Superior Court of New Jersey
Appellate Division

Docket No. A -001993-24	
ANGELA GRAY Plaintiff/Appellant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-3860-23
v.	CIVIL ACTION
UNIVERSITY HOSPITAL and JOHN DOES ONE THROUGH TEN Defendants/Respondents	SAT BELOW: HON. RICHARD T. SULES, J.S.C.

PLAINTIFF/APPELLANT ANGELA GRAY'S BREIF IN SUPPORT OF AN APPEAL FROM THE HONORABLE RICHARD T. SULES J.S.C'S NOVEMEBR 22, 2024 ORDER DISMISSING THE COMPLAINT WITH PREJUDICE.

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PRELIMINARY STATEMENT

On April 19, 2023, the arbitrator in the case of Angela Gray v. University Hospital docket number ESX-L-1007-20 issued an order following arbitration of this matter in favor of respondent University Hospital (Exhibit “PA1”). The arbitrator retired Judge Howard Kessler issued that order even though he had an undisclosed conflict of interest. During the final day of testimony on December 14, 2023 the arbitrator informed claimant’s counsel for the first time that prior to going on the bench in 2004, he was corporate counsel for Chilton Memorial Hospital for over 20 years. In 2001, claimant's counsel filed a lawsuit against Chilton Memorial Hospital. That litigation resulted in a trial in 2005 in which claimant's attorney’s client prevailed and was awarded $200,000.00. The case then settled for $300,000.00. If Gray's attorney knew of this situation and the conflict it presented for Judge Kessler, he would never had approved of him as arbitrator.

Gray's counsel then filed a verified complaint pursuant to R.4:67 et seq., seeking to vacate Judge Kessler's decision and remove him as the arbitrator (Exhibit “PA2”).

On November 22, 2024, the Honorable Richard T. Sules, J.S.C. dismissed Gray's

verified complaint on entire controversy, collateral estoppel and procedural grounds [1](Exhibit "PA3"). Judge Sules ignored the fact that the decisions upon which his collateral estoppel and entire controversy decisions were based were made by an arbitrator who had an undisclosed conflict of interest. Those decisions therefore should never have been made by a conflicted arbitrator. In addition the verified complaint was filed pursuant to R.4:67 et seq. which was also ignored by Judge Sules. Furthermore, if Judge Sules found a procedural error in the complaint, he should have dismissed without prejudice to allow for correction.

Claimant now seeks to reserve Judge Sules' decision and remove Kessler as arbitrator and vacate his decision.

PROCEDURAL HISTORY/STATEMENT OF FACTS

On or about February 6, 2020 a complaint was filed on behalf of Angela Gray (Exhibit "PA4") in the Superior Court of New Jersey. In that complaint, Ms. Gray asserted that she suffered from a hostile work environment and retaliation in violation of New Jersey's Law Against Discrimination N.J.S.A. 10:5-1 et seq. Ms. Gray asserted that she observed her supervisor having sex in the office with a co-employee.

[1] The procedural history and statement of facts are combined because they are directly related.

Plaintiff further asserted that her employment was terminated after her supervisor believed that Ms. Gray knew about the sexual liaison he had with another employee.

On or about July 2, 2020 defendant hospital filed an answer (Exhibit "PA5"). On or about October 8, 2021, the court filed an order dismissing the complaint and the case was submitted to arbitration (Exhibit "PA6").

Negotiations between counsel took place as to the identity of the arbitrator. Both counsels were interested in using the services of retired Judge Kessler and the American Arbitration Association forwarded his credentials (Exhibit "PA7"). Nowhere in those credentials was it listed that the Judge had been employed as corporate counsel for Chilton Memorial Hospital in Pequannock, New Jersey for an extended period of time ending in early 2000's. Judge Kessler left his position at Chilton Memorial Hospital in 2019 to take seat in the Superior Court of New Jersey. The judge left the hospital in 2003. In 2001 Gray's attorney Mr. Mulick began a lawsuit against Chilton Memoria Hospital. That case resulted in a trial in 2005. At that trial the jury entered a verdict for plaintiff in the amount of $200,000. (Exhibit "PA8") The case then settled for $300,000. That case resulted in extensive publicity in local newspapers and legal journals because of the unique nature of plaintiff's cause of actions (Exhibit "PA8"). Plaintiff in that case asserted that she was terminated as an employee of the hospital because she received a positive HIV test result which later turned out to be false. This resulted in a large black

eye for Chilton hospital because the jury found that plaintiff was terminated as an employee because of a medical diagnosis.

After Judge Kessler found for respondent University Hospital, and Gray learned of his conflict of interest, she sought to vacate that decision and remove Judge Kessler as arbitrator because of an undisclosed conflict. A verified complaint was filed pursuant to R.4:67 et seq. on or about June 16, 2024 (Exhibit "PA2"). University Hospital then sought to dismiss that complaint for failure to state a claim upon which relief could be granted On or about November 22, 2024, the Honorable Richard T. Sules, J.S.C. granted University Hospital's motion and dismissed the case with prejudice. (Exhibit "PA3"). Judge Sules based his decision upon the theories of res judicata and the entire controversy doctrines. He ignored the fact that Judge Kessler's decisions with regard to those theories were invalid because of his conflicts. Judge Sules also found procedural errors. However, Gray does not agree the verified complaint was filed improperly. If a procedural error existed the complaint should have been dismissed without prejudice so a correction could be made. Dismissing the case with prejudice left plaintiff with no legal recourse.

POINT I

THE ARBITRATOR'S FAILURE TO DISCLOSE HIS LONG-TERM EMPLOYMENT RELATIONSHIP WITH A HOSPITAL THAT PLAINTIFF'S COUNSEL SUCCESSFULLY SUED WOULD HAVE CAUSED PLAINTIFF TO OBJECT TO HIS APPOINTMENT. NO EVIDENCE THAT THE ARBITRATOR WAS ACTUALLY BIASED IS REQUIRED FOR HIS REMOVAL. (See court decision pages 20-22.)

The trial court spent most of its opinion analyzing the theories of res judicata and entire controversy doctrines. The court did not understand that all of that analysis is irrelevant if the arbitrator who did the analysis should have been disqualified as in this case. The arbitrator, Judge Kessler, failed to disclose his long-term relationship with Chilton Memorial Hospital. Respondent's counsel would never allow him to be the arbitrator if he knew the judge worked for the hospital against whom plaintiff's counsel scored a major trial discovery.

Pursuant to N.J.S.A 2A:24-8 an arbitration award can be vacated and a rehearing ordered for a variety of reasons including: the award was procured by corruption, fraud or undue means, the presence of evident partiality or corruption in the arbitrator, where the arbitrator is found to have misbehaved in a manor prejudicial to the rights of any party or the arbitrator exceeded or so imperfectly executed his/her powers that a mutual, final definite award upon the subject matter submitted was not made. In the present matter, Judge Kessler's failure to disclose his long-term employment with Chilton Hospital raises issues of corruption, fraud, undue means, partiality, and prejudicial behavior.

The court in Minkowitz v. Israeli, 433 NJ Super 111 (App. Div. 2013) held that New Jersey has a strong public policy favoring settlement of disputes through fair arbitration. That court also held that the party seeking to vacate an arbitration award must first obtain trial court review of the award. An arbitration award may be vacated where it violates a clear mandate of public policy. Arbitrators must conduct the proceedings in an evenhanded manor and treat all parties with equality and fairness at all stages of the proceedings. An arbitrator must maintain broad public confidence in the integrity and fairness of the arbitration process. Id. 131-147 Moreover, arbitrators have a duty of reasonable inquiry in disclosing to parties any facts that might affect their impartiality during the arbitration. Del Piano v. Merrill Lynch, 372 NJ Super 503, 516 (App. Div. 2004)

In interpreting N.J.S.A 2A:24-8 the court in Varcon Associates v. Tri-County Asphalt, 86 NJ 179, 213 (1981) held that when a relevant fact is not disclosed at the outset of arbitration proceedings and the award is later challenged, a reviewing court may vacate the award if it concludes that the undisclosed fact would have been such as to lead a reasonable person to object to the designation of the arbitrator in question. There need not be evidence that the arbitrator was actually biased.

In the present matter, the arbitrator's failure to disclose a real and perceived conflict of interest requires the court to vacate the award pursuant to the statutory requirements.

During the selection process by counsel herein, pursuant to the rules of the

American Arbitration Association (AAA), Judge Kessler failed to disclose a real and perceived conflict of interest. Judge Kessler failed to disclose that he had been employed as corporate counsel by Chilton Hospital while plaintiff's attorney sued that institution. It was not until discovery was completed that a first and second summary judgment motion decided and hearing testimony completed in December 2022 that the arbitrator revealed his long-term employment with Chilton.

Gray's attorney represented a woman employee of Chilton who asserted that her employment was terminated once it became known that she tested positive for the HIV virus. Judge Kessler was not the trial attorney. That case was vigorously litigated and a trial took place in 2005. At that trial, the jury found that Chilton did violate the law when it fired the plaintiff after it became well known that claimant tested positive. The jury awarded plaintiff $200,000 for lost wages and $100,000 was granted in attorney's fees. That decision received ample media coverage in both local newspapers and legal journals.

While Judge Kessler left employment with Chilton and became a Judge of the superior court in 2004, it is difficult to believe that he did not have knowledge of that jury verdict since it was such a huge black eye for Chilton. After all, the jury found that a hospital fired an employee because of a medical diagnosis.

If Judge Kessler's employment with Chilton had been known to plaintiff's counsel during the arbitrator selection process, he never would have consented to his appointment. Even though the trial against Chilton took place years ago, why would

plaintiff's counsel select an arbitrator who was employed in a high-level position by an institution he successfully sued? Furthermore, there is little doubt that the arbitrator was aware of the prior superior court litigation and trial as it was ongoing while he was still employed by Chilton. He left Chilton in 2004. However, after such a long tenure at the hospital, he must have maintained an interest in that institution and became aware of the media attention that case generated. The arbitrator's failure to disclose coupled with his treatment of the evidence herein establishes prejudicial misbehavior, partiality, corruption, fraud and undue means. Although actual bias need not be established.

If the arbitrator's decision is allowed to stand, the public's trust in the fairness of the arbitration process will be severely undermined.

Finally, if the trial court found a procedural error, he should have dismissed the complaint with prejudice to allow for correction. Instead he dismissed with prejudice depriving plaintiff of a path forward under the law. In addition, with regards to the theories of collateral estoppel and entire controversy doctrine neither apply herein. The arbitrator's failure to disclose a conflict was not discovered until after the trial concluded. So how could those issues have been decided earlier.

Conclusion

For the above cited reasons the appellate court should reverse the trial court's decision and send the case back for a new arbitration and a new arbitrator.

Respectfully Submitted,

Mark Mulick, Esq.

ANGELA GRAY, Plaintiff-Appellant, v. UNIVERSITY HOSPITAL, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-001993-24 ON APPEAL FROM SUPERIOR COURT, LAW DIVISION ESSEX COUNTY, DOCKET NO. ESX-L-003860-23 Sat below: Hon. Richard T. Sules, J.S.C.

AMENDED RESPONSE OF DEFENDANT/RESPONDENT UNIVERSITY HOSPITIAL IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL OF THE TRIAL COURT'S NOVEMBER 22, 2024 ORDER

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Dated: October 14, 2025

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PRELIMINARY STATEMENT

This matter arises out of a binding arbitration hearing that was held in front of retired Essex County Superior Court Judge Donald Kessler in December 2022. At issue during the arbitration hearing was whether Appellant Angela Gray ("Appellant") was subjected to sexual harassment under the New Jersey Law Against Discrimination ("NJLAD") while on a temporary work assignment at Respondent University Hospital ("Respondent" or "UH"). After a three-day evidentiary hearing and extensive post-hearing briefing, Judge Kessler entered a Final Award in Appellant's favor on April 19, 2023.

Following Judge Kessler's decision, Appellant filed a Complaint in Superior Court demanding judgment against Respondent for damages under the NJLAD and New Jersey "common law" on June 16, 2023. However, the factual allegations in the Complaint were virtually identical to the allegations arbitrated in front of Judge Kessler at the arbitration hearing in December 2022. The Complaint also requested that Judge Kessler's Final Award be vacated due to a convoluted conflict of interest that Appellant's counsel, Mark Mulick, Esq., claims to have discovered during the evidentiary hearing (but failed to raise until after the Final Award was issued). According to Mr. Mulick, the alleged conflict relates to Judge Kessler's previous employment with Chilton Memorial Hospital, who Mr. Mulick apparently sued on behalf of another litigant about twenty years ago.

On November 22, 2024, the Trial Court properly granted Respondent's Motion to Dismiss Appellant's Complaint pursuant to Rule 4:6-2(e). In dismissing Appellant's Complaint, the Trial Court correctly concluded that Appellant's Complaint – which involves the same litigants, alleges the same claims, and is based on the same events and laws that Appellant relied on in the final and binding arbitration – was barred by the basic concepts of *res judicata,* collateral estoppel and the entire controversy doctrine. Furthermore, the Trial Court correctly found that Appellant's filing of a new Superior Court Complaint against Respondent was a procedurally improper way to challenge the Final Award issued by Judge Kessler.

Appellant now appeals the Trial Court's November 22, 2024 Order dismissing the Complaint. Instead of appealing the basis on which the Trial Court dismissed the Complaint, Appellant again argues on appeal that the arbitration award should be vacated because of Judge Kessler's alleged conflict. Appellant is missing the point. The Trial Court did not rule on, nor even address, the alleged conflict of interest because, as the Trial Court correctly ruled, the appropriate avenue for challenging Judge Kessler's decision was through a summary action under Rule 4:67-1. Instead, the Trial Court ruled that Appellant's claims against Respondent are all barred by the well-settled, fundamental concepts of *res judicata*, collateral estoppel, and the entire controversy doctrine. Appellant does not argue otherwise on appeal.

Respondent respectfully requests that the Court affirm the Trial Court's

November 22, 2024 Order dismissing Appellant's Complaint, with prejudice.

FACTUAL STATEMENT AND PROCEDURAL HISTORY[1]

The long, somewhat tortured history of this case begins on February 6, 2020, when Appellant commenced a lawsuit against Respondent in the Superior Court of New Jersey, Essex County, Docket No. ESX-L-001007-20, alleging that she was sexually harassed and retaliated against during a temporary work assignment at UH in violation of the NJLAD. (PA3 at 53a-57a).[2] As it turned out, Appellant was party to an arbitration agreement with her employer, Adecco Staffing, USA, of which Respondent was a third-party beneficiary. As a result, Respondent asked Appellant to consent to arbitration with the American Arbitration Association ("AAA"). Appellant refused, which required Respondent to file a motion to dismiss and compel arbitration. (Ra001-Ra002).[3] After initially opposing the motion – which required costly briefing and preparation for oral argument by Respondent's counsel – Mr. Mulick eventually conceded that AAA was the appropriate forum and withdrew his opposition once oral argument on the motion started on October 8, 2021. (PA5 at 70a). The Court then dismissed the complaint with prejudice and submitted the matter for arbitration before AAA. (PA5 at 70a).

[1]Respondent has combined the factual statement and procedural history for the Court's convenience given the intertwined nature of the facts and procedural history.

[2] Citations to "PA__ at ___a" refer to Appellant's Appendix.

[3] Citations to Ra__ refer to Respondent's Appendix submitted with this Brief.

I. The Parties' Selection of Judge Kessler as Arbitrator and the Arbitration Proceedings

AAA provided the Parties with a panel of arbitrators, including the resumes of each of the proposed arbitrators. After reviewing the panel and the resumes provided for each proposed arbitrator, the Parties agreed on Judge Kessler as the arbitrator. (PA2 at 45a, ¶ 16). Judge Kessler's resume provided, among other things, that he "[s]erved as corporate counsel to Chilton Memorial Hospital in Pompton Plains, NJ for over 25 years." (PA6 at 76a).

After months of discovery, Appellant's retaliation claim was dismissed on summary disposition by Judge Kessler on August 5, 2022. (PA1 at 2a). Appellant's hostile work environment claim then proceeded to an evidentiary hearing that took place from December 12 through December 14, 2022. (PA1 at 2a). On April 19, 2023, Judge Kessler entered a Final Award in Respondent's favor and dismissed Appellant's remaining hostile work environment claim in its entirety. (PA1 at 1a-40a).

II. Mr. Mulick Files a Procedurally Deficient Complaint Against Respondent, which the Trial Court Dismissed With Prejudice.

Following the Final Award, Mr. Mulick sent a barrage of communications to AAA demanding that the Final Award be vacated and that Judge Kessler be removed as the arbitrator because Mr. Mulick claimed to have learned of Judge Kessler's previous employment with Chilton Memorial Hospital on the last day of the

evidentiary hearing. (Ra003-Ra013). According to Mr. Mulick, this created a conflict of interest for Judge Kessler because Mr. Mulick won a case against Chilton Memorial Hospital on behalf of another individual in 2005 (*after* Judge Kessler's employment at Chilton had ended). (Ra008). He then began sending improper subpoenas to Respondent before eventually filing a motion to reinstate Appellant's original state court filing (ESX-L-001007- 20) on June 7, 2023. (Ra014-Ra020). In response to the filing, Respondent submitted a letter to the Superior Court explaining that Appellant's motion was procedurally improper. (Ra021-Ra026). Specifically, Respondent explained that the proper vehicle for challenging an arbitration award (which Appellant appeared to be attempting to do) is to file a summary action under Rule 4:67-1. (Ra022). Presumably in response, Mr. Mulick voluntarily withdrew the motion to reinstate the case on June 15, 2023. (Ra027). Oddly, Appellant then filed a new Complaint against Respondent on June 16, 2023. (PA2 at 42a-51a). Rather than simply request that Judge Kessler's award be overturned, Appellant's new Complaint (which was not a summary action under Rule 4:67-1) brought the identical causes of action against Respondent that were previously arbitrated with AAA. (PA2 at 42a-51a).

As a result, on June 22, 2023, Respondent's counsel sent Mr. Mulick a frivolous litigation letter, demanding that the new Complaint be withdrawn. (Ra028-Ra030). Respondent's counsel explained that, to the extent Appellant was attempting

to relitigate her previously arbitrated claims against Respondent, these claims were clearly barred by fundamental concepts of *res judicata,* collateral estoppel and the entire controversy doctrine. Respondent's counsel further explained (again), that to the extent Appellant was attempting to overturn Judge Kessler's award, such an application should be made as a summary action under Rule 4:67-1. (Ra028-Ra030). Appellant refused to withdraw the Complaint, forcing Respondent to file a motion to dismiss on July 19, 2023. (Ra031-Ra032).

On November 22, 2024, the Court held oral argument and granted Respondent's motion to dismiss in full. (T22:3-9).[4] In doing so, the Court held that Appellant's claims were barred by *res judicata,* collateral estoppel and the entire controversy doctrine. (T17:23-T19:13). Additionally, the Court noted during oral argument that the correct procedural vehicle for challenging an arbitration award (assuming that was what Appellant was attempting to do) was though a summary action under Rule 4:67-1 as previously pointed out by Respondent's counsel.[5] (T19:14-T20:19).

III. Appellant's Appeal is Dismissed by the Court *Sua Sponte* Twice for Failure to File a Corrected Brief and Appendix.

On March 10, 2025, Appellant filed an untimely notice of appeal of the Trial

[4] Citations to "T__" refer to the Transcript filed by Appellant.

[5] Respondent then made a motion for its attorneys' fees following the Trial Court's dismissal of the Complaint. (Ra033-Ra034). The Court denied Respondent's motion on February 20, 2025, explaining that "[w]hile plaintiff's complaint was meritless in light of the prior arbitration ruling, the court cannot say it was commenced in bad faith." (Ra035-Ra036).

Court's November 22, 2024 Order dismissing Appellant's (second) Complaint. (Ra037-Ra040). Appellant filed her brief and appendix on April 23, 2025. That same day, the Court uploaded a deficiency letter on eCourts stating that Appellant's "brief/appendix . . . has been reviewed and is deficient in several respects." (Ra041-Ra043). The Court instructed Appellant that the "noted deficiencies must be corrected within 15 days or the appeal may be subject to dismissal." (Ra041). Moreover, the Court also docketed a notice on April 23, 2025 to Mr. Mulick stating that his request for oral argument was rejected, and it must be resubmitted. (Ra044-Ra045). While Mr. Mulick filed his corrected oral argument request via eCourts on April 28, 2025, he failed to file an amended brief and appendix within 15 days (*i.e.*, by May 8, 2025) as ordered by the Court. (Ra046). Accordingly, on June 3, 2025, the Court dismissed Appellant's appeal on its own motion for failing to file a timely corrected brief. (Ra047).

On June 11, 2025, Appellant filed a motion to reinstate her appeal. (Ra048-Ra50). In support, Mr. Mulick submitted a certification in which he stated that he did not receive the Court's April 23 deficiency letter until June 5 because it went to his "spam account." (Ra049-Ra50). On June 26, 2025, over Respondent's objections, the Court granted Appellant's motion and ordered Appellant "to comply with the Appellant Clerk's deficiency letter" within thirty (30) days, or by July 28, 2025. (Ra051). The Court's Order further stated that "Appellant's counsel shall

either modify his email settings to accept communications from the Judiciary or check his spam mailbox to ensure communications regarding this case are reviewed in a timely manner." (Ra051).[6]

Incredibly, despite being given a second chance to comply with the Court's April 23 deficiency letter, Appellant failed to file an amended brief and appendix within thirty (30) days of the Court's June 26, 2025 Order – *i.e.*, by Monday, July 28, 2025. On July 29, 2025, the Court *again* dismissed Appellant's appeal on its own motion for failing to file a conforming timely brief. (Ra054). On August 15, 2025, Appellant filed a second Motion to Reinstate the Appeal, arguing that reinstatement of the appeal is justified because Mr. Mulick "searched both [his] email and [his] spam accounts and [he] never received the deficiency letter or the order granting [his] motion to reinstate the appeal until after the appeal was dismissed twice." (Ra055-Ra057). On September 8, 2025, over Respondent's objections, the Court granted Appellant's motion to reinstate the appeal. (Ra058).

After Appellant once again filed a deficient brief and appendix on September 10 and a deficiency notice was indicated on the docket, Appellant submitted an updated brief and appendix, which was accepted and uploaded by the Appellate Division on September 12, 2025. Respondent now opposes

[6] Strangely, the day ***after*** the Court granted Appellant's motion, Mr. Mulick accessed eCourts to file a reply brief in further support of the same, already granted motion. Shortly thereafter, the Court rejected the reply brief because the Court had already granted the motion. (Ra052-Ra053).

Appellant's appeal of the Trial Court's November 22, 2024 Order dismissing the Complaint, with prejudice.

STANDARD OF APPELLATE REVIEW

The applicable standard of appellate review for this appeal is *de novo*. *See G.W. v. Am. Day Cd. Ctrs.*, 2021 N.J. Super. Unpub. LEXIS 831, at *5 (App. Div. May 7, 2021)[7] ("The application of res judicata and the entire controversy doctrine are questions of law, and accordingly, we review those issues de novo . . . Moreover, as these issues arose on a motion to dismiss, we use a de novo standard of review.") (internal citations omitted); *see also Rosenblum v. Borough of Closter*, 2020 N.J. Super. Unpub. LEXIS 1409, at *8 (App. Div. July 15, 2020)[8] ("The applications of res judicata and collateral estoppel are questions of law, . . . which we review de novo.") (citing *Selective Ins. Co. v. McAllister*, 327 N.J. Super. 168, 173 (App. Div. 2000); *Kean Fed' of Teachers v. Morrell*, 233 N.J. 566, 583 (2018)).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT THE DOCTRINE OF *RES JUDICATA* BARS APPELLANT FROM RELITIGATING HER NJLAD CLAIMS AGAINST APPELLANT.

"The doctrine of *res judicata* provides that a cause of action between parties

[7] A true and correct copy of the Court's unpublished decision in *G.W.* is at Ra059-Ra062.

[8] A true and correct copy of the Court's unpublished decision in *Rosenblum* is at Ra063-Ra066.

that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." *Velasquez v. Franz*, 123 N.J. 498, 505 (1991); *see Ping Yew v. FMI Ins. Co.*, 2023 N.J. Super. Unpub. LEXIS 472, at *11 (App. Div. 2023)[9] ("Under the doctrine of *res judicata*, once a 'controversy between parties is fairly litigated and determined, it is no longer open to relitigation.'") (quoting *Wadeer v. N.J. Mfrs. Ins. Co.*, 220 N.J. 591, 606 (2015)) (internal quotation marks and alterations omitted). It is well settled that "[a]n arbitration award has the same effect under the doctrine of *res judicata* as a judgment of the court." *Carino v. Allstate Fin. Servs., LLC*, 2011 N.J. Super. Unpub. LEXIS 888, at *8 (App. Div. 2011)[10] (citing *Raritan Plaza I. Assocs., L.P. v. Cushman & Wakefield of N.J., Inc.*, 273 N.J. Super. 64, 761 (App. Div. 1994)); *Spolitback v. Cyr Corp.*, 295 N.J. Super. 264, 270 (App. Div. 1996).

The doctrine of *res judicata* applies to a subsequent complaint if "(1) the judgment in the prior action [is] valid, final, and on the merits; (2) the parties in the later action [are] identical to or in privity with those in the prior action; and (3) the claim in the other action [] grow[s] out of the same transaction or occurrence as the claim in the earlier one." *Ping Yew*, 2023 N.J. Super. Unpub. LEXIS 472 at *11 (quoting *Rippon v. Smigel*, 449 N.J. Super. 344, 367 (App. Div. 2017)). Accordingly,

[9] A true and correct copy of the Court's unpublished decision in *Ping Yew* is at Ra067-Ra071.

[10] A true and correct copy of the Court's unpublished decision in *Carino* is at Ra072-Ra076.

New Jersey Appellate Courts routinely affirm the trial courts' dismissals of complaints under Rule 4:6-2(e) based on *res judicata* where plaintiffs "sought to relitigate against the same party issues and claims arising from the same controversy that were conclusively resolved on the merits in the prior action." *E.g.*, *Ping Yew*, 2023 N.J. Super. Unpub. LEXIS 472 at *14-15; *Thurman v. Lindenworld Ctr. LLC*, 2015 N.J. Super. Unpub. LEXIS 485, at *11 (App. Div. 2015)[11] (affirming the trial court's dismissal of the plaintiffs' complaint based on the doctrines of res judicata and collateral estoppel where the plaintiffs "had their day in court" in a prior action on the same issues that they raise in the complaint).

The Trial Court correctly found that dismissal is warranted here. The Trial Court properly concluded that Judge Kessler's Final Award was valid, final, and on the merits. (T17:23-25). The allegations asserted by Appellant in the Complaint are identical to the allegations asserted in AAA, and the parties are the same. (T18:1-7). In short, Appellant is blatantly trying to relitigate NJLAD claims against Respondent that were already decided by Judge Kessler in arbitration. This conduct has been expressly forbidden by the New Jersey Supreme Court. *Velazquez*, 123 N.J. at 515 ("Because we find that plaintiff's complaint was adjudicated in federal court on the merits, we will not ignore well-founded principles of *res judicata* and permit an essentially identical complaint to be heard by our state courts."). That Appellant may

[11] A true and correct copy of the Court's unpublished decision in *Thurman* is at Ra077-Ra081.

disagree with Judge Kessler's ruling does not create a basis for a new cause of action. *See id.* at 511-12 ("[A]n 'erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely upon the plea of res judicata . . . . A judgment merely voidable based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct appeal and not by bring another action upon the same cause of action.") (quoting *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 298 (1981)) (alterations omitted).

For these reasons, the Court should affirm the Trial Court's holding that the doctrine of *res judicata* bars Appellant's NJLAD claims pled in the Complaint.

POINT II

THE TRIAL COURT CORRECTLY HELD THAT APPELLANT'S COMMON LAW CLAIM FOR DAMAGES IS BARRED BY COLLATERAL ESTOPPEL AND THE ENTIRE CONTROVERSY DOCTRINE.

In the Complaint, Appellant also "demands judgment against defendant for all damages . . . under Common Law." (PA2 at 48a). The Trial Court correctly held that Appellant's common law claim for damages is based on the same allegations underlying Appellant's NJLAD claims and is thus barred by collateral estoppel and the entire controversy doctrine.[12] (T18:8-T19:13).

[12] Hostile work environment and retaliation claims are a product of statute and not recognized at common law. *See Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 492 (App. Div. 1994) ("[S]upplementary common law causes of action may not go to the jury when a statutory remedy under the LAD exists.").

Collateral estoppel bars Appellant from relitigating any issues that (1) are "identical to the issue decided in the prior proceeding"; (2) were "actually litigated in the prior proceeding"; (3) had a "a final judgment" issued on the merits; (4) "were essential to the prior judgment"; and (5) were asserted against the same party or "in privity with a party to the earlier proceeding." *Ping Yew*, 2023 N.J. Super. Unpub. LEXIS 472 at *12 (quoting *Winters v. N. Hudson Reg'l Fire & Rescue*, 212 N.J. 67, 85 (2012)). Similarly, the entire controversy doctrine precludes Appellant not only from subsequently asserting claims that were litigated, but also from relitigating "all relevant matters that could have been so determined." *Ping Yew*, 2023 N.J. Super. Unpub. LEXIS 472 at *13; *see also Thurman*, 2015 N.J. Super. Unpub. LEXIS 485 at *12 ("The rule encompasses virtually all causes, claims and defenses related to a controversy, . . . and requires all parties in an action to raise all transactionally related claims or risk preclusion."); *see also Shoremount v. APS Corp.*, 368 N.J. Super. 252, 255 (App. Div. 2004) (applying the entire controversy doctrine to arbitration proceedings.").

These principles apply here. As the Trial Court correctly noted, the facts and issues being raised in the Complaint are identical to the facts and issues that were litigated in arbitration. (T18:23-25). Judge Kessler issued a final judgment in consideration of these same facts and issues. (T18:25-19). The parties are also identical. (T19:3-7). Appellant and Mr. Mulick participated in a three-day

evidentiary hearing, during which Appellant called six (6) witnesses – two of whom were the individuals she accused of allegedly creating a hostile work environment – in addition to testifying herself. (PA2 at 45a). The arbitral forum afforded Appellant ample opportunity to have the issues fairly and fully determined. Appellant is simply trying to relitigate these issues by repackaging them as a "common law" claim. This claim is clearly barred by collateral estoppel and the entire controversy doctrine. *See Thurman*, 2015 N.J. Super. Unpub. LEXIS 485 at *11 ("[W]e share the trial court's conclusion that collateral estoppel bars the [plaintiffs'] Current Action. The [plaintiffs] already 'had their day in court' on the ***same issues*** they raise in the Current Action.") (emphasis added).

For these reasons, the Court should affirm the Trial Court's holding that Appellant's common law claims pled in the Complaint are barred by collateral estoppel and the entire controversy doctrine.

POINT III

APPELLANT'S ARGUMENT THAT THE TRIAL COURT SHOULD PERMIT HER COMPLAINT TO ALLOW DISCOVERY ON WHETHER JUDGE KESSLER SHOULD BE REMOVED AS ARBITRATOR IS PROCEDURALLY IMPROPER AND HAS BEEN WAIVED.

The only *new* issue Appellant raised in her Complaint was her request that Judge Kessler be removed as the arbitrator and his final Award be vacated. (PA2 at

48a). The Trial Court correctly found that this claim is procedurally impermissible because Appellant did not follow the appropriate procedure to challenge Judge Kessler's arbitration award. (T20:8-19, T21:12-18). As we previously advised Mr. Mulick, and as the Trial Court advised Mr. Mulick at the oral argument, the proper vehicle for vacating an arbitration award is a summary action under Rule 4:67-1. *See* N.J. Rev. Stat. § 2A:23B-5. (T20:15-19). Among other things, Rule 4:67 requires the Appellant to file a complaint in a summary action, verified by affidavits, which then triggers a briefing and expedited hearing schedule. *See* N.J. Ct. R. 4:67. Although Appellant cites Rule 4:67-1 in the caption of her Complaint, she did not commence a summary action; rather, she commenced a traditional action against Respondent under the NJLAD and common law, with a typical Track 3 discovery period of 450 days. The Trial Court correctly dismissed the Complaint for this reason as well. (T21:12-T22:10).

However, even assuming for purposes of this appeal only that Appellant had properly filed a summary action pursuant to Rule 4:67-1, Appellant waived any objection to Judge Kessler serving as the Arbitrator. Mr. Mulick claims to have first learned of Judge Kessler's previous employment at Chilton Memorial Hospital on December 14, 2022. (PA2 at 46a, ¶ 19). This is blatantly not true. Judge Kessler's resume – which Mr. Mulick includes in Appellant's Appendix at Exhibit PA6 – explicitly states Judge Kessler "[s]erved as corporate counsel to Chilton Memorial

Hospital in Pompton Plans, NJ for over 25 years." (PA6 at 76a). Mr. Mulick therefore knew, or should have known, of Judge Kessler's previous employment with Chilton Memorial Hospital prior to selecting him as the Arbitrator.

Even more so, even if Mr. Mulick was unaware of Judge Kessler's previous employment at Chilton Memorial Hospital until December 14, 2022, Mr. Mulick admittedly and intentionally chose not to raise until ***more than four (4) months*** later on April 20, 2023 – the day after Judge Kessler issued a Final Award in Respondent's favor. (Ra008). In his correspondence with AAA, Mr. Mulick shockingly admitted that he was simply waiting to see if Judge Kessler ruled in his favor. (Ra004). Specifically, he stated "when I found out that the judge had failed to fully disclose his background, I believed the case was over and the evidence was overwhelming in my client's favor." (Ra004). Mr. Mulick went on to state that "[o]f course, I was reluctant to throw everything out the window at that point" and "[i]t wasn't until the judge ruled against the overwhelming evidence that led me to believe he carried a vendetta against me and my client even though it was twenty years in the making." (Ra004).

New Jersey Courts have expressly prohibited this exact conduct, holding that "if a party fails to raise an objection at the time an arbitrator makes a disclosure, that party has waived any right to later object to that arbitrator based on the disclosure." *See Vollers Excavating & Constr., Inc. v. Watchung Square Assocs., LLC*, 2009 N.J.

Super. Unpub. LEXIS 1938, at *14 (App. Div. July 27, 2009)[13] (citing *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 195 (N.J. 1981)). The New Jersey Supreme Court in *Barcon Associates, Inc.* described this waiver as a "simple procedural rule of litigation necessary to avoid unfairness to the other party and waste of adjudicatory resources." *Barcon Associates Inc.*, 86 N.J. at 197. Indeed, the New Jersey Supreme Court explained:

> Courts can only rule on the apparent partiality of an arbitrator if one of the parties objects and brings the matter before the courts. It would be inequitable and wasteful to allow a party to withhold its objections until after the panel has rendered an unfavorable decision.

Id.; *see also Vollers Excavating & Constr., Inc.*, 2009 N.J. Super. Unpub. LEXIS 1938 at *27 ("If a 'reasonable person' would have cause to object to an arbitrator's remaining in a case, that standard must be applied at the time of the disclosure ***not after the award.*** The process of arbitration (and litigation as well) cannot tolerate a 'wait and see' posture as to whether to object to an arbitrator (or judge's) continued serve in a matter.") (emphasis added).

This is exactly what Mr. Mulick did here. Presumably, Mr. Mulick knew of Judge Kessler's previous employment at Chilton Memorial Hospital at the outset of the case given Judge Kessler's inclusion of this on his resume. (PA6 at 76a). But

[13] A true and correct copy of the Court's unpublished decision in *Vollers Excavating & Construction, Inc.* is at Ra082-Ra090.

even if Mr. Mulick did not learn of Judge Kessler's prior employment at Chilton Memorial Hospital until December 14, 2022, he admittedly sat on the issue until Judge Kessler made an adverse ruling. Appellant has therefore waived any objection to Judge Kessler's appointment as the Arbitrator.

POINT IV

APPELLANT FAILED TO PLEAD A *PRIMA FACIE* CASE IN FAVOR OF VACATING JUDGE KESSLER'S FINAL AWARD

Lastly, even assuming for purposes of this appeal only that Appellant had properly filed a summary action pursuant to Rule 4:67-1 and that Appellant did not waive her objection to Judge Kessler's appointment as Arbitrator, Appellant failed to plead facts in the Complaint to meet the heavy burden to vacate the Final Award. New Jersey recognizes a "strong judicial presumption in favor of the validity of an arbitral award." *Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 372 N.J. Super. 503, 510 (App. Div. Nov. 3, 2004). A Court may vacate an arbitration award where "the award was procured by corruption, fraud, or other undue means," or "the arbitrator was partial or corrupt, or committed misconduct thereby prejudicing the parties' rights." *See* N.J. Rev. Stat. § 2A:23B-23(a)(1)-(2).

Here, Appellant appears to be alleging that Judge Kessler was "partial or corrupt." This allegation is based on the premise that Judge Kessler worked for Chilton Memorial Hospital more than twenty (20) years ago, and Mr. Mulick

represented a client in a lawsuit against Chilton Hospital that led to a jury verdict in his client's favor in 2005. (PA2 at 46a, ¶ 20). However, Appellant admits in both the Complaint and in her Appellate Brief that Judge Kessler ***was not even employed*** at Chilton Memorial Hospital when Mr. Mulick obtained the verdict in 2005. (PA2 at 46a, ¶ 20). The Trial Court also noted this fact on the record during oral argument: "[Judge Kessler] was on the bench for ten years before he retired. So, he couldn't have been counsel for the hospital during that period of time." (T10:1-10).

In any event, all Appellant has done is point out what she believes to be an appearance of impropriety. This alone is not enough to disturb an arbitration award. *See Uhrmann v. Labow*, 2020 N.J. Super. Unpub. LEXIS 2450, at *11 (App. Div. Dec. 22, 2020)[14] ("[W]hat might be viewed as an appearance of impropriety does not by itself establish the evident partiality requiring vacation of an arbitration award."); *see also Xuehai Li v. Zhang*, 2023 N.J. Super. Unpub. LEXIS 1050, at *20 (App. Div. June 26, 2023)[15] ("[M]ere dissatisfaction with the arbitrator's evidentiary rulings and credibility assessments are insufficient to disturb an arbitration award."). Rather, Appellant bears the burden of ***proving*** the existence of evident impropriety by Judge Kessler sufficient to vacate the arbitration award. *Del Piano*, 372 N.J. Super. at 509-10 ("[B]ecause of the strong judicial presumption in favor of validity

[14] A true and correct copy of the Court's unpublished decision in *Uhrmann* is at Ra091-Ra095.

[15] A true and correct copy of the Court's unpublished decision in *Xuehai Li* is at Ra096-Ra105.

of an arbitral award, the party seeking to vacate it bears a heavy burden."); *Xuehai*, 2023 N.J. Super. Unpub. LEXIS 1040 at *19-20 (holding that "plaintiff failed to sustain his burden of proof to justify vacating the award" because "[]plaintiff does not set forth any facts . . . which might reasonably support an inference of partiality, corruption or misconduct by the arbitrator"). Here, Appellant has not pled facts or presented evidence suggesting Judge Kessler had any involvement in the case brought against Chilton Memorial Hospital by Mr. Mulick, let alone that his involvement was so significant as to suggest he was not impartial in his handling of the arbitration in this instant matter. As such, Appellant cannot meet her burden to demonstrate that the Final Arbitration Award should be vacated.

CONCLUSION

Appellant was afforded a fair opportunity to litigate her claims against Respondent in arbitration. She did so and lost. Appellant cannot simply refile the same claims against Respondent in the Superior Court under the guise of an alleged conflict of interest involving the Arbitrator – one that Mr. Mulick knew about at the inception of the arbitration based on Judge Kessler's resume. Nonetheless, the Trial Court correctly found that Appellant's Complaint – which involves the same Parties, the same allegations, and the same issues that were decided in a final and binding arbitration – is barred by *res judicata*, collateral estoppel, and the entire controversy doctrine. Appellant's brazen disregard for these very basic legal principles

contravenes the underlying principles of the judicial system and has required Respondent to spend an inordinate amount of time and money fending off Appellant's various procedurally improper and legally unfounded challenges to Judge Kessler's ruling for almost two-and-a-half years. To put it mildly, this matter must be brought to an end.

Respondent respectfully requests that the Court affirm the Trial Court's November 22, 2024 Order dismissing Appellant's Complaint, with prejudice, based on *res judicata*, collateral estoppel, and the entire controversy doctrine.

Respectfully submitted,

JACKSON LEWIS P.C.

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Dated: October 14, 2025

4917-7967-4990, v. 2

Superior Court of New Jersey
Appellate Division

Docket No. A -001993-24	
ANGELA GRAY Plaintiff/Appellant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-3860-23
v.	CIVIL ACTION
UNIVERSITY HOSPITAL and JOHN DOES ONE THROUGH TEN Defendants/Respondents	SAT BELOW: HON. RICHARD T. SULES, J.S.C.

PLAINTIFF/APPELLANT ANGELA GRAY'S BREIF IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION OF APPEAL FROM THE HONORABLE RICHARD T. SULES J.S.C'S NOVEMBER 22, 2024 ORDER DISMISSING THE COMPLAINT WITH PREJUDICE.

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PRELIMINARY STATEMENT

Appellant's lower court action was filed pursuant to R.4:67-1. Following the filing, respondent immediately moved to dismiss. This matter was dismissed. Appellant did not have the opportunity to present this matter in a summary action or otherwise because of that dismissal.

Respondent does not deny that during all relevant times Judge Kessler had an undisclosed conflict with regards to his employment at Chilton Hospital. Respondent also does not deny that information was not provided to the parties in the biographical information submitted by the American Arbitration Association. The reference to Judge Kessler's Chilton employment that respondents referred to is a computer screen buried under several other computer screens in the Judge's present law firm's website. Appellants have the right to rely upon information provided by the American Arbitration Association (AAA) and need not conduct an independent investigation of each arbitrator suggested in this matter.

PROCEDURAL HISTORY/STATEMENT OF FACTS

Appellant relies upon a procedural history and statement of facts provided in its original appellate brief.

POINT I

THE DOCTRINES OF *RES JUDICATA*, COLLATERAL ESTOPPEL AND THE ENTIRE CONTROVERSY DOCTRINE DO NOT APPLY TO THIS MATTER.

The doctrines of *res judicata*, collateral estoppel and the entire controversy doctrine do not apply to this matter as each one of those legal concepts require a showing that the controversy at issue was fairly and entirely heard and decided and a litigant now wants to re-litigate those matters. At no point was Judge Kessler's undisclosed conflict of interest and its effects upon the arbitration of this matter ever decided by anyone. The trial court did not decide that issue and it was never presented during arbitration because it was not discovered until after the arbitration concluded. It is undisputed that appellant did not learn of the undisclosed conflict until December 2022 after the close of evidence.

Moreover, the doctrine of *res judicata* applies only to a subsequent complaint if the judgement is valid, final and on the merits. Judge Kessler's conflict was never decided on the merits by any court whatsoever. Ping Yew v. FMI 2023 N.J. Super., unpub. U LEXIS 472*11 (app. div. 2003). It is appellant's position that Judge Kessler's arbitration decision is null and void because he would not have been chosen as an

arbitrator if his undisclosed Chilton Memorial Hospital employment had been disclosed. Respondent's claim that the trial court correctly held that appellant's common law claim for damages is based on the same allegations underlying appellant's LAD claims and is thus barred by collateral estoppel and the entire controversy doctrine misses the point of this appeal. The lower court never reached a decision on Judge Kessler's undisclosed conflict. Therefore, collateral estoppel and entire controversy do not apply. The facts and issues raised in the complaint are not relevant to this appeal as it is Judge Kessler's conflict that is at issue and not issues decided during the course of arbitration. If respondent theory is accepted then R.4:67-1 would be rendered meaningless as each litigant who seeks relief under that rule is obviously questioning the arbitration decision and requesting the decision be vacated and a rehearing held.

POINT II

APPELLANT'S COUNSEL WOULD HAVE VIOLATED HIS DUTY OF CARE TO HIS CLIENT IF HE ASSERTED THAT JUDGE KESSLER HAD AN UNDISCLOSED CONFLICT IN DECEMBER 2022.

In December 2022**,** appellant learned for the first time that Judge Kessler was a long time chief counsel for Chilton Memorial Hospital. He was there while appellant's counsel Mark Mulick Esq. litigated a case that was tried shortly after he left the hospital. That trial resulted in a judgement for the appellant in the amount of $200,000. The case against Chilton hospital later settled for $300,000. (Appellant Appendix Vol.

1, Exhibit PA7, pg. 80a)

The arbitration of this matter was such that it was overwhelmingly in favor of the appellant. (AAA Transcripts of Proceedings). All of the respondent's witnesses admitted they lied, accused each other of lying or contradicted documents. If appellant's counsel moved to eliminate Judge Kessler as arbitrator at that point it would have been a violation of is duty of care to his client. Salvemini v. Specter, 213 N.J. Super., unpub. Lexis 2942, N.J., In re: Cohen 2011 N.J. Super., unpub. Lexis 1758, N.J.

Contrary to what respondent's claim, appellant was not aware of the Judge's conflict when he was selected for this matter. His employment with Chilton Hospital was nowhere listed in the biographical information submitted by the American Arbitration Association. (Appellant Appendix Vol. 1, Exhibit PA6, Pg. 72a) Appellant had the right to rely upon those documents. It would have been overly burdensome to have required appellant to conduct an individual investigation into the backgrounds of each and every suggested arbitrator. The reference to Judge Kessler's employment to Chilton Hospital cited in respondent's brief is buried under several computer screens in his law firm's biography. The Judge never verbally told appellant's counsel that he was employed by Chilton Memorial Hospital during that period of time until December 2022. While the Judge left the hospital's employment shortly before the referred to trial, it's hard to believe that after his 20+ year service there he was not aware of the case which resulted in a severe black eye to Chilton Hospital since the jury found the hospital fired an employee because of a medical diagnosis.

POINT III

APPELLANT'S FILING WAS NOT PROCEDURALLY DEFECTIVE.

Appellant's filing below was not procedurally defective. It was brought under R.4:67-1 and N.J.S.A. 2A:24-8 which holds that an arbitration award can be vacated and a rehearing ordered if the arbitrator is found to be corrupt, fraud or undo means was present, the evidence of partiality or corruption in the arbitrator, where the arbitrator is found to have misbehaved in a manner prejudicial to the rights of any party or the arbitrator exceeded or so imperfectly executed his powers that a mutual, final definite award upon the subject matter submitted was not made. In the present matter Judge Kessler perpetrated a fraud and misbehavior on the rights of appellant, Angel Gray. In the case of Varcon Associates v. Tri-County Asphalt, 86 NJ 179, 213 (1981) the court held that if an undisclosed fact would have been such as to lead a reasonable person to object to the designation of the arbitrator in question the arbitration award can be vacated. No evidence of actual bias is needed. It is interesting to note that respondent does not even cite the Varcon case or argue against its holding. If the case was procedurally defective, the court should have dismissed it without prejudice to allow for correction and a decision based on the merits.

POINT IV

APPELLANT HAS SET FORTH A PRIMA FACIE CASE THAT JUDGE KESSLER ACTED IMPROPERLY AND HAD AN UNDISCLOSED CONFLICT AND HIS ARBITRATION AWARD SHOULD BE VACATED.

Appellant has set forth a prima facie case that Judge Kessler's corruption, fraud or other undo means requires that his arbitration decision be vacated.

The subject litigation against Chilton Hospital conducted by appellant's counsel began while Judge Kessler was the corporate counsel for that hospital. It ended shortly after he became a Judge and received ample media coverage in newspapers and journals. (Appellant Appendix Vol. 1, Exhibit PA7-PA8, pgs. 80a-83a)

Conclusion

The improper and fraudulent conduct of Judge Kessler's requires his decision be vacated and arbitration be re-litigated.

Respectfully Submitted,

Mark Mulick, Esq.