because Plaintiff's cross-motion did not relate to the subject matter of the motion, Defendant needed to address, in its reply submission, different issues than the issues presented to the Law Division by Defendant's motion, including Rule 1:6-3 and the case law concerning cross-motions; Rule 4:9-3 and the law concerning amendments and the relation-back doctrine; and whether Plaintiff's lack of diligence precluded the relief sought by the cross-motion. That the so-called cross-motion so dramatically expanded the issues which needed to be briefed, and then considered by the Law Division, confirms that the cross-

motion did not genuinely relate to the substance of the summary judgment motion.

Furthermore, Rule 4:9-1, governing applications to file an amended pleading, mandates that "[a] motion for leave to amend shall have annexed thereto a copy of the proposed amended pleading." Plaintiff did not satisfy this requirement and the Law Division cited this as an additional reason to deny the cross-motion on procedural grounds. [Pa80, 89].

Plaintiff concedes that "[p]rior counsel did not attach a copy" of the proposed Amended Complaint. [Pb12]. Even so, he argues "the motion papers clearly identify the only thing sought to be amended" and thus "Plaintiff complied with the spirit of the Rule." [Pb12-13]. There are two problems with these contentions. First, Plaintiff cites to nothing to support his contention that the "the motion papers clearly identify the only thing sought to be amended." A review of the motion papers does not support this contention that Plaintiff intended to "only" amend one "thing." If the Law Division had entered the order requested by Plaintiff, nothing would have prevented Plaintiff from modifying, amending, or adding other allegations, including new causes of action, theories of recovery, or new parties.

There is no "spirit of the rule," there is the rule. When parties claim they followed the spirit of the rule they are admitting they did not follow the rule. Rule 4:9-1 requires a draft of the proposed amended complaint so the parties,

and the court, can assess those issues implicated by an application to amend a pleading -- such as whether the newly pleaded matters can "relate back," or whether the newly pleaded matters would prove futile, or whether the proposed amended complaint would prove prejudicial.

The Law Division ruled that Plaintiff's cross-motion was procedurally defective because it was not a proper application within the meaning of Rule 1:6-3 and did not comply with Rule 4:9-1. Plaintiff did not address the first point and admitted the second. For these reasons alone, this Court should affirm.

III. Plaintiff Did Not Address Rule 4:9-3 Below And Now Raises Arguments Under Rule 4:9-3 For the First Time On Appeal From the Law Division's Decision Under Rule 4:9-3

[Raised and Decided at Pa72-81; Pa76, Pa79-80; Pa85, Pa88-89]

At pages 13 through 14 of his brief, Plaintiff takes exception to the Law Division's observations concerning Rule 4:9-3, and the analysis of whether Plaintiff could seek the benefit of "relation back" for the new Morristown Memorial Cause of Action.

At the outset, this Court must note that Plaintiff filed no memorandum of law or brief below, either in opposition to the motion for summary judgment or in support of the cross-motion. All legal argument was presented by way of counsel's certification [Pa42-43], which effectively asserted nothing more than the reference to 20 Whippany Road was a "clerical error" and that there would

be "no prejudice" if the amendment were allowed. [Pa43, ¶7]. Neither factual analysis nor legal authority was provided to support either one of these bare conclusions.

The Law Division declined the label of clerical error, emphasizing it was the attorney's error. [1T 12:21-13:1]. The court observed:

> But the reality is, the Complaint was not properly filed. And it's the obligation of a professional attorney to make sure that the Complaint is proper. It's not a clerical error once one signs a Complaint that's wrong. It's a -- it's an error of the attorney.

[*Id.*].

The Law Division stated that, to be relieved of that error, Plaintiff needed to demonstrate diligence – a showing lacking on the record before it. As the Law Division correctly set forth, a party seeking to amend a pleading to allege new or additional facts must demonstrate diligence. "An unadorned allegation of clerical error without any explanation as to why this clerical error persisted for so long without correction, fails the "diligence" requirement of New Jersey law." [Pa89]. "[C]ase law has emphasized the need for plaintiffs and their counsel to act with due diligence in attempting to identify and sue responsible parties within the statute of limitations period." [Pa89, *quoting*, *Baez v. Paulo*, 453 *N.J. Super*. 422, 438 (App. Div. 2018).

The Law Division properly analyzed the newly asserted Morristown Memorial Cause of Action under Rule 4:9-3. An amendment to a pleading

relates back to the date of the original pleading if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." However, the rule states further: "but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading."

Rule 4:9-3 thus recognizes two types of an amendment. First, it recognizes that a pleading can be amended to assert new causes of action arising out of the cause of action set forth in the original pleading. But the Law Division rejected that this amendment fell under that portion of the rule, as Plaintiff was not seeking to assert new claims based on facts of which Defendant was already on notice. [Pa88-89]. Nor was Plaintiff seeking to correct a deficient pleading of the cause of action which he had attempted to set forth; in fact, to the contrary a cause of action was actually and sufficiently set forth in the Complaint.

The Law Division thus properly viewed the application under the second part of the rule, as one which was a "statement of a new or different claim or defense in the pleading." [Pa88-89]. Plaintiff had never previously placed Defendant on notice of the "fact" that an incident had occurred at Morristown Memorial. [Pa88-89]. Changing the location of the incident was an effort to plead a new cause of action based on a newly asserted fact.

The Law Division was correct on all points. As the Law Division observed, in New Jersey a party seeking to amend a pleading to allege new or additional facts must demonstrate "diligence." [Pa88-89]. Thus, the Law Division ruled that an allegation of clerical error, without any explanation why this clerical error persisted for so long without correction, fails the "diligence" requirement of New Jersey law. [Pa88, *quoting*, *Baez v. Paulo*, 453 *N.J. Super.* 422, 438 (App. Div. 2018)].

The Law Division wrote:

> Plaintiff's solution is to ask this Court to "amend" the existing Complaint to replace the Whippany Road Cause of Action with the Morristown Memorial Cause of Action. Plaintiff makes this request without invoking Rule 4:9-3, governing motions to amend pleadings. However, Plaintiff fails to address the case law concerning when an "amendment" to a pleading can relate back. Moreover, Plaintiff fails to acknowledge Plaintiff's burden to show why, equitably, his belated assertion of the Morristown Memorial Cause of Action should relate back to the date of the original Complaint. Plaintiff simply contends that his allegation of the Whippany Road Cause of Action was a "clerical" error.
>
> In New Jersey, however, a party seeking to amend a pleading to allege new or additional facts must demonstrate "diligence." An unadorned allegation of "clerical error," without any explanation why this clerical error persisted for so long without correction, fails the "diligence requirement of New Jersey law. "[C]ase law has emphasized the need for plaintiffs and their counsel to act with due diligence in attempting to identify and sue responsible parties within the statute of limitations period." *Baez v. Paulo*, 453 *N.J. Super.* 422, 438 (App. Div. 2018).
>
> While the relation-back doctrine may be otherwise forgiving, the New Jersey Supreme Court has observed that after the statute of limitations has expired, the doctrine cannot be extended to "a

> distinctly new or different claim or defense" and, to seek refuge under the relation-back doctrine the movant must demonstrate that "the gist of the action or the basic subject of the controversy remains the same." *Harr v. Allstate Insurance*, 54 *N.J.* 287, 299 (1969). Plaintiff's Complaint alleged that the accident occurred at one location. Plaintiff now seeks to allege that the accident occurred at a different location, which is a fundamental change to the occurrence underlying the claim, and thus not protected by the relation-back doctrine.

[Pa88-89].

Plaintiff raises a vague and lacking objection to the Law Division's decision on this point, writing: "It is respectfully submitted the court below took an approach more restrictive than required by the Rule and case law. The court did not consider the facts as they relate to either the conduct or the occurrence set forth in the original Complaint." [Pb13].

Plaintiff's basis for this argument is the assertion that Defendant admitted to having performed a negligent act which "caused injury to Plaintiff." [Pb13]. Defendant has previously established that this assertion is simply wrong.

The Law Division correctly applied New Jersey law holding that amendments fundamentally altering the factual allegations of the complaint, so as to introduce a new claim or occurrence, are not protected under the relation-back doctrine. *Harr v. Allstate Insurance*, 54 N.J. 287, 299 (N.J. 1969). Plaintiff's Complaint alleged that the incident occurred at one location. Plaintiff then sought to allege that the incident actually happened in a different location,

which is a fundamental change to the occurrence underlying the claim, and thus not protected by the relation-back doctrine.

Therefore, while acknowledging the liberality that Rule 4:9-1 generally extends to requests to amend pleadings, the Law Division exercised proper discretion to decline this amendment because the new cause of action would be time-barred -- an issue that Plaintiff neither briefed nor addressed. To overturn this decision on appeal, Plaintiff would need to show "clear abuse" of the Law Division's discretion. As this Court has held:

> While motions for leave to amend pleadings are to be liberally granted, they nonetheless are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made. *R.* 4:9–1*; Du–Wel Products v. U.S. Fire Ins*., 236 *N.J.Super.* 349, 364 (App.Div.1989) *certif. denied*, 121 N.J. 617, (1990); *Keller v. Pastuch*, 94 *N.J.Super.* 499 (App.Div.1967).

Fisher v. Yates, 270 *N.J. Super.* 458, 467 (App. Div. 1994). Thus, a motion to amend "is generally left to the sound discretion of the trial court" and that exercise can be overturned on appeal only upon a showing of a "clear abuse of discretion." *Franklin Medical Associates v. Newark Public School District*, 362 *N.J. Super.* 494, 506 (App. Div. 2003).

Here, the Law Division faulted Plaintiff for lack of diligence in identifying the "attorney error" [Pa88-89, *Baez v. Paulo*, 453 *N.J.Super.* 422, 438 (App. Div. 2018) (case law has emphasized the need for plaintiffs and their counsel to act with due diligence in attempting to identify and sue responsible parties

within the statute of limitations period)]. The Law Division expressed its concern regarding Plaintiff's neglect – and this concern finds firm support in the record. Although served with discovery on March 18, 2024, Plaintiff admitted that he started to prepare responses only after receiving the summary judgment motion six months later. [1T 10:13-20]. If Plaintiff had timely responded to discovery, he would have discovered the error long before the summary judgment motion was filed.

Further, the Law Division faulted Plaintiff for failing to address whether the newly asserted Morristown Memorial Hospital Cause of Action would "relate back" to the Whippany Road Cause of Action. [Pa89, *citing Harr v. Allstate Insurance*, 54 *N.J.* 287, 299 (1969) (Relation-back doctrine may be otherwise forgiving, after the statute of limitations has expired, the doctrine cannot be extended to "a distinctly new or different claim" and, to seek refuge under the relation-back doctrine the movant must demonstrate that "the gist of the action or the basic subject of the controversy remains the same".] The Law Division did not abuse its discretion by treating allegations about an accident in a different, unrelated location as a distinctly different claim than the one alleged in the Complaint. *See Franklin Medical Associates*, 362 *N.J.Super.* at 506.

Since the newly asserted claim was "a distinctly new or different claim," the Law Division treated the cause of action as futile, as there was no basis for relation-back, and the statute of limitations had lapsed. Citing to the Supreme

Court's decision in *Notte v. Merchant Mutual Insurance Company,* 185 *N.J.* 490 (2006), the Law Division observed: "In other words, '[c]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law'. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted."[Pa85, citing to *Notte*, 185 *N.J.* at 501, *quoting Interchange State Bank v. Rinaldi*, 303 *N.J. Super*. 239, 256~57 (App. Div. 1997)].

A review of the Law Division's written decision, as well as comments on the record, demonstrate that the Law Division considered the issues below fully informed on the facts and well read on the applicable law. After setting forth the facts and the law, the Law Division engaged in a careful exercise of discretion. Plaintiff's belated arguments on appeal -- arguments that were not presented below -- concerning Rules 4:9-1 and 4:9-3, are ineffective in view of the "clear abuse" of discretion needed to be shown to reverse the Orders.

IV. The Law Division Correctly Granted Summary Judgment

[Raised and Decided at Pa14-39; Pa82-90]

The Law Division granted summary judgment as to the cause of action set forth in the Complaint, that being the Whippany Road Cause of Action. Plaintiff did not challenge the factual predicate of that motion, that being no elevator malfunction occurred at that location, on August 25, 2002 or any day proximate to that day. Plaintiff did not file a response to Defendant's Rule 4:46-2 statement

and, if that were not enough, Plaintiff's filings effectively admitted that no accident occurred on that day at that location, as alleged in the Complaint.

CONCLUSION

For the foregoing reasons, this Court should affirm the Orders under review.

Respectfully submitted,

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By: /s/ James L. Sonageri
James L. Sonageri

Dated: May 21, 2025