SHIRLEY A. GOODHEART,

Plaintiff/Appellant,

vs.

AMERICAN MULTI-CINEMA, INC., i/p/a AMC THEATERS, FREDERICK WIEDER i/p/a FRED WIDENER JOHN DOES and JANE DOES,

Defendants/Respondents

and

JOHN DOES and JANE DOES,

Defendants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 1988-24T2

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NUMBER: MRS-L-1832-19

CIVIL ACTION:

Sat Below:

HON. ROSEMARY E. RAMSAY, P.J.Cv.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT SHIRLEY A. GOODHEART

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[1] This and other exhibits includes a brief. The undersigned is aware of the general prohibition on the inclusion of brief in appendices. *See R.* 2:6-1(a)(2). Briefs are included in this appendix, however, insofar as they were parts of exhibits in support of the Motion to Dismiss Plaintiff's Complaint with Prejudice file on August 26, 2024..

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[2] Erroneously titled "Order on Motion to Vacate the Court's December 19, 2024, Order."

PRELIMINARY STATEMENT

Plaintiff/Appellant Shirley A. Goodheart ("Plaintiff") was assaulted by Defendant/Respondent Frederick Wieder (deceased), improperly pleaded as Fred Weidner ("Mr. Wieder") while on the premises of Defendant/Respondent American Multi-Cinema, Inc., improperly pleaded as AMC Theaters ("AMC"). Plaintiff sustained multiple permanent injuries, including traumatic brain injuries, as a result of the assault.

Plaintiff retained the services of a medical expert, Joel F. Lehrer, M.D., whose testimony and report was to be relied upon at the time of trial. Unfortunately, Dr. Lehrer passed away on January 26, 2024. This office had difficulty finding a physician with the appropriate specialty to replace him. Its difficulties was compounded by the fact the senior partner of this firm passed about the same time. This caused a great crisis in this small office which required major adjustments including the reassignment of numerous files.

In response to the motion of AMC, the trial court ordered that Plaintiff serve her expert report by November 15, 2024. Despite its best efforts, this office could not obtain a report from the expert who replaced Dr. Lehrer until November 19, 2024. Immediately after it was received, the report was served on counsel for Defendants and we notified the trial court of these facts. Despite the fact that the report was served only four days after the court's

deadline, the trial court dismissed Plaintiff's Complaint against AMC with prejudice by order dated December 16, 2024.

On January 8, 2025, this office filed a Motion for Reconsideration to vacate the December 16, 2024 order. Before that motion was decided, the trial court entered an order dated January 17, 2025 dismissing Plaintiff's Complaint as to all Defendants with prejudice at the request of Mr. Wieder.

On January 31, 2025, the trial court entered an order denying Plaintiff's motion to vacate the December 16, 2024 order.

It is respectfully submitted that the motion judge grossly abused her discretion in imposing the ultimate sanction of dismissal of Plaintiff's Complaint with prejudice when the expert report in question was served a mere four (4) days after the trial court's November 15, 2024 deadline. Accordingly, the December 16, 2024 and January 17, 2025 orders dismissing Plaintiff's Complaint with prejudice and the January 31, 2025 denying Plaintiff's Motion for Reconsideration must be reversed.

PROCEDURAL HISTORY

This action was commenced on August 22, 2019 when Plaintiff filed a Complaint *pro se*. Pa1 to Pa2. On September 30, 2019, an Answer was filed on behalf of AMC. Pa4 to Pa10. On October 9, 2019, and Answer and Counterclaim was filed on behalf of Mr. Wieder. Pa11 to Pa18. Plaintiff filed

a pleading in response to Mr. Wieder's pleading and an Amended Complaint on November 7, 2019. Pa19 to Pa26. A notice of dismissal of Mr. Wieder's Counterclaim was filed on November 8, 2019. Pa27

On October 13, 2022, Plaintiff requested that an October 24, 2022 trial date be adjourned for medical reasons. Pa312 to Pa314. The trial date was ultimately adjourned from October 24, 2022 to January 30, 2023. Pa596. On January 18, 2023 Plaintiff again filed a request for adjournment of the January 30, 2023 trial date also for health reasons. Pa316 to Pa319. By order dated January 30, 2023 the trial court denied the latter request for adjournment of the trial and dismissed Plaintiff's Complaint without prejudice for failure to proceed at trial. Pa31

On February 17, 2023, Plaintiff filed a motion seeking reconsideration of the trial court's January 30, 2023 order and other relief. Pa324 to Pa331. AMC opposed the motion and the trial court denied the motion. Pa333 to Pa338; Da342 to Da343.

Plaintiff filed a second Motion for Reconsideration of the trial court's January 30, 2023 order dismissing this action without prejudice. Pa345 to Pa359. AMC again opposed the motion. Pa361 to Pa376. The trial court denied Plaintiff's second Motion for Reconsideration by order dated June 2, 2023. Pa509 to Pa510.

By order dated January 5, 2024, the trial court granted Plaintiff's motion to permit the Law Offices of Gold, Albanese & Barletti, LLC to substitute in as attorneys for Plaintiff. Pa519 to Pa502. Accordingly, a Substitution of Attorney was filed by this office. Pa28.

On August 26, 2004, AMC filed a Motion to Dismiss Plaintiff's Complaint with Prejudice along with an application for sanctions and attorneys fees. Pa29 to Pa523 On September 6, 2024, a Cross Motion to Dismiss With Prejudice was filed on behalf of Mr. Wieder. Pa524 to Pa527. On September 19, 2024, a Cross Motion Seeking to Reopen Discovery to Name a New Medical Expert and Establish a Discovery Schedule was filed on behalf of Plaintiff. Pa528 to Pa544. AMC filed papers in opposition to Plaintiff's Cross Motion and in further support of its motion. Pa545 to Pa559.

On October 3, 2024, the trial court heard oral argument on these motions. T7-2 to T23-8[1]. Afterward, the motion judge rendered an oral opinion. T23-13 to T40-20. She denied Plaintiff's cross-motion to reopen discovery. T37-8 to 37-9. She also announced her intention to deny the motions to dismiss Plaintiff's Complaint with prejudice on the condition that

[1] "T" refers to the transcript of the October 3, 2024 motion proceeding. This is the only proceeding in open court that is directly relevant the issues on appeal.

Plaintiff produce an expert report by November 15, 2024 and file a motion to reinstate the complaint no later than December 20, 2024. T37-22 to T38-5.

The trial court also denied AMC's motion for attorneys fees without prejudice but granted its motion for sanctions associated with Plaintiff's "undue delay" in the amount of $300.00 T38-23 to T39-13, T30-24 to T40-20.

The trial court entered an order dated October 3, 2024 dismissing Plaintiff's Complain with prejudice, ordering Plaintiff to pay sanctions in the amount of $300.00 and denying AMC's application for attorneys fees without prejudice. Pa560 to Pa561. It entered another order dated October 3, 2024 which denied Plaintiff's cross motion to reopen discovery and establish a discovery scheduled. Pa562 to Pa563.

However, on the next day, October 4, 2024, the trial court entered an amended order denying, without prejudice, AMC's motion to dismiss Plaintiff's Complaint with prejudice, ordering Plaintiff to pay sanctions in the amount of $300.00 and denying AMC's application for attorneys fees without prejudice. Pa564 to Pa565. The order also required Plaintiff to serve her expert report by November 15, 2024 and provided that if Plaintiff failed to do so, Defendants may submit an order dismissing Plaintiff's Complaint with prejudice under the Five Day Rule. Pa565. The court below also entered an

order dated October 4, 2024 denying without prejudice, Weidner's cross motion to dismiss Plaintiff's Complaint with prejudice. Pa566 to Pa567.

On November 18, 2024, counsel for AMC sent correspondence to the motion judge stating that Plaintiff had failed to file her expert report by November 15, 2024 along with an order under the Five-Day Rule. Pa568. On the next day, November 19, 2024, Plaintiff's expert report dated November 19, 2024 was served on defense counsel and the trial court was notified of this fact. Pa568. Nevertheless, on December 16, 2024, before the December 30, 2024 deadline the court set for the filing of motion for reinstatement of the Complaint, the trial court entered an order granting the motion of AMC dismissing Plaintiff's Complaint with Prejudice for failure to serve an expert report by November 15, 2024. Pa572, Pa565

On January 8, 2025, Plaintiff filed a Motion for Reconsideration to vacate the trial court's December 16, 2024 order.[2] Pa573 to Pa576. AMC filed opposition to the motion. Pa580 to Pa582. On January 17, 2025, the trial court entered an order at the request of Mr. Wieder dismissing Plaintiff's Complaint with prejudice as to all Defendants. Pa577 to Pa579.

[2] Erroneously titled "Notice of Motion for Reconsideration of the Court's ***December 19, 2024*** Order." Pa15 (emphasis added).

On January 31, 2025, the trial court entered an order denying Plaintiff's motion to vacate the trial court's December 16, 2024 order. Pa583 to Pa584.

Thereafter, on March 10, 2025, Plaintiff filed a Notice of Appeal from the trial court's December 16, 2024, January 17, 2025 and January 31, 2025 orders. Pa585 to Pa590. On March 18, 2025 Plaintiff filed an Amended Notice of Appeal. Pa590 to Pa 594.

STATEMENT OF FACTS

On or about August 25, 2017, Plaintiff was assaulted by Mr. Wieder while on the premises of AMC Theaters. Pa1 to Pa2; Pa25 to Pa26; Pa6. As a result of the assault, Plaintiff suffered severe and permanent personal injuries, including but not limited to, injuries to her brain stem, her neck, back and chest, whiplash injuries, and myospasms to her cervical muscles and thoracic spine as well as vision problems and vertigo which she continues to suffer. Pa531; Pa576; Pa543 to Pa544.

The Social Security Administration found that Plaintiff is disabled. Pa416 to Pa423. It determined that the onset date of Plaintiff's disability was August 25, 2017, the day that Mr. Wieder assaulted her. Pa423.

Plaintiff had retained the services of a medical expert, Joel F. Lehrer, M.D. Pa531; Pa576. Dr. Lehrer prepared a report dated July 28, 2020 which was served on all counsel by way of amendment to Plaintiff's interrogatories

on July 28, 2020. Pa531; Pa530 to Pa544; Pa576. Plaintiff also served the medical reports of Vincent R. Vicci, Jr., O.D. and Nathalia Broderick, O.D. Pa313 to Pa314, Pa431 to Pa436.

Unfortunately, Dr. Lehrer passed away on January 26, 2024. Pa531. Also, Robert F. Gold, Esq., the senior partner in the office had suddenly passed away a week earlier on January 19, 2024. Pa576.

After AMC and Mr. Wieder moved to dismiss Plaintiff's Complaint with prejudice (Pa29 to Pa523, Pa524 to Pa527), this office filed a Cross Motion Seeking to Reopen Discovery to Name a New Medical Expert and Establish a Discovery Schedule on behalf of Plaintiff. Pa528 to Pa544. In the certification in support of Plaintiff's Cross-Motion, counsel for Plaintiff stressed the difficulty in finding an expert with the proper specialty to replace the late Dr. Lehrer. Pa531 to Pa532.

AMC's and Mr. Wieder's motions were ultimately denied without prejudice and Plaintiff's Cross-Motion was denied. Pa564 to Pa565; Pa562 to Pa563. The trial court's order denying AMC's motion without prejudice required Plaintiff to serve her expert report by November 15, 2024. Pa564 to Pa565. Plaintiff served the report of the substitute expert on November 19, 2024. Pa269; Pa576. Despite the fact that the report was served only four days

after the court's deadline, the trial court dismissed Plaintiff's Complaint against AMC with prejudice by order dated December 16, 2024. Pa572.

On January 8, 2025, the undersigned filed a Motion for Reconsideration to vacate that order. Pa573 to Pa576. At the request of counsel for Mr. Wieder, the trial court entered an order dated January 17, 2025 dismissing Plaintiff's Complaint as to all Defendants with prejudice. Pa577 to Pa579. On January 31, 2025, the trial court entered an order denying Plaintiff's motion to vacate the December 31, 2024 order. Pa583 to Pa584.

LEGAL ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE. [T23-12 to T46-23; Pa572; Pa579; Pa583 to Pa584]

The Supreme Court has recognized that the dismissal of a complaint ""with prejudice is the ultimate sanction.'" *Abtrax Pharms. v. Elkin Sinn,* 139 N.J. 499, 514 1995), *quoting Zaccardi v. Becker*, 88 N.J. 245, 253 (1982). The Supreme has directed that the sanction be imposed "'only sparingly." *Abtrax Pharms,* 139 N.J. at 514, *quoting Zaccardi* 88 N.J. 253. *See also* Pressler & Verniero, *Current N.J. Court Rules* (2025 ed.), comment 2 on *R.* 4:23-2 (observing "the court must be loath to impose the ultimate sanction of dismissal" for violation of the *Rule*).

The *Abtrax* court went on to state that

> "The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious."

139 N.J. at 515 *quoting Lang v. Morgan's Home Equip. Corp.*, 6 N.J. 333, 339 (1951)). Here, Plaintiff's complaint was dismissed merely because a report of a medical expert report to substitute for that of the late Dr. Lehrer was served four days after the trial court's November 15, 2024 deadline. Neither of the criteria set forth in *Abtrax* for dismissal of a complaint with prejudice were met.

First, even if there had been no submission of the substitute expert report, such an omission would not go to the "very foundation" of Plaintiff's cause of action. If expert medical opinion was necessary to sustain Plaintiff's cause of action, Plaintiff has served the report of Drs. Vicci & Broderick that provided expert opinion. Pa431to 436. The fact that the report was served on defense counsel is evidenced by the fact that the report was marked as an exhibit at Plaintiff's March 1, 2021 deposition. Pa431. Thus, Plaintiff's case could proceed even without the opinion of the medical expert who substituted for Dr. Lehrer.

Second, the fact that the report of the substitute expert was served only four days after the November 15, 2024 deadline set forth in the trial court's

October 4, 2024 order (Pa564 to Pa565; Pa569) shows that the failure to comply was not deliberate and contumacious, but rather indicates that a good faith effort was made to comply with the court's order. In his November 19, 2024 letter to the motion judge informing her that the report of the expert substituted for Dr. Lehrer had been served, Plaintiff's counsel stated that "[t]he report was obtained as quickly as possible." Pa569.

It must be noted that serving a replacement expert report was not simply a matter of opening a phone book and picking an expert to replace Dr. Lehrer. There was a vetting process involved which included attempting to find an expert with similar credentials who was willing to assess Plaintiff and write a forensic report evaluating her injuries and the causal relationship of the same to the assault, who would be willing to testify at the time of the trial of this matter and who would be available to testify at what we were told would be an imminent trial in this matter.

By contrast to Plaintiff counsel's good faith efforts to comply with the motion judge's October 4, 2024 order, in " *Abtrax Pharms. v. Elkin Sinn, supra,* the plaintiff's president and majority stockholder concealed the existence of documents made false statements under oath and thus disobeyed a court order. 139 N.J. at 509. Since the plaintiff deliberately obstructed

discovery in *Abtrax*, the Supreme Court reinstated the trial court's dismissal the complaint. *Id.* at 521-522.

This Court has noted that "a motion judge has great discretion in the manner he or she manages a case." *Conrad v. Michelle & John, Inc.*, 394 N.J. Super. 1, 10 (App. Div. 2007). It said, however, "the sanction of dismissal with prejudice for a procedural violation must be a recourse of last resort." *Id.* at 11. The dismissal of a claim for failure to comply with discovery is the "last and least favorable option." *Il Grande v. DiBenedetto*, 366 N.J. Super. 597, 624 (App. Div. 2004). As the Supreme Court has stated:

> Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, . . . or when the litigant rather than the attorney was at fault.

Zaccardi v. Becker, supra, 88 N.J. at 253 (citations omitted). Here, it is inconceivable that the service of the report of the substitute expert a mere four days after the trial court's November 15, 2024 deadline would result in any prejudice to the defendants. In *Irani v. K-Mart Corp.*, 281 N.J. Super. 383 (App. Div. 1995) this Court stated that "[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." *Id.* at 387.

Moreover, even if there existed a possibility of prejudice due to the slight delay in the service of the report, the motion judge should have chosen the lesser sanction of barring the report and the testimony of its author at trial. Her failure to do so and instead her opting for the ultimate sanction of dismissal with prejudice constituted a gross abuse of discretion. *See Georgis v. Scarpa*, 226 N.J. Super. 244, 251 (App. Div. 1988) ("If a lesser sanction than dismissal suffices to erase the prejudice to the non-delinquent party, dismissal of the complaint is not appropriate and constitutes an abuse of discretion"). As discussed above the barring of the report and testimony of the expert who was substituted for Dr. Lehrer would not extinguish Plaintiff's cause of action because, even if medical expert opinion is necessary to sustain the action, Plaintiff has served the report of Drs. Vicci & Broderick.

Moreover, there is no evidence that the slight delay in the service of the report the substitute expert was the fault of Plaintiff herself. Even if the delay was the fault of Plaintiff's counsel, it is well established that the sins of an attorney should visited upon the attorney's client. *See e.g. Burns v. Belafsky*, 326 N.J. Super. 462, 471 (App. Div. 1999), *aff'd,* 166 N.J. 466 (2001); *Parker*

v. Marcus, 281 N.J. Super. 589, 594 (App. Div. 1995); *Jansson v. Fairleigh Dickinson Univ.*, 198 N.J. Super. 190, 196 (App. Div. 1985).

In her order dated January 31, 2025 denying Plaintiff's Motion for Reconsideration of the December 16, 2024 order, the motion judge stated that Plaintiff did not submit objection to the latter order. Pa584. However, Plaintiff counsel's letter to the motion judge dated November 19, 2024 informing her that the report of the substitute expert had been served on counsel (Pa569) should have had the effect of countering the submission of the order dismissing Plaintiff's Complaint against AMC with prejudice under the 5-day rule. *See* Pa568. While the letter did not explicitly object to the proposed order, to say that the letter was not submitted to counter the proposed is to elevate form over substance.

All this being said, the undersigned is cognizant of the fact that at time of the trial court's October 4, 2024 order requiring that Plaintiff served the report of her substituted expert by November 15, 2024 (Pa564 to Pa565) Plaintiff's Complaint had been dismissed without prejudice for failure to proceed to trial. Pa321. The undersigned is also aware that the trial court's October 4, 2024 order provided that defendant could submit an order seeking dismissal of the complaint with prejudice under the Five Day Rule if Plaintiff did serve the report of her substitute expert. Pa565. These circumstances do not diminish

the fact that the motion judge, who was informed that the report was served on defense counsel albeit four days after the November 15, 2024 deadline (Pa569), nevertheless imposed the ultimate sanction of dismissal with prejudice.

The undersigned is also cognizant of the history of this case and must acknowledge that much of its longevity is due to the fact that Plaintiff has not provided timely discovery at times. The record on appeal, however, makes it clear that Plaintiff has prosecuted this case as a disabled *pro se* litigant during most of its history. This firm was not substituted in a counsel for Plaintiff until December 5, 2023. Pa28,

Counsel for AMC has pointed out that this case was filed more than five years ago and related to an incident that occurred more than seven years ago. Pa51. A five-year old case is not unusual, however, especially when a good part of its history took place during the COVID-19 pandemic. Also, the fact that the incident in question took place over seven years ago is due in large part to the fact that Plaintiff's complaint was filed nearly at the end of the two-year statute of limitations period. Pa1. Under *N.J.S.A.* 2A:14-2, Plaintiff had every right to initiate this action any time within two years of the incident.

Any frustration that the motion judge and defense counsel may have had with any infraction of the rules of discovery that Plaintiff may have committed

does not justify the imposition of the "ultimate sanction" of dismissal with prejudice. *Sert v. Loconte*, Docket No. A-706-20, 2021 N.J. Super. Unpub. LEXIS 2962 (App. Div. December 7, 2021) (Pa597 to Pa600), *9-10, *citing Abtrax Pharm., Inc. v. Elkins-Sinn, Inc.*, *supra*, 139 N.J. at 514. The *Sert* court went on to say:

> We are not insensitive to the legitimate concerns of the motion judge for compliance with discovery rules, but our first duty is to do justice. As we said in *Santos v. Estate of Santos*, 217 *N.J. Super.* 411 (App. Div. 1986), "[t]here 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.* at 416.

2021 N.J. Super. Unpub. LEXIS 2962 at *10. "Eagerness to move cases must defer to our paramount duty to administer justice in the individual case." *Audubon Volunteer Fire Co. No. 1 v. Church Constr. Co., Inc.*, 206 N.J. Super. 405, 406 (App. Div. 1987). Thus, "[u]ntil courts have exhausted means of performing their shepherding function which do not terminate or deeply affect the outcome of a case, they ought not to bar a litigant's way to the courtroom." *Id.* at 407. A court can generally ascertain methods short of dismissal to address case management issues. *Ghandi v. Cespedes*, 390 N.J. Super. 193, 197 (App. Div. 2007). While the motion judge professed an inability to allow Plaintiff more time to secure the expert report several time during the October 3, 2024 motion hearing (T12-12 to T12-15,

T13-12 to T13-24, T14-21 to T14:24T33-20 to T33-25), she was mistaken if she believed that she lacked the discretion to fashion a fair result.

Moreover, the purported prejudice to Defendants that allegedly would result from the continuation of this action has been overstated, if the threat of such prejudice exists at all. AMC asserts that it is prejudiced because of the fading memories of witnesses. Pa52. This, however, occurs in all cases and in this matter fading memories affect Plaintiff's witnesses, too. AMC also contends that it will be difficult, if not impossible, "to reach witnesses at this point." T8-9 to T8-10. This argument must also be discounted because AMC should have identified its witnesses long ago, stayed in contact with them and, if necessary, preserve their testimony.

AMC and the motion judge have pointed out that Mr. Wieder is deceased (Pa52; T18-6 toT18-7, T32-23 to T32-24), but as the court below acknowledged, Mr. Wieder passed away early on, perhaps before Plaintiff even filed her complaint. T18-6 to T18-8. Certainly, he was deceased by time that an answer and counterclaim was filed on behalf of his estate on October 19, 2019, less than two months after Plaintiff filed her complaint. Pa11 to Pa18, Pa1 to Pa2. Thus, the unavailability of Mr. Wieder as a witness cannot be attributed to any delay on the part of Plaintiff in prosecuting this action.

In support of the contention that Defendants have been prejudiced by delay of the litigation in this matter, it has also been asserted that Mr. Wieder's wife, Elizabeth Wieder, purported to be the only eyewitness to the incident in question, is seriously ill. Pa52; T32-25. Certainly Ms. Wieder's testimony can be preserved by taking her *de bene esse* deposition . Moreover, no medical evidence of Ms. Wieder's condition has been presented. By contrast evidence of the significant impairment Plaintiff's physical condition as result of Mr. Wieder's assault upon her has been documented. *See e.g.* Pa431 to Pa436; Pa539 to Pa544.

Finally, in arguing that it will be prejudiced by the continuation of litigation in this matter, AMC also has stated that it has expended over $150,000 in attorneys fees in defending this action. Pa51; T8-4. That claim has not been corroborated in any way. Moreover, we value the catastrophic injuries that Plaintiff has sustained as victim of the assault at more than ten (10) times the fees that AMC claim to have insured. Therefore, defense cost of $150,000, if incurred, would not be unreasonable.

Moreover, in action, counsel's efforts in defending AMC has at times been excessive. For example, AMC's Motion to Dismiss Plaintiff's Complaint with Prejudice filed August 26, 2024 consists of approximately 500 pages. Pa29 to Pa523. The certification in support of the motion alone consists of 24

pages and 165 paragraphs. Pa31 to Pa53. Also, the extent to which counsel for AMC's hourly rate or other measure of compensation contributed to its attorneys fees total is unknown. Regardless, incurrence of defense costs is not a cognizable prejudice and should not be a consideration in the determination of this appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court's December 16, 2024, January 17, 2025 and January 31, 2025 orders must be reversed and this matter should be remanded to the trial court for restoration to the active trial calendar.

Respectfully submitted,

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Shirley A. Goodheart

PAUL E. KIEL

By:_____
PAUL E. KIEL, ESQ.

Dated: June 20, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-001988-24

SHIRLEY A. GOODHEART, *Plaintiff-Appellant,* vs. AMERICAN MULTI-CINEMA, INC., i/p/a AMC Theaters, FREDERICK WIEDER i/p/a Fred Widener, JOHN DOES and JANE DOES, *Defendants-Respondents,* and JOHN DOES and JANE DOES, *Defendants*.	:	CIVIL ACTION ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO.: MRS-L-1832-19 Sat Below: HON. ROSEMARY E. RAMSAY, P.J.Cv.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT AMERICAN MULTICINEMA, INC. IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

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PRELIMINARY STATEMENT

Plaintiff/Appellant Shirley A. Goodheart (hereinafter, "Plaintiff") appeals the underlying Orders of the Hon. Rosemary E. Ramsay, P.J.Cv. dated December 16, 2024, and January 17, 2025, dismissing her Complaint with prejudice and the January 31, 2025, Order denying Plaintiff's motion for reconsideration.

Despite Plaintiff's admission that she is in direct violation of the Court's October 4, 2024 Order setting forth a final expert deadline of November 15, 2024, a deadline to pay $300 sanctions to Defendant AMC, and a deadline to file a motion to reinstate Plaintiff's Complaint, Plaintiff attempts to argue that the Court erred in dismissing her Complaint. Plaintiff attempts the within appeal despite the fact that, the Orders dismissing her complaint with prejudice were completely unopposed and no objection to these Orders were raised by the Plaintiff before the Trial Court.

Plaintiff further asserts that the expert report at issue was "a mere four (4) days" late. However, Plaintiff completely ignores the facts and procedural history in this matter leading up to this final deadline being set by the court and yet again, her failure to meet this deadline. But not just this deadline, there was also a deadline in place for Plaintiff to pay a $300 sanction and file a motion to reinstate her case, both of which were completely ignored, without excuse or

explanation and not even addressed in Plaintiff's motion for reconsideration or this appeal.

This matter had a final discovery end date of November 30, 2021, nearly four years ago. Therefore, the Plaintiff is not a mere four days late in serving an expert report. Furthermore, the Plaintiff served the late, expert report without any explanation or appropriate certification as to why such a report was late in violation of R. 4:17-7, yet again, completely disregarding the requirements of the Court Rules. At minimum, Plaintiff must show good cause for the late submission but completely failed to provide any excuse at the time and instead now asserts that the late amendment should be allowed because it was "close enough". But what about her failure to pay the $300 sanction? What about her failure to file the required motion to reinstate her case? These issues alone are fatal to Plaintiff's appeal as the Plaintiff failed to make a good-faith attempt to comply with the Orders of the Trial Court.

The Plaintiff continues to assert the tired excuse that the prior expert retained on behalf of the Plaintiff, Dr. Joel F. Lehrer, M.D., passed away in January of 2024. While extremely sad, the Court accommodated Plaintiff with nearly a year to find a replacement expert. Then on October 4, 2024, the Plaintiff was provided with an additional six (6) weeks to produce such expert report, over the Defendants' continuous objections. Even with that additional time,

Plaintiff still could not meet the deadline. As noted in the Transcript of Judge Ramsay's oral opinion, this matter "has a torturous history" and that is "an understatement by every way, shape, or form of a description." (T24:23-25). Despite years of time and near infinite opportunities, Plaintiff failed to comply with Orders of the Court, which was ultimately fatal to her lawsuit. Furthermore, Plaintiff did not even object when Defendants submitted the Orders of Dismissal to the Trial Court. As such, Plaintiff should be precluded from even appealing this matter. Ultimately, Plaintiff's appeal must be denied, and the underlying Orders of the Court dismissing this case, must be upheld.

PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS[1]

The plaintiff filed a pro se complaint in this matter nearly six years ago, on August 22, 2019, on the eve of the Statute of Limitations, and this matter was assigned an original discovery end date of July 26, 2020. (Pa1; T24:6).

After various extensions, the discovery end date in this matter ultimately expired on November 30, 2021. (Da1-19).

This matter was assigned an initial trial date of June 13, 2022. (T25:20-21).

[1] The factual background and procedural history of this matter are intertwined and thus presented together.

This trial date was adjourned to October 13, 2022, at Plaintiff's request and over the objection of the Defendants. (T26:7-8).

This trial date was again adjourned to January 30, 2023, at Plaintiff's request and over the objection of the Defendants. (T26:13-17).

On January 30, 2023, Plaintiff appeared at trial unprepared and, as a result, her complaint was dismissed without prejudice. (T26:18-25).

On December 13, 2023, Plaintiff's current Counsel substituted into this matter on behalf of the Plaintiff. (T29:4-6).

Despite the matter currently being dismissed for now over a year, Plaintiff then requested a case management conference, which was set for February 5, 2024, wherein Plaintiff requested additional time to retain a medical expert. (T29:17-23).

Another case management conference was set for February 20, 2024, wherein Plaintiff advised that she retained a Dr. Wachim to act as her expert and, again, requested additional time to get examined and an expert report generated. (T30:4-10).

Another case management order was scheduled for May 30, 2024, yet the Plaintiff still could not produce an expert report and yet again requested additional time. (T30:12-18).

Over the continued objections of the Defendants, another case management conference was scheduled for June 24, 2024, when the Plaintiff advised that Dr. Wachim was unwilling to produce an expert report on behalf of the Plaintiff and again requested additional time to secure a new expert. (T30:19-22).

Over the continued objections of the Defendants, yet another case management conference was scheduled for July 8, 2024, wherein Plaintiff advised that she had located a doctor in Louisiana, Dr. Gianoli, who was willing to perform a record review and generate an expert report. (T30:23-25 to T31:1-4). The Plaintiff also requested yet another forty-five-day extension, which was granted. (T31:3-5).

Plaintiff's expert report was due on August 22, 2024 and another case management conference was scheduled for August 27, 2024, yet on August 26, 2024, Plaintiff requested an adjournment of this conference as she required additional time and documents to produce an expert report. (T31:6-15).

At this juncture, after years of litigation and near infinite extensions for the Plaintiff, Defendants again objected to further adjournments and time extensions and filed a motion to dismiss Plaintiff's complaint with prejudice and for sanctions. (Pa29) (T31:16-18).

In response, Plaintiff filed a motion to reopen the discovery period, over three years after the discovery end date had passed. (Pa528).

At oral argument on October 3, 2024 for the pending motions, the Court ruled that Plaintiff would have additional time, until November 15, 2024, to produce an expert report, but that this was Plaintiff's last chance to produce an expert and failure to do so would result in dismissal of her claim with prejudice. (T37:22 to T38:5).

In addition, the Court ruled that Plaintiff was required to pay a $300 award of sanctions to Defendant AMC prior to filing a Motion to Reinstate the Complaint no later than December 30, 2024. The October 4th Amended Order clearly stated that failure to comply with the requirements of the Court Order, would result in a dismissal with prejudice. (Pa564-565).

The Order further allowed Defendants to submit an Order under the five-day rule, should Plaintiff fail to serve her expert report by November 15, 2024. (Pa565).

The Plaintiff failed to submit an expert report by November 15, 2024, so by letter dated November 18, 2024, Defendant AMC submitted an Order under the five-day rule as instructed by the Court, which was unopposed by the Plaintiff. (Pa572 and Pa568).

On November 19, 2024, Plaintiff served the late report of her proposed expert, without warning, without permission from the Court, without an apology and further without a certification of due diligence as required by R. 4:17-7. (Pa569). This fact alone is fatal to Plaintiff's appeal.

On December 16, 2024, Defendant AMC's Order was granted by the Trial Court and Plaintiff's Complaint was dismissed with prejudice. (Pa572).

AMC did not receive its $300.00 sanction and December 30th, 2024 passed without Plaintiff filing the required Motion to Reinstate, in further violation of the Court's October 4, 2024 Amended Order. (Pa564-565).

Plaintiff remains in violation of the Court's October 4, 2024 Amended Order as of the date of filing. (Pa564-565).

On January 8, 2025, Plaintiff filed a motion for reconsideration to vacate the December 16, 2024 Order of Dismissal with Prejudice. (Pa573).

Then, after Plaintiff fully failed to comply with the Orders of October 3 and 4, 2025, by failing to serve her expert report by November 15, 2025, failing to pay the Court ordered sanctions to Defendant, AMC, and failing to file a motion to reinstate her complaint by December 30, 2025, by letter dated January 8, 2025, a final request was made to the Court under the 5 day rule, in compliance with the Court's Order. (Pa464-465). Plaintiff did not object or oppose the request for the Order of Dismissal and the Court Ordered the

dismissal of Plaintiff's case with prejudice, as to all Defendants, on January 17, 2025. (Pa577-578 and Pa579).

The Court then correctly denied this motion for reconsideration by Order dated January 31, 2025, as the Plaintiff failed to oppose or object to the underlying Orders as required by R. 4:42-1(c) and because the Plaintiff had caused irreparable prejudice to the Defendants due to her constant, undue delays. (Pa583).

Plaintiff then filed the within notice of appeal on March 10, 2025. (Pa585).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S COMPLAINT WITH PREJUDICE DUE TO PLAINTIFF'S CONSTANT AND CONTINOUS VIOLATIONS OF COURT ORDERS AND THE RULES OF COURT

"If our discovery rules are to have any meaningful effect upon calendar control and the early disposition of litigation, they must be adhered to unless, for good cause shown, they are relaxed under R. 1:1-2. The imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrant it, but to deter others who may be tempted to violate the rules absent such a deterrent." Zaccardi v. Becker, 162 N.J. Super. 329, 332 (1978). In Zaccardi the Supreme Court held that Plaintiff's complaint should be dismissed with prejudice due to his significant delay in producing discovery. See Id. at

333. Noting that the matter was "not a case of short delay where sanctions imposed upon counsel would be appropriate." Id. at 332. The Supreme Court went further holding that allowing Plaintiff's complaint to move forward "would make a mockery of the discovery rules, render them meaningless, and be an open invitation to litigants to avoid the strictures of our procedural rules." Id. at 333.

In this matter, the facts are quite clear. The Court provided Plaintiff with one last opportunity to prosecute her case by providing her with a final deadline for her expert report and one last deadline to reinstate her case, and Plaintiff failed to meet either of these deadlines. (Pa464-465). This is not just about a late expert report. It is about a complete disregard for the Court's Order of October 4, 2025 which clearly stated that violating the Order will result in her case being dismissed with prejudice. (Pa465). It is further about Plaintiff's complete failure to oppose the requests for dismissal with prejudice, not once, but twice. (Pa484). The unexcused violations of the Court's Orders and complete disregard for the Court's Rules of Procedure are therefore nothing less than contumacious.

R. 4:27-2 specifically contemplates this issue and allows for the Trial Court to "in it's discretion…dismiss an action or any claim against [a] defendant" for a plaintiff's "failure to comply with these rules or any order of the court…" Id. In this matter, the Plaintiff both failed to adhere to the Rules of Court and directly violated several orders of the Trial Court. The Trial Court

correctly utilized its discretion in dismissing Plaintiff's complaint without and then with prejudice for her repeated failures and flagrant disregard of the Rules of Court.

Plaintiff's actions went further than merely violating the New Jersey Court Rules, by also ignoring and violating the direct Orders of the Trial Court. (Pa564-565). The Plaintiff's assertion that the expert report was merely four days late completely ignores years of delay, improper procedural violations, multiple trial calls, and a Court Order not only setting a final deadline for submission of the expert report at issue, but also requiring that Plaintiff pay a sanction and file a motion to reinstate her case by a date certain, all of which was completely disregarded by the Plaintiff. (Pa564-565); (T36:7-12).

Plaintiff's Complaint has been dismissed in this matter since January 30, 2023, two years and six months ago. (T26:18-25). Then, Plaintiff's Complaint was dismissed with prejudice not only once, but twice, due to her multiple violation of the October 4, 2024 Order of the Trial Court. (Pa572 and Pa579). However, Plaintiff provides no explanation for her unexcused, late expert report, and completely fails to acknowledge her failure to pay the $300 sanction to Defendant AMC, and failure to file necessary motion to reinstate her Complaint by the Court ordered deadline of December 30, 2024. (Pa464-465). Plaintiff's failure to comply with the Court's October 4, 2024 Order resulting in the Order

of Dismissal of her case with prejudice dated January 17, 2025 is uncontested. She simply failed to comply with orders without any excuse and did not even oppose the requests for the dismissals with prejudice filed by the Defendants. This Appeal therefore must be denied.

In addition to directly violating the Court's Order, Plaintiff's late discovery amendment was made in violation of the New Jersey Court Rules. Plaintiff's late expert report was served without the required Certification of Due Diligence pursuant to R. 4:17-7, which states that a party seeking to amend discovery after an end date or deadline must certify that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the due date. Id. In this matter, the Plaintiff did not submit any such certification and therefore the submitted expert report is invalid and impermissible regardless of whether it was served one day late or ten years late. Id.; O'Donnell v. Ahmed, 363 N.J. Super. 44, 51 (Law Div. 2003).

Plaintiff further argues that her violations of discovery deadlines and violations of standing Court Orders were not "deliberate and contumacious", therefore pursuant to Abtrax Pharms. v. Elkin Sinn, 139 N.J. 499, 514 (1995), the Plaintiff's Complaint should not have been dismissed with prejudice. First, Plaintiff has been delinquent in her discovery responses and proofs for years. (T24:23-25). Plaintiff's Complaint was dismissed in January of 2023 for her

repeated delinquencies and was never reinstated. (T26:18-25). The Plaintiff had made it a practice to repeatedly violate Court Orders, blatantly ignore discovery deadlines and completely disregard the Court Rules throughout the long and exhausting litigation of this matter as repeatedly referenced by Judge Ramsay on the record. (Pa583). Plaintiff ignores the fact that the Trial Court has already determined that Plaintiff's actions, regarding the expert report, were sanctionable due to Plaintiff's undue delay. (T39:24-25).

The Appellate Court's review of a trial court's findings of fact are entitled to "substantial deference" if supported by the record. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). In this matter, the decision of the Trial Court must be upheld as Plaintiff's constant and unreasonable failures have made a mockery of the New Jersey Court Rules and have prejudiced the Defendants far beyond any lesser sanction could possibly cure. Judge Ramsay lived through this torturous history and took this into consideration when making her sound rulings in this matter.

Second, even then, Plaintiff did not attempt to correct her delinquency but instead served the late report while completely disregarding the requirements of R. 4:17-7 and in direct violation of the standing Order of the Court. (Pa564). As a result, Plaintiff's actions cannot be considered anything but "deliberate and contumacious". A flagrant disregard for the Court Rules and

standing Orders of the Court cannot be considered an immaterial procedural breach.

It seems Plaintiff believes that since she said she made an alleged "good faith effort" to comply with the Court's Order, that is sufficient, and the report should have been allowed by the Trial Court. (Pb 11). This ignores the New Jersey Court Rules which require actual proof of "good cause", beyond a conclusory statement, and a Certification of Due Diligence. R. 4:17-7. Since Plaintiff did not even attempt to argue that she had good cause for the late submission and for violating the Court Rules and Court Order, this appeal fails on its face. Failure to provide details regarding the cause of a late submission "should always be fatal." O'Donnell v. Ahmed, 363 N.J. Super. 44, 51 (Law Div. 2003).

Plaintiff further argues that even though she violated the October 4, 2024 Order of the Court, she should still be considered to have submitted "expert opinion" via the previously submitted medical reports of Drs. Vicci and Broderick. (Pa431). First, the mere medical treatment notes and/or report attempting to evaluate and treat the Plaintiff cannot be considered an expert report. Second, neither Dr. Vicci nor Dr. Broderick was named as an expert witness and their respective C.V.s were never provided in discovery.

Third, even if these medical treatments providers were to be allowed as experts, the Plaintiff failed to raise and argue this issue with regard to the underlying Motions, Oral Arguments, and Orders. The Plaintiff cannot use the within appeal to attempt to argue new issues that were available to the Plaintiff but not raised below. The Appellate Court must decline to consider questions or issues not properly presented to the trial court "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 38 N.J. Super. 542, 548 (App. Div. 1959)). Plaintiff's refusal to comply with the Court Rules and standing orders of the Trial Court is not a jurisdictional issue or matter of "great public concern," therefore this issue cannot be considered by the Appellate Court. This reference is a clear attempt by the Plaintiff to muddy the waters of this Appeal and cannot be considered.

Plaintiff then goes on to contradict her own arguments by simultaneously arguing that the late submission at issue was the fault of counsel and that the sins of an attorney should not be visited upon the client, while simultaneously arguing that the years of delays in this matter were caused by the Plaintiff representing herself *pro se*. (Pb13 and 15). First, Plaintiff was given enormous latitude with prosecuting the underlying action as a *pro se* litigant. See

Procedural History. Second, a *pro se* litigant is not to be afforded additional time and latitude, even though she was in this matter. Our Courts have long held that "[p]rocedural rules are not abrogated or abridged by plaintiff's pro se status." Rosenblum v. Boro of Closter, 285 N.J. Super 230, 241 (App. Div. 1995), certif. denied, 146 N.J. 70 (1996). If a litigant chooses to act pro se, "they must understand that they are required to follow accepted procedure promulgated by the Supreme Court to guarantee an orderly process. Such litigants are also presumed to know, and are required to follow, the statutory law of this State." Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221 (App. Div. 1989). Plaintiff's argument that the multitude of failures were the fault of her counsel, despite representing herself for years, is incredible. Furthermore, if Plaintiff does believe that her attorneys erred in prosecuting her claims, then her remedy for that failure is separate but it is in no way relevant to, nor does it provide any support for this Appeal.

Plaintiff finally argues the Defendants would not be prejudiced by the remanding of this action. (Pb18). First, the Trial Court, after living with his case since the inception, has already found that Defendants have been severely prejudiced by Plaintiff's "extraordinary delay" in this matter. (T17:21 to 18:2); (T32:23-24); (Pa 584). Therefore, Plaintiff's assertion is in direct contradiction with the factual findings of the Trial Court, which are to be given deference.

Town of Kearny, 214 N.J. at 91 (2013). Further, suggesting that having to actively defend a matter for over five years, causing Defendants to spend hundreds of thousands of dollars, all while enduring the passing of Parties, witnesses, and experts, while the Trial Court gave Plaintiff near infinite opportunities and accommodations, does not prejudice the Defendants, is incredible. Finally, Plaintiff attempts to blame the Defendants for the cost of defense by suggesting that filing motions to dispense of Plaintiff's frivolous claims, after Plaintiff's continued abuse of process, were excessive. (Pb18). Plaintiff should refer to her inability to prosecute her frivolous claims for over seven (7) years before she can attempt to blame the Defendants for being forced to defend themselves in the underlying frivolous action.

A "trial court's decisions regarding discovery are normally given deference by a reviewing court and will not be upset on appeal absent an abuse of discretion…" Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008). See also Wilson v. Amerada Hess Corp., 168 N.J. 236, 253 (2001); Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997); Spinks v. Twp. of Clinton, 402 N.J. Super. 454, 459 (App. Div. 2008); Medford v. Duggan, 323 N.J. Super. 127, 133 (App. Div. 1999). An abuse of discretion takes place when a decision is made without a rational explanation, inexplicably departs from

established policies or is rested on an impermissible basis. State v. Chavies, 247 N.J. 245, 257(2021) (*quoting* State v. R.Y., 242 N.J. 48, 65 (2020).

Judge Ramsay did not take her decisions here lightly, as can be seen by her decisions, both written and oral before the Court on this Appeal. Judge Ramsay's exercise of discretion here was in no way an abuse of discretion. She lived with this case and its torturous history, giving Plaintiff every courtesy available and then some. (T23:23-24, T28:2-4)[2]. Judge Ramsay was therefore justified in exercising her authority to grant the Orders of Dismissal in this case, pursuant to R. 4:27-2.

In this matter, the Plaintiff admits that she failed to comply with the discovery and trial rules which resulted in a dismissal of her complaint without prejudice back in January of 2023. Plaintiff was presented with near infinite opportunities to cure the defects with her discovery responses and expert testimony. The standing order of the Trial Court gave Plaintiff yet another opportunity to cure her deficiencies with the warning and knowledge that failure to do so would result in a dismissal of her Complaint with prejudice. Despite this issue ultimately being resolved by way of dismissal of Plaintiff's complaint

[2] reference is made by Judge Ramsay to her prior oral record created on occasions such as 1/30/23 and 12/5/23, further showing her continued courtesies extended to Plaintiff, the extraordinary delay tolerated by the Court and the extreme prejudice to the Defendants. These transcripts are not included in this record on appeal but can be made available to the Court if need be.

with prejudice, this is a discovery dispute and enacting of the New Jersey Court Rules. Therefore, this appeal should be reviewed based upon the abuse of discretion standard set forth in Piniero and Judge Ramsay's decisions should not be disturbed.

The facts and precedential case law relevant in this matter both show that Plaintiff's appeal is completely frivolous, having no basis in fact or law, after she failed to even oppose the Orders of dismissal, and therefore this Appeal should be denied in its entirety.

POINT II

THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION

Reconsideration of a final order is not a mechanism "to expand the record and reargue a motion." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). "A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the [c]ourt." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The purpose of reconsideration is to correct a court's error or oversight. State v. Puryear, 441 N.J. Super. 280, 294 (App. Div. 2015) (citing Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010)). In this matter, the Plaintiff was simply dissatisfied with the ruling of the Trial Court, which, correctly, dismissed her claims for Plaintiff's undue delay, Plaintiff's refusal to prosecute her claims, the

significant prejudice enacted upon the Defendants, and her constant disregard of New Jersey Court Rules and violations of standing Orders of the Trial Court.

Plaintiff's underlying motion for reconsideration does not even state why the Trial Court's ruling was made in error or why Plaintiff's submission of the expert report was served in violation of the standing Court Order of October 4, 2024. (Pa573). In motions for reconsideration after a final order, a party must demonstrate that the judge who issued the order sought to be reconsidered decided it in an arbitrary, capricious or unreasonable manner; that the decision was based on a palpably incorrect or irrational basis; or that the judge failed to appreciate the significance of probative, competent evidence. D'Atria v. D'Atria, 242 N.J. Super. 392, 401-402 (Ch. Div. 1990). The Plaintiff did not even argue reconsideration as required pursuant to D'Atria. In fact, Plaintiff did not even oppose the Orders of dismissal she now seeks to appeal. Therefore, the motion for reconsideration was frivolously filed and the denial of the motion for reconsideration must be upheld.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny Plaintiff's appeal in its entirety and affirm the December 16, 2024, January 17, 2025 and January 31, 2025 Orders of the Trial Court.

/s/ Catherine De Angelis
Catherine De Angelis, Esq.

Dated: July 21, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001988-24

SHIRLEY A. GOODHEART,

Plaintiff-Appellant

v.

AMERICAN MULTI-CINEMA, INC. I/P/A AMC THEATERS, FREDERICK WIEDER I/P/A FRED WIDENER, JOHN DOES AND JANE DOES,

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MORRIS COUNTY
DOCKET NO.: MRS-L-1832-19

Sat Below:

HON. ROSEMARY E. RAMSAY, P.J.CV.

BRIEF
OF
DEFENDANT-RESPONDENT FREDERICK WIEDER (DECEASED)

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PRELIMINARY STATEMENT

The within matter arises out of an alleged incident that occurred on or about August 25, 2017. Notwithstanding the Appellant's brief and citations to the complaint, the allegations in this case are disputed beyond competing expert reports or expert opinions. However, the dismissal of this matter admittedly was not based upon an adjudication of facts nor on the merits of any claims or defenses to same. The dismissal of this matter was based upon an abuse of process and disregard of Court Orders and the Rules of Civil Procedure.

It is submitted to the court that the plaintiff's complaint was properly dismissed with prejudice and should remain dismissed. The dismissal with prejudice was not simply serving an expert report four days after a deadline. The dismissal of the complaint with prejudice was the result of multiple years of not pursuing this matter and disregarding Court Orders put in place in an effort to avoid prior dismissals of this matter with prejudice. The orders of the lower court entering dismissals with prejudice were appropriate and within the discretion of the Honorable Rosemary E. Ramsay, P.J.Cv.(Ret.).

PROCEDURAL HISTORY

The defendant-respondent Frederick Wieder (deceased) adopts and incorporates the lengthy procedural history set forth in the Appellate Brief of the plaintiff-appellant. In fact, the lengthy procedural history of this matter is indicative of the complicated and even tortured procedural history that led up to the court entering orders of dismissal with prejudice including the January 17, 2025, Order that dismissed the matter with prejudice as to all defendants. (Pa579).

On January 31, 2023, the plaintiff's complaint was dismissed for failure to prosecute her case at the time of a scheduled trial date. (Pa320). The matter remained dismissed without prejudice until the court entered the orders dated December 16, 2024 and January 17, 2025 dismissing the matter with prejudice. (Pa572, Pa579). Notwithstanding the gap of time and ability to engage in motion practice, the complaint was never properly restored nor was plaintiff ready to proceed to trial in accordance with the dates imposed by way of multiple court orders. The plaintiff-appellant now seeks appellate review of the lower courts' orders of December 16, 2024, January 17, 2025, and January 31, 2025. (Pa57, Pa579, Pa583). It is submitted that those orders remain in effect and the decisions of the lower court not be altered, amended or reversed.

STATEMENT OF FACTS

The plaintiff alleges personal injuries as a result of an incident that occurred on August 25, 2017, as a result of certain conduct by the defendants. (Pa1-Pa3). The defendants denied the allegations and dispute the incident occurred as described by the plaintiff and dispute any causal relationship between injuries and any incident that may have occurred. (Pa4-Pa10, Pa11-Pa18). However, the Statement of Facts which are material for the appeal are the manner in which the matter was handled and prosecuted including a disregard of the lower court's orders resulting in a dismissal of the complaint with prejudice.

As previously cited, the plaintiff's complaint in this matter was dismissed without prejudice on January 30, 2023. (Pa320-Pa321). The matter remained dismissed even at the time that an order was entered allowing for a new counsel to substitute into this case on behalf of the plaintiff. (Pa28). Notwithstanding a substitution of attorney that was filed in December of 2023, the case was still dismissed without prejudice when the co-defendant moved for a dismissal with prejudice. (Pa29-Pa523). This defendant-respondent cross moved to dismiss the complaint with prejudice as there was no progress in this case moving forward and well over a year had passed from when this case was dismissed without prejudice. (Pa524-Pa527). The court denied the motions to dismiss with prejudice as set forth in the October 4, 2024 Order of the Court. (Pa564-Pa565, Pa566-Pa567). The lower

court also set forth a deadline as to when the new expert report would be served and when plaintiff would have to file a motion to reinstate the complaint. (Pa564-Pa565).

The plaintiff violated the order of the court regarding the deadline to serve a new expert report as it was served on November 19, 2024. (Pa569). The plaintiff ignored and never filed a motion to reinstate the complaint by December 30, 2024. (Pa564-Pa565). The court entered an order on January 17, 2025 dismissing the plaintiff's complaint with prejudice as to all defendants which was unopposed. (Pa577-Pa579). The final order of the lower court was entered on January 31, 2025 denying a motion for reconsideration of a December 19, 2024 order of dismissal with prejudice. (Pa583-Pa584).

LEGAL ARGUMENT

THE LOWER COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT WITH PREJUDICE

The appellant recognizes that a dismissal with prejudice is a sanction contemplated by not only our Court Rules but also by a body of case law. See generally, Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499 (1995); Zaccardi v. Becker, 88 N.J. 245 (1992). This defendant-respondent does not suggest or attempt to persuade the court that dismissals with prejudice are granted liberally or even something that is common practice. However, it is necessary to allow for the trial court to have that discretion when imposing court rules or enforcing court orders. The October 4, 2024, Order of the Honorable Rosemary Ramsay, P.J.Ch.(Ret.) was not a discovery order entered in the preliminary stages of discovery or even at the conclusion of discovery. The order that was ignored and disregarded by the plaintiff was entered long after the case had received trial dates and had been dismissed without prejudice for failure to prosecute the claim. There was no uncertainty or any ambiguity with the court's decision when denying pending motions seeking a dismissal with prejudice and providing plaintiff with the final opportunity to remedy what had transpired over the course of years leading up to October 4, 2024.

After plaintiff failed to supply the expert report in a timely fashion, the defendant-respondent AMC obtained an order of dismissal with prejudice that was dated December 16, 2024. The plaintiff did nothing to remedy that order prior to the passing of the second deadline required by the lower court in which plaintiff had to seek an order restoring the matter to the active trial list. On January 17, 2025, the court signed the second order of dismissal with prejudice as to all defendants based upon the untimely service of the outstanding expert report and the failure to move to restore the complaint to the active trial list.

The appellate arguments set forth by the plaintiff focus on the harshness of the ultimate sanction based upon a discovery violation. However, the appellate papers should focus on the plaintiff's disregard of a court order that imposed deadlines to comply with a directive of the court as all reasonable time to complete discovery had long passed. As a result of the appellant's failure to comply with the court order, the trial court was well within its discretion to enter the orders of December 16, 2024, January 17, 2025, and January 31, 2025. Rule 4:37-2 contemplates and permits a dismissal with prejudice based upon the failure of a party to comply with any order of the court. See generally, Zaccardi v. Becker, 88 N.J. 245, 254 (1982) and Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582, 584-585 (App. Div. 1977).

As previously noted, the imposition of the final deadlines came long after trial dates were assigned and discovery concluded. The court had even denied motions to dismiss with prejudice. The only just result was a dismissal with prejudice.

Although there is undoubtably prejudice to the defendants when having to defend and litigate a matter for years and even several years after this case was set to be ready for trial, the burden should not now shift requiring the defendants to counter the plaintiff's attempt to rebut the prejudice arguments. The defendants were put in a position to sit and wait for the plaintiff until the plaintiff was ready to move forward with the claim. The defendants should not be put in a position to scramble or find witnesses to accommodate the delay.

Moreover, while the plaintiff made the defendants wait, the plaintiff also failed to comply with court orders that were put in place to put an end to this abuse of our process. Therefore, it is submitted to this Appellate Court that the lower court within its discretion properly dismissed the plaintiff's complaint with prejudice. It is submitted that this matter should remain dismissed with prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Orders of the Trial Court dated December 16, 2024, January 17, 2025, and January 31, 2025, should remain in full force and not be altered, amended or reversed. The Complaint of Shirley A. Goodheart was properly dismissed with prejudice and should remain dismissed with prejudice.

Respectfully submitted,

O'TOOLE, COUCH & DELLA ROVERE LLC
Attorneys for Defendant/Respondent
Frederick Wieder (deceased)

By: Michael Della Rovere
Michael Della Rovere, Esq.

Dated: July 25, 2025

SHIRLEY A. GOODHEART,

Plaintiff/Appellant,

vs.

AMERICAN MULTI-CINEMA, INC., i/p/a AMC THEATERS, FREDERICK WIEDER i/p/a FRED WIDENER JOHN DOES and JANE DOES,

Defendants/Respondents

and

JOHN DOES and JANE DOES,

Defendants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 1988-24T2

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NUMBER: MRS-L-1832-19

CIVIL ACTION:

Sat Below:

HON. ROSEMARY E. RAMSAY, P.J.Cv.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT SHIRLEY A. GOODHEART

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CASES:

PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff/Appellant Shirley A. Goodheart ("Plaintiff") in reply to the briefs submitted on behalf of Defendant/Respondent American Multi-Cinema, Inc. ("AMC") and Defendant/Respondent Frederick Wieder (deceased) ("Mr. Wieder").

In their respective briefs, AMC and Mr. Wieder (collectively ("Defendants") portray themselves and the motion judge as victims of the litigation of this matter. The real victim is Plaintiff herself who was grievously injured due to an assault inflicted by the late Mr. Wieder which the employees of AMC could have prevented. It respectfully submitted therefore that the interest of justice must prevail over Defendants' attempts to deprive Plaintiff of a decision on the merits in this case.

LEGAL ARGUMENT

I. AMC'S INACCURATE AND UNSUBSTANTIATED FACTS.

At the outset it must be noted that, at various points in its brief, facts stated by AMC are inaccurate and unsubstantiated by the record as demonstrated by the following examples.

First, AMC states that case management conferences were scheduled on June 24, 2024 and July 8, 2024 "[o]ver the continued objections of the

Defendants." Ab2[1] citing T30:19 to T30:22, T30:23 to T31-4. The cited references to the trial judge's October 3, 2024 opinion, however, do not indicate that Defendant objected to the scheduling of these conferences.

Second, AMC states that Plaintiff's motion to reopen discovery was filed "***over*** three years" after the discovery end date Ab6 citing Pa528 (emphasis added). This is inaccurate. The discovery end date in this matter was November 30, 2021 (Da1) and Plaintiff's Cross Motion to Reopen Discovery was filed on September 19, 2024, less than three years later .

Third, AMC states that Plaintiff "directly violated several orders of the Trial Court." Ab9. It does not specify which orders were violated, much less provided the appropriate citations to the record to document the purported violations.

Fourth, AMC describes Plaintiff's claims as "frivolous" without any documentation that challenges the merits of Plaintiff's claims. Ab16.

Finally, in a footnote, AMC references oral proceedings on January 30, 2023 and December 5, 2023 without supplying the transcript of such

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[1] The following abbreviations will be utilized to reference the various briefs:

"Pb" for Plaintiff's initial brief;
"Ab" for AMC's brief;
"Wb" for Mr. Wieder's brief.

Additionally, "Da" refers to AMC's appendix

proceedings. A1, n. 2. AMC assurance that the transcripts "can be made available to the Court if need be" does not excuse the omission because Plaintiff has been deprived of the opportunity to address the contents of the transcripts. Any reference to the transcripts or their contents must be disregarded.

II. DEFENDANTS' CONTENTIONS REGARDING THE HISTORY OF THIS ACTION AND PREVIOUS DISCOVERY VIOLATIONS.

Throughout their briefs, AMC and Mr. Wieder emphasize "years of delay" and prior discovery infractions by Plaintiff in this action. *See e.g.* Ab2, Ab10, Ab11 to Ab12, Ab14 to Ab15, Wb2, Wb5. By this, Defendants are attempting the distract the court from the real issue on this appeal—the motion judge's gross abuse of discretion in imposing the ultimate sanction of the dismissal of Plaintiff's Complaint with prejudice when the expert report in question was served a mere four (4) days after the trial court's November 15, 2024 deadline. The focus of this appeal must be on that harsh action.

AMC contends that Plaintiff "completely ignores years of delay, improper procedural violations, multiple trial calls" and the October 4, 2024 order imposing deadlines on Plaintiff. Ab10. This is not true. In her prior brief Plaintiff acknowledged that the history of this case was lengthened by Plaintiff's failure to provide timely discovery at times. Pb15. But as Plaintiff

noted, a five-year old case is not unusual, especially when part of its history took place during the COVID-19 pandemic. *Ibid.* Moreover, Plaintiff not only proceeded *pro se* during much of the litigation of this case, but she is also disabled. *See e.g.* Pa312, Pa316, Pa317. AMC speaks of "various extensions" of the discovery end date. The discovery end date, however, was only extended three times. Da1. Moreover, certainly Plaintiff did not ignore the October 4, 2024 order because the appeal is based on the fact that Plaintiff served an expert report a mere four days after the deadline imposed by the order and yet the motion judge dismissed Plaintiff's Complaint with prejudice.

Finally, there is no contradiction between Plaintiff's pointing out that Plaintiff was *pro se* during much of the litigation and the fact her counsel bears any fault that may have caused the service of the substitute expert report after the November 15, 2024 deadline as claimed by AMC. Ab14. The former point addresses Defendants' contention regarding the history of this litigation while the latter point addresses the timing of the service of the expert report.

III. THE ABUSE OF DISCRETION STANDARD

AMC points out that a reviewing court normally gives deference to the trial court on discovery decisions and will not reverse such decisions absent an abuse of discretion. Ab16. Plaintiff has acknowledged that the abuse of discretion standard of review applies on this appeal. Pb2, Pb9, Pb12.

AMC states that "an abuse of discretion takes place when a decision is made without a rational explanation, inexplicably departs from established policies or rested on an impermissible basis." Ab16 to Ab17, *quoting State v. Chavies*, 247 N.J. 245, 257 (2021) (*quoting State v. R.Y.*, 242 N.J. 48, 65 (2020). An abuse of discretion also occurs when a decision is arbitrary, capricious, or unreasonable. *See e.g. Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Bd.*, 420 N.J. Super. 193, 200 (App. Div. 2011), *citing New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adjustment*, 160 N.J. 1, 14 (1999). It is respectfully submitted that in this matter the motion judge's dismissal of Plaintiff's Complaint with prejudice was arbitrary, capricious and unreasonable in light of the fact that the expert report was served on November 19, 2024, a mere four days after the November 15, 2024 deadline set in the trial court's October 4, 2024 order. Pa569, Pa564 to Pa565.

While Defendants cite case law supporting the dismissal of a complaint due to failure to comply with discovery obligations or court orders (Ab8 to Ab9, Wb6), they ignore the body of case law which holds that dismissal of a complaint with prejudice must be a recourse of last resort. See Pb12 to Pb13.

IV. ALLEGED PREJUDICE TO DEFENDANTS

Defendants claim that they have be severely prejudiced by the "delay" in the litigation of this action. Ab8, Ab15 to Ab16, Wb7. AMC argues that the

motion judges "finding" that Defendants were prejudiced by Plaintiff's discovery infraction and the delay is entitle to "'substantial deference'" Ab12, Ab15 to Ab16, *citing Town of Kearney v. Brandt*, 214 N.J. 76, 91 (2013). The record on appeal, however, does not reveal any evidentiary proceeding or even analysis that resulted in such a "finding." Thus, it cannot be said that the motion judge made any "finding" as to prejudice suffered by Defendants that is entitled to "substantial deference."

Moreover, even if such a finding was made, in order for a judge's finding to be accorded substantial deference on appellate review it must be supported by "'adequate, substantial, and credible evidence.'" *Town of Kearny, supra*, 214 N.J. at 91, *citing Pheasant Bridge Corp. v. Twp. of Warren*, 169 N.J. 282, 293 (2001), *cert. denied*, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002). Here, Defendants' claim that they were prejudiced by a "delay" in the litigation of this action is not supported by "adequate, substantial, and credible evidence." As in noted in Plaintiff's previous brief, there is no proof that witnesses have become unavailable due to such "delay." Pb17 to Pb18. Any "prejudice" resulting from the age of this matter is prejudice to all the parties, not just the Defendants.

Moreover, AMC's claim over $150,000 in attorneys fees were incurred the defense of this action (Pa51, T8-4) is unsubstantiated. Furthermore, as

previously stated, AMC's defense efforts have been excessive at times and, if the defense costs are reasonable, they should be expected in a case such as this where the plaintiff has suffered catastrophic injuries. See Pb18 to Pb19.

Finally, Mr. Weider contends that "the burden should not shift requiring the defendants to counter the Plaintiff's attempts to rebut the prejudice arguments." Wb7. No authority is cited for that illogical proposition. Certainly, if Defendants are claiming prejudice, they have the burden of proving it.

V. AMC'S CONTENTION THAT THE MOTION JUDGE HAS "LIVED WITH" THIS CASE.

AMC comments that the motion judge has "lived with" this case. Ab12, Ab16. Apparently, by doing so AMC attempting to convey that this matter has been a strain on the motion judge. While the undersigned disagrees with trial court' dismissal of Plaintiff's Complaint with prejudice, AMC's comments regarding the motion judge's "living with" this case underestimates her ability to manage cases. Trial judges manage cases all the time, some of which are as old or older than this one. This is particularly true of presiding civil judges such as the motion judge in this case. As the Supreme Court has noted "our judges are made of sterner stuff. . . ." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 541 (1995).

While it is understandable that the motion judge may have been frustrated by the history and length of this case, this Court has said that Any frustration that the motion judge and defense counsel may have had with any infraction of the rules of discovery that Plaintiff may have committed does not justify the imposition of the "ultimate sanction" of dismissal with prejudice. *Sert v. Loconte*, Docket No. A-706-20, 2021 N.J. Super. Unpub. LEXIS 2962 (App. Div. December 7, 2021) (Pa597 to Pa600), *9-10, *citing Abtrax Pharm., Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499, 514 (1995).

VI. DEFENDANTS' CLAM THAT PLAINTIFF "DISREGARDED" THE OCTOBER 4, 2024 ORDER AND THAT SUCH CONDUCT WAS "CONTUMACIOUS."

Defendant's claim that Plaintiff "disregarded" the trial court's October 4, 2024 order. Ab9, Ab10, Wb1, Wb5. AMC describes Plaintiff's conduct as "contumacious.' Ab9. Plaintiff did not "disregard" the order because she served the expert report a mere four days after the November 15, 2024 deadline imposed by the order as soon as it became available. Pa569. Under no circumstances can doing one's best to comply with a deadline, but falling four days short be deemed to be "a disregard"; let alone "contumacious."

Since Plaintiff did serve the expert report, it cannot be said that her conduct was contumacious. *Compare Abtrax Pharms. v. Elkin Sinn, supra,* 139 N.J. at 509, 520 (contumacious conduct found where plaintiff's president

and majority stockholder concealed the existence of documents and made false statements under oath); *Fik-Rymarkiewicz v. University of Med. & Dentistry of N.J.* 430 N.J. Super. 469, 482 (App. Div.), *certif. denied*, 214 N.J. 118 (2013) (contumacious conduct found were plaintiff refused to comply with discovery demands). Indeed, the orders dismissing Plaintiff's Complaint with prejudice and denying her final Motion for Reconsideration did not contain a finding that Plaintiff's failure to serve an expert report by November 15, 2024 was contumacious. Pa572 to Pa573, Pa579, Pa583 to Pa584.

AMC also claims that Plaintiff failed to comply with the trial court's October 4, 2024 order (Pa564 to Pa565) by not filing a motion to reinstate her complaint and pay the $300 sanction to AMC by December 30, 2024. Ab1, Ab2, Ab10. Mr. Wieder also claims that Plaintiff failed to comply with the trial court's October 4, 2024 order by not filing a motion to reinstate her complaint by December 30, 2024. Wb4. Since Plaintiff's Complaint against AMC had been dismissed with prejudice before December 30, 2024 (Pa572), these provisions became moot. This is because they contemplated restoration of a Complaint that had been dismissed without prejudice. Since a motion to reinstate Plaintiff's Complaint would have been inappropriate under these circumstances, Plaintiff's counsel instead filed a Motion for Reconsideration to vacate the December 16, 2024 order. Pa573 to a576.

VII. THE FOUNDATION OF THE CAUSE OF ACTION ELEMENT

As noted in Plaintiff's previous brief, the Supreme Court has held that:

> "The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious."

Abtrax Pharms. v. Elkin Sinn, supra, 139 N.J. at 515 *quoting Lang v. Morgan's Home Equip. Corp.*, 6 N.J. 333, 339 (1951)). As discussed in Plaintiff's prior brief (at Pb10 to Pb12) and above, Plaintiff service of an expert report four days after the November 15, 2004 deadline was not contumacious.

Nor did the October 4, 2024 order requiring the service of the report go to the "very foundation" of Plaintiff's cause of action as explained in Plaintiff's previous brief. Pb10, Pb13. In support of this, Plaintiff noted that she had served reports by Vincent R. Vicci, Jr., O.D. and Nathalia Broderick, O.D. AMC contends that these doctor do not qualify as experts in this action. Ab13. Even if this is the case, New Jersey courts have long permitted treating physicians to offer medical testimony regarding the diagnosis and treatment of their patients, pursuant to *N.J.R.E.* 701. *Delvecchio v. Twp of Bridgewater*, 224 N.J. 559, 576 (2016). Insofar some of Plaintiff's injuries, such as those to her neck, back and chest are clearly the natural result of the assault in question,

this case may proceed without expert medical opinion. See *Kelly v. Borwegen*, 95 N.J. Super. 240, 243-244 (App. Div. 1967).

AMC also argues that Plaintiff cannot rely on the testimony of Drs. Vicci and Broderick because they failed to raise the issue involving these providers in the court below. Ab14 *citing Nieder v. Royal Indemnity Co.*, 62 N.J. 229, 234 (1973) (*quoting Reynolds Offset Co., Inc. v. Summer*, 38 N.J. Super. 542, 548 (App. Div. 1959)). *Nieder* is distinguishable from this case in that there factual data was presented to the Supreme Court that was not presented to the courts below. 62 N.J. at 234-235. Here, by contrast, the reports of Drs. Vicci and Broderick were part of the record below. Pa313 to Pa314, Pa431 to Pa436.

In *Reynolds Offset Co., Inc. v. Summer, supra,* this court considered an issue not raised below in light of the nature of the issue. 58 N.J. at 549. Under the circumstance here, the availability of the testimony of Drs. Vicci and Broderick should be considered to establish that that the trial court's October 4, 2024 order requiring the service of an expert report by November 15, 2024 did not go to the "very foundation" of Plaintiff's cause of action. This is because both Defendants cite *Abtrax Pharm., Inc. v. Elkins-Sinn, Inc.*, *supra*, (Ab11,Wb5) which holds that a violation of an order for discovery

that goes to the "very foundation" of the cause of action may be grounds for dismissal of a complaint with prejudice. 139 N.J. at 515.

VIII. AMC'S CONTENTION THAT PLAINTIFF'S EXPERT REPORT WAS SUBMITTED WITHOUT AN "EXCUSE."

AMC contends that the expert report in question was served without any excuse or explanation as to why it was served after the November 15, 2024 set by the trial court's October 4, 2024 order. Ab2, Ab7, Ab10. AMC is wrong; Plaintiff's counsel November 19, 2024 letter to the motion judge explained that "[t]he report was obtained as quickly as possible." Pa569. If a further explanation needed, the reason for the delay can be determined on remand.

AMC also argues that Plaintiff did not serve a Certification of Due Diligence pursuant to *R.* 4:17-7 along with the report. Ab2, Ab7, Ab11, Ab12, Ab13. This argument is misplaced. *R.* 4:17-7 pertains to amendments to answers to interrogatories The report served on November 19, 2024 was not such an amendment; it was a replacement for the report of the late Dr. Lehrer, submitted pursuant to the trial court's October 14, 2024 order. Pa564 to Pa565. The reasons as to why the report had to be served after the discovery date following the death of Dr. Lehrer are set forth in the certification of Plaintiff's counsel date September 19, 2024. Pa531 to Pa533. Moreover, the trial court's October 4, 2024 did not specify that the report was to be served as served as an amendment to Plaintiff's answers to interrogatories. Pa564 to Pa265.

Moreover, AMC cites *O'Donnell v. Ahmed*, 363 N.J. Super. 41, 51 (Law Div. 2003) out of context. Ab11; Ab13. The part of the opinion cited by AMC deals, not with an amendment to answers to interrogatories, but to a motion to extend discovery after a trial date has been set requiring a showing of exceptional circumstances under *R.* 4:24-1(c), 363 N.J. Super. at 51.

IX. AMC'S CONTENTION THAT PLAINTIFF DID NOT OPPOSE THE ENTRY OF THE ORDERS DISMISSING THE HER COMPLAINTS WITH PREJUDICE.

Defendants claim that Plaintiff did oppose their applications under the 5day rule which resulted in the orders dismissing Plaintiff's Complaint with prejudice. Ab1, Ab6, Ab7, Wb4. As explained in Plaintiff's previous brief at Pb14), however, the November 19, 2024 letter of Plaintiff's counsel informing the motion judge that the report of the substitute expert had been served on counsel (Pa569) should have had the effect of countering the submission of the order dismissing Plaintiff's Complaint with prejudice. As stated in Plaintiff's previous brief, while the letter did not explicitly object to the proposed order, to say that the letter was not submitted to counter the proposed order is to elevate form over substance. Moreover AMC cites no authority for its contention that lack of formal opposition the entry of the order dismissing Plaintiff's Complaint with prejudice bars Plaintiff's appeal. Ab3.

X. PLAINTIFF'S MOTION FOR RECONSIDERATION.

AMC contends that Plaintiff's Motion For Reconsideration of the lower court's December 16, 2024 order was improperly filed. Ab18 to AB19. AMC is mistaken. The cases cited by AMC actually show that the Motion for Reconsideration was appropriate. In *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi*, 398 N.J. Super. 299 (App. Div.), *certif. denied* 195 N.J. 521 (2008) this court said:

> "Reconsideration should be utilized only for those cases . . . that fall within that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence."

398 N.J. Super. at 310, *quoting D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). In *State v. Puryear* , 441 N.J. Super. 280 (App. Div. 2015), this court states that "[t]he proper object of reconsideration is to correct a court's error or oversight." *Id.* at 294 , *citing Palombi v. Palombi*, 414 N.J. Super. 274, 288 (App. Div. 2010).

These purposes were served by Plaintiff's Motion for Reconsideration. The certification in support of the motion pointed out that the report of the expert who substituted by the late Dr. Lehrer were served on November 19, 2024 (Pa576) and therefore the motion judge erroneously ordered the dismissal

of Plaintiff's claims against AMC by order dated December 16, 2024. Pa572. Moreover, the motion was intended to correct an oversight on the part of the motion judge since her December 16 order did not indicate that the motion judge considered the service of the expert report on December 16, 2024. *Ibid.*

Finally, even if Plaintiff's Motion for Reconsideration was improperly filed as AMC contends, this appeal seeks review of the trial court's December 16, 2024 order and its January 17, 2025 order as well as the January 31, 2025 order denying Plaintiff's Motion for Reconsideration. Pa285, Pa288.

CONCLUSION

For the foregoing reasons, as well as those stated in the previous brief on behalf of Plaintiff/Appellant Shirley A. Goodheart filed in this Court, it is respectfully submitted that the trial court's December 16, 2024, January 17, 2025 and January 31, 2025 orders must be reversed and this matter should be remanded to the trial court for restoration to the active trial calendar.

Respectfully submitted,

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Dated August 8, 2025