
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002058-23

FANG LIU,
Plaintiff-Appellant,

v.

Affinity Care of NJ,
WellCare New Jersey,
Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
HUDSON COUNTY

Hon. Jeffrey R. Jablonski,
A.J.S.C.
Sat below

BRIEF AND APPENDIX
FOR
APPELLANT FANG LIU

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PRELIMINARY STATEMENT

On May 28, 2021, plaintiff pro se filed a complaint with the Hudson County Superior Court and amended the complaint on August 16, 2021. Plaintiff sued defendant Affinity Care of NJ ("Affinity Care"), a homecare service agency, and defendant WellCare New Jersey ("WellCare"), a managed care organization, for causing her father's wrongful death on June 2, 2019, while under a homecare service contract from May 12, 2019, to June 8, 2019, and for subsequent cover-up. Plaintiff pursued ten causes of action, including contract-based actions, torts, and fraudulent concealment. The statute of limitations for contract-based actions will not expire until July 14, 2025 (N.J.S.A. 2A:14-1).

On October 22, 2021, the trial court issued an order dismissing the case without prejudice on the basis that the plaintiff was not appointed as administrator at the time of filing. This decision was erroneous, as there was no such statute, and the court was bound by an irrelevant case, Repko v. Our Lady of Lourdes Med. Ctr., 464 N.J. Super. 570 (App. Div. 2020) ("Repko"). Plaintiff appealed the order to the appellate court on November 30, 2021. On December 2, 2022, the appellate court reversed the trial court's decision and remanded that plaintiff should retain an attorney to pursue wrongful death and survivor actions.

On March 3, 2023, the trial judge ordered plaintiff to retain an attorney by April 3, 2023. Subsequently, on March 10, 2023,

plaintiff filed a motion to demand documents that had been concealed by the defendants. On March 31, 2023, after a hearing, the court rejected plaintiff's motion and further ordered plaintiff to retain counsel by April 17, 2023. On May 12, 2023, the trial court dismissed the case without prejudice for the second time because plaintiff was unable to comply with the prior order issued on March 31, 2023. Plaintiff filed a motion for leave to appeal with the appellate court on October 11, 2023, and the appellate court denied the motion on December 12, 2023.

The trial court erred in considering the request for medical records as pre-trial discovery in the order of March 31, 2023. Unlike pre-trial discovery, a medical records request is governed by HIPAA privacy rule (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27 and N.J.A.C. 8:43G-15.3, and should be provided to plaintiff within 30 days upon request. These documents are entitled to plaintiff, who can represent herself to demand them, unaffected by the appellate court's order issued on December 2, 2022.

On March 1, 2024, the trial court issued an order to dismiss the case with prejudice. In this order, the trial court stated that it had given plaintiff sufficient time to comply with the appellate court's order issued on December 2, 2022, and that plaintiff failed to retain an attorney, thereby warranting the court's discretion to bar the suit.

The trial court erred by dismissing a closed case with prejudice since the judge had already ruled on plaintiff's non-compliance and closed the case without prejudice on May 12, 2023 for the same reason. Additionally, the trial judge did not specify any date for plaintiff to reopen the case. There is no legal basis for the judge to determine the sufficient time for plaintiff to reopen the case other than what is determined by the statute of limitations. Plaintiff has the right to retain an attorney and reopen the case before July 14, 2025.

Plaintiff is appealing both the trial court's order on March 31, 2023, and the order on March 1, 2024.

- Defendants have already violated plaintiff's rights to obtain her father's healthcare records and should release all requested documents to plaintiff.
- Plaintiff has the right to reopen the case before the expiration of the statute of limitations for the corresponding causes of action.

Defendants have confirmed the breach of contract (N.J.S.A. 2A:14-1). However, due to the defendants' fraudulent concealment, plaintiff cannot retain an attorney and requests the court's permission to appear pro se.

PROCEDURAL HISTORY

On May 28, 2021, Plaintiff filed a complaint against defendants Affinity Care and WellCare (Pa3 – Pa6).¹

On June 30, 2021, Defendant Affinity Care filed an answer and requested documents (Pa7 – Pa20).

On July 14, 2021, Defendant Affinity Care filed a motion to dismiss (Pa21 – Pa34).

On August 16, 2021, Plaintiff filed a cross-motion to amend the original complaint to pursue ten causes of action and to request documents, encompassing contract-based claims, torts, and allegations of fraudulent concealment (Pa35 – Pa43).

On September 21, 2021, Defendant WellCare filed a notice of appearance. The court granted WellCare's request for an extension to file an answer.

On September 29, 2021, Plaintiff qualified as administrator ad prosequendum (Surrogate's Court of Hudson County Docket No. 322339).

On October 13, 2021, the court held an oral argument on the defendant's motion to dismiss and plaintiff's motion to amend the complaint (1T).²

¹ Pa = plaintiff/appellant's appendix

² 1T = transcript of October 13, 2021

On October 14, 2021, plaintiff qualified as the general administrator (Surrogate's Court of Hudson County Docket No. 322339).

On October 22, 2021, the court granted the defendant's motion and dismissed plaintiff's complaint and amendment without prejudice (Pa44 – Pa48). The New Jersey court allowed plaintiff to amend the complaint upon her appointment as administrator pursuant to N.J.S.A. 2A:31-2. The trial court's failure to clarify this requirement in the procedural guidelines for pro se litigants violated plaintiff's due process rights pursuant to U.S. Const. amend. XIV, § 1.

On November 30, 2021, plaintiff filed an appeal with the appellate division (Case #: A-970-21).

On December 2, 2022, the appellate court reversed the trial court's decision and remanded plaintiff to retain an attorney to pursue wrongful death and survivor actions (Pa49 – Pa66).

On February 4, 2023, the trial court issued a Lack of Prosecution Dismissal Warning (Pa67).

On February 7, 2023, defendant Affinity Care filed a Motion to set a schedule for plaintiff to retain counsel (Pa68 – Pa73).

On March 3, 2023, the trial court ordered plaintiff to retain an attorney by April 3, 2023 (Pa72 – Pa73).

On March 10, 2023, Plaintiff filed a Motion to Demand documents, and requested to extend the date to retain an attorney to 30

days after the delivery of the documents (Pa74 – Pa87).

On March 23, 2023, both defendants, Affinity Care and WellCare, filed motions to oppose plaintiff's motion to demand (Pa88 – Pa96), and defendant Affinity Care submitted a "Client Notes Report" to the court (Pa92).

On March 31, 2023, the trial court held an oral hearing (2T).³

On March 31, 2023, Plaintiff filed a brief to support the Motion to demand documents (Pa97 – Pa102). The court considered plaintiff's request for documents as pretrial discovery and issued an order rejecting plaintiff's motion. The court also extended the date for plaintiff to retain an attorney to April 17, 2023 (Pa103 – Pa104).

On April 17, 2023, defendant Affinity Care filed a motion to dismiss (Pa105 – Pa113). Defendant WellCare joined the motion on April 20, 2023.

On May 12, 2023, the court granted defendants' Motion to dismiss and dismissed plaintiff's case without prejudice since plaintiff was not able to comply with the prior court order issued on March 31, 2023 (Pa114 – Pa115).

On October 11, 2023, plaintiff filed a Motion for leave to appeal with the appellate court (Case #: AM-000071-23) and filed the brief on November 10, 2023 (Pa116 – Pa126). Defendants filed their responses on November 27, 2023 (Pa127 – Pa149).

³ 2T = transcript of March 31, 2023

On December 12, 2023, the appellate court denied the plaintiff's Motion (Pa150). The case has been closed as of May 12, 2023.

On February 14, 2024, defendant Affinity Care filed a motion to dismiss (Pa151 – Pa160).

The trial court stated that the plaintiff had not complied with the appellate court's order for a sufficient time; therefore, it dismissed the case with prejudice on March 1, 2024 (Pa161 – Pa170).

STATEMENT OF FACTS

On May 28, 2021, plaintiff filed a complaint against defendant Affinity Care of NJ ("Affinity Care"), a home care service agency, and defendant WellCare New Jersey ("WellCare"), a managed care organization (Pa3 – Pa6). The complaint was later amended on August 16, 2021 (Pa35 – Pa43). The complaint and its amendment included ten causes of action, encompassing contract-based claims, torts, and allegations of fraudulent concealment.

From May 12, 2019, to June 8, 2019, plaintiff arranged home care services for her father ("decedent") while she was on an international trip. Under the service contract, Affinity Care agreed to provide home care four times a week, totaling 10 hours each week. Defendant WellCare was responsible for authorizing and

overseeing these services. Plaintiff authorized both defendants to take necessary actions for the care during this period.

Starting from at least May 18, 2019, or possibly earlier, the assigned aide failed to fulfill the contract's requirements and left the decedent unattended, as noted in the "Client Notes Report" by defendant Affinity Care (Pa92). Unfortunately, the decedent fell at home during this time and passed away on June 2, 2019.

After the incident, plaintiff made multiple requests for healthcare service records to which she was entitled. However, defendants refused to provide these documents, thereby violating the HIPAA privacy rule (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27 and N.J.A.C. 8:43G-15.3.

On March 1, 2024, the trial judge dismissed plaintiff's suit with prejudice (Pa1 – Pa2).

ARGUMENT

Point I

The trial court lacks a legal basis to dismiss plaintiff's suit with prejudice in the order issued on March 1, 2024. Plaintiff maintains the right to refile the case before the expiration of the statute of limitations relevant to the causes of action.

On March 1, 2024, the trial judge issued an order to dismiss the case with prejudice (Pa1 – Pa2), which had already been closed, citing non-compliance with the court's prior orders issued on March 31, 2023 (Pa103 – Pa104), and May 12, 2023 (Pa114 – Pa115). The order explicitly stated:

"This court has provided more than sufficient opportunity for the Plaintiff to comply with the order of the Appellate Division. This court dismissed the complaint on May 12, 2023, for the Plaintiff's failure to comply with the March 31, 2023, order.

R. 4:37-2 permits the court, for a delinquent party's failure to comply with a court order, to dismiss the complaint. Although dismissal with prejudice is the exception rather than the rule, such a permanent resolution is necessary here. For over one year, the plaintiff has not complied with the Appellate Division's mandate that she retain an attorney. More than sufficient time has passed to allow her to comply. However, she has not done so. The Defendant is, as noted by counsel, entitled to finality in this matter. "

A. R. 4:37-2 does not apply in this situation.

The trial judge dismissed plaintiff's case without prejudice on May 12, 2023 (Pa114 – Pa115), citing plaintiff's failure to comply with the appellate court's order on December 2, 2022 (Pa49 – Pa66), and the trial court's order on March 31, 2023 (Pa103 – Pa104), to retain an attorney by April 17, 2023. Consequently, the

case has remained closed since May 12, 2023. As the trial judge explained, R. 4:37-2 does not apply in this situation for the trial judge to dismiss an already-closed case with prejudice on March 1, 2024 (Pa1 – Pa2), for the same reason—that plaintiff did not retain an attorney.

B. The appellate court's order does not impose a time limit.

The appellate court's order on December 2, 2022 (Pa49 – Pa66), reversed the trial judge's order on October 22, 2021 (Pa44 – Pa48), but did not impose a specific time limit for plaintiff to retain an attorney to pursue wrongful death and survivor actions on behalf of her father's estate.

C. The judge has no legal basis when determining when plaintiff should reopen the case.

Since the judge's order issued on May 12, 2023 (Pa114 – Pa115), did not specify any date for plaintiff to reopen the case, there was no legal basis for the judge to claim that "over one year" is sufficient time for plaintiff to retain an attorney.

D. The order issued on May 12, 2023, does not affect the statute of limitations for the causes of actions in the case.

Plaintiff retains the right to reopen the case before the expiration of the statute of limitations for the following causes

of action, which have a six-year statute of limitations until July 14, 2025:

- Breach of contract (N.J.S.A. 2A:14-1)
- Breach of fiduciary duty (Balliet v. Fennell, 368 N.J. Super. 15, 845 A.2d 168 (App. Div. 2004))
- Consumer protection statutes under the New Jersey Consumer Fraud Act (N.J.S.A. 56:8-1)

Plaintiff has the right to work with an attorney to pursue these causes of action before the expiration date.

E. The arbitrary decision violated plaintiff's constitutional right, liberty to petition.

Plaintiff has followed New Jersey court procedures to file suit within the statute of limitations and to appeal the trial court's decisions. Plaintiff meets all requirements to continue her suit. The dismissal jeopardized the plaintiff's liberty to petition, under the U.S. Const. amend. I and N.J. Const. of 1947 art. I, § 18. Due to unjust treatment, plaintiff is barred from future filings. The decision made it impossible to resolve the dispute in a fair manner.

Point II

In the order issued by the trial court on March 31, 2023, the trial judge erred by mishandling the plaintiff's request for medical records as pre-trial discovery and subsequently rejecting plaintiff's motion to obtain those records.

A. Defendants violated the HIPAA privacy rule (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27 and N.J.A.C. 8:43G-15.3.

According to the HIPAA privacy rule (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27 and N.J.A.C. 8:43G-15.3, Defendant WellCare, as a managed care organization, and Defendant Affinity Care, as a home care service provider, are required to provide copies of requested health records, billing information, and plan information within 30 days after the patient's personal representative or guardian submits the requests. In the latter half of 2019, plaintiff made multiple requests, but both defendants repeatedly violated these statutes by ignoring plaintiff's requests.

On August 16, 2021, plaintiff filed a Motion to Amend Complaint and Demand Documents (Pa35 – Pa43). Subsequently, on March 10, 2023, plaintiff submitted another Motion to Demand Documents (Pa74 – Pa87). However, both motions were dismissed by the trial court on October 22, 2021 (Pa44 – Pa48) (1T), and March 31, 2023 (Pa103 – Pa104) (2T), respectively.

As the personal representative of her father and appointed administrator following his passing, plaintiff is entitled to these documents regardless of whether a legal case is pending. The

statutes do not impose a requirement for plaintiff to retain an attorney when making such requests.

B. The appellate court's order does not prevent plaintiff from obtaining these documents on her own.

In its order issued on December 2, 2022, the appellate court remanded that plaintiff, as the administrator, should be represented by counsel to pursue wrongful death and survivor actions (Pa49 – Pa66). However, the request for medical records falls under the HIPAA privacy rule (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27 and N.J.A.C. 8:43G-15.3, which do not mandate that plaintiff must be represented by an attorney to obtain these documents. Regardless of whether there is an active legal case, plaintiff is entitled to these documents.

C. The judge erred in treating the request for medical records as pre-trial discovery.

Health care records are governed by the HIPAA privacy rule (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27 and N.J.A.C. 8:43G-15.3. Pre-trial discovery procedures do not apply in this context. Moreover, even if plaintiff decides not to pursue the case further in court, she still retains the right to access these documents as per the applicable statutes.

Point III

Defendants confirmed their breach of contract and fraudulent concealment in the falsified "Client Notes Report".

A. Background on the Home Care Service Contract from May 12, 2019 to June 8, 2019

The home care service contract was effective from May 12, 2019, to June 8, 2020. This contract initially covered the period from May 12, 2019, to June 8, 2019. After the contract began, the defendant unilaterally extended it for an additional year until June 8, 2020, with defendant WellCare authorizing the extension without notifying the plaintiff. The contract was terminated by defendant WellCare in early June 2019 after the plaintiff informed both defendants of Mr. Liu's passing.

According to the service contract, defendant Affinity Care was required to send its home care aide to provide care for Mr. Liu at home four times a week, for 10 hours each week, while the plaintiff was overseas. Defendant WellCare was responsible for authorizing and overseeing the service. The plaintiff authorized the defendants to take all necessary measures to conduct the service during this period.

B. Admission of Breach of Contract, contradictions and lack of documentation in "Client Notes Report"

On March 23, 2023, defendant Affinity Care submitted a half-page, incomplete "Client Notes Report" (Pa92) to the trial court in response to plaintiff's Motion to Demand documents filed on March 10, 2023 (Pa74). This document is self-contradictory and falsified, intended to further cover up defendants' malpractice. Even in this falsified document, defendant Affinity Care acknowledged that they breached the contract and did not provide services as required, at least from May 18, 2019, if not earlier, while the service contract was active.

In the "Client Notes Report," defendant Affinity Care described how the service was conducted from their perspective. It did not specify any dates or services offered during this period. Defendant Affinity Care was supposed to commence service on Monday, May 13, 2019. Even assuming that the aide provided services on May 13, May 15, and May 17, 2019, three times as required, there were multiple violations and self-contradictions regarding the service itself and its documentation (Pa97).

- Defendant Affinity Care claimed that on May 18, 2019, the aide was 'denied entry' when attempting to visit Mr. Liu, without explaining the circumstances of the denial.
- Defendant Affinity Care mentioned an update in the records and stated that the supervisor instructed the aide to inform the plaintiff, but did not clarify whether the aide complied

or how the plaintiff responded. From the context, it appeared that plaintiff neither instructed defendant Affinity Care to cease the service nor proposed any solutions to the issue, as defendant Affinity Care stated that the aide made two subsequent attempts on May 19, 2019, and May 28, 2019, respectively, and was still denied entry.

Essentially, defendant Affinity Care acknowledged that they were unable to provide any services due to being "denied entry" since May 18, 2019. However, despite knowing they were breaching the contract and unable to resolve the issue, it does not make sense why defendant Affinity Care did not inform defendant WellCare of the emergency, allowing for a reassessment of the service or suspension to absolve defendant Affinity Care from liabilities as the service provider under the active contract. In turn, defendant WellCare failed in its duty to oversee the service (Pa97). Neither defendant was aware of Mr. Liu's passing until informed by the plaintiff.

Defendant Affinity Care's claim contradicts typical procedures for providing home care services and common sense. The documentation notably omitted crucial details and seemed to attribute their breach of contract to being "denied entry" by the service beneficiary, who had passed away. Reconstructing the

events is challenging since only defendant Affinity Care's aide witnessed them.

C. Defendants' breach of contract, breach of fiduciary duty, violation of NJ Consumer Fraud Act, and fraudulent concealment are substantiated.

In the original complaint filed on May 28, 2021 (Pa3 – Pa6), and its amendment filed on August 16, 2021 (Pa35 – Pa43), the plaintiff alleged causes of action including breach of contract (N.J.S.A. 2A:14-1), breach of fiduciary duty (Balliet v. Fennell, 368 N.J. Super. 15, 845 A.2d 168 (App. Div. 2004)), and violation of consumer protection statutes under New Jersey Consumer Fraud Act (N.J.S.A. 56:8-1). Defendants are confirmed to have committed the alleged actions.

Defendant Affinity Care has persisted in concealing original documents and making contradictory statements. Consequently, the plaintiff remains uninformed of the facts and unable to effectively pursue legal remedies against the defendants. Their fraudulent concealment is also evident.

The plaintiff and the surviving family have endured the wrongful death of the decedent and seek the truth. The court should compel the defendants to produce the original, unaltered records of the service and hold them accountable.

Point IV

Although the appellate court reversed the trial court's decision, plaintiff is unable to comply with the order to retain an attorney due to the defendants' fraudulent concealment of all service records. In situations where the interests of attorneys and plaintiff cannot be aligned, plaintiff should have the right to bring suit pro se.

A. Due to fraudulent concealment and subsequent challenges in uncovering the truth, plaintiff cannot retain an attorney.

As mentioned earlier, plaintiff appealed the dismissal in case # A-000970-21. The appellate court reversed the trial court's decision in an order issued on December 2, 2022, and remanded the plaintiff to amend the case with legal representation (Pa49 – Pa66). However, due to fraudulent concealment and subsequent challenges in uncovering the truth, the plaintiff cannot comply with this order. The decision to retain an attorney is not solely within the plaintiff's control but also depends on how attorneys assess the potential outcomes, unrelated to the merits of the plaintiff's case. Moreover, the plaintiff has the right to maintain the quality of legal counsel. Unless the court appoints an attorney for the plaintiff, plaintiff should have the right to proceed pro se when the interests of attorneys and the plaintiff are not aligned.

B. In this case, the third-party beneficiary has already relinquished power to plaintiff, and the legal basis cited is incorrect.

The appellate court referenced court rules and cases in its order issued on December 2, 2022: "Pursuant to R. 1:21-1(a) (except as provided by Rule 1:21-1, no person is permitted to practice law in this State unless they are a licensed attorney)" (Pa63). Notably, NJ courts always permit individuals to represent themselves in legal matters, a fundamental constitutional right under the U.S. Const. amend. I and N.J. Const. of 1947 art. I, § 18. Self-representation in court does not constitute practicing law.

The estate represents the decedent's property at the time of death and does not possess legal rights as an entity or individual. In this instance, since the decedent did not leave a will, Mr. Liu's surviving wife, Ms. Sun, is the sole beneficiary of the estate. As the court-appointed administrator of her father's estate, authorized by Ms. Sun and the Hudson County Surrogate Court, the plaintiff has the exclusive right to manage the estate. There is no New Jersey statute mandating the retention of an attorney by an administrator, enabling the plaintiff to assert her personal rights and appear pro se in court.

The appellate court also cited Kasharian v. Wilentz, 93 N.J. Super. 479, 482 (App. Div. 1967); R. 1:21-1(a); ("prohibit[ing]

such appearances by non-lawyer fiduciaries where the action involves another's beneficial interests") (Pa63). However, this precedent does not apply here. Before plaintiff's appointment as administrator ad prosequendum at the Hudson County Surrogate Court, Ms. Sun renounced all rights to pursue claims or lawsuits. Thus, there is no potential for conflicting interests of the beneficiary. As the court-appointed administrator ad prosequendum, the plaintiff has the right to advise and represent herself in court.

C. The court's order has created a conflict of laws and violated the plaintiff's right to petition.

Since the administrator ad prosequendum is prohibited from bringing suit in court when unable to retain an attorney due to fraudulent concealment, the court's order has created a conflict of laws and violated the plaintiff's right to petition.

In fact, there is a conflict between NJ Statute R. 1:21-1(a) and Kasharian v. Wilentz, 93 N.J. Super. 479, 482 (App. Div. 1967), with the U.S. Const. amend. I and N.J. Const. of 1947 art. I, § 18. Pursuant to the U.S. Const., art. VI, cl. 2, the Supremacy Clause, the rights under U.S. Const. amend. I, prevail over conflicting state laws. Therefore, if an attorney cannot be retained or designated by the court, the plaintiff should be allowed to proceed pro se.

Every case has community implications. The court's decision might embolden homecare providers and insurance companies to conceal malpractice by withholding critical medical documents from family members, thereby preventing injured parties from seeking legal recourse.

In homecare situations, families rely on providers to care for vulnerable individuals at home when they are unable to do so themselves. Providers are often the sole witnesses to these events. This case could establish a significant legal precedent, potentially shielding homecare providers and insurance companies from accountability for their misconduct. This outcome risks diminishing the quality of homecare services within the community and encourages continued malpractice by these entities.

CONCLUSION

The trial court erred in dismissing the plaintiff's case with prejudice. The plaintiff should have the right to reopen the case before the expiration of the statute of limitations for the causes of action.

Furthermore, the trial court mishandled plaintiff's motion to demand documents and should compel the defendants to provide the concealed records to plaintiff.

The defendants' violations of the contract, fiduciary duty, and consumer rights laws are confirmed. However, due to the defendants' fraudulent concealment and cover-up of facts, the plaintiff cannot comply with the appellate court's order to retain an attorney. In this situation, the plaintiff should be allowed to pursue the case pro se.

Respectfully submitted,



Fang Liu

Dated: June 24, 2024



METHFESSEL & WERBEL

A Professional Corporation

**Superior Court of New Jersey –
Appellate Division
Letter Brief**

Appellate Docket No. A-002058-23

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July 11, 2024

Letter Brief on Behalf of: VC Services, LLC t/a Affinity Care of NJ

Fang Liu

Plaintiff

v.

Affinity Care of NJ,
Wellcare New Jersey

Defendants

Case Type: Civil

County/Agency: Hudson

Trial Court/Agency Docket No.: HUD-L-2170-21

Trial Court Judge/Agency Name: Hon. Jeffrey R. Jablonski, A.J.S.C.

To the Honorable Judges of the Appellate Division:

We represent Respondent VC Services, LLC t/a Affinity Care of NJ. In
accordance with RR. 2:6-2(b) and 2:6-4(a), and in lieu of a more formal filing,
please accept this letter brief in response to Petitioner Fang Liu's brief.

JOEL N. WERBEL>
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Please reply to New Jersey

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PROCEDURAL HISTORY/STATEMENT OF FACTS

On May 28, 2021, Petitioner Fang Liu filed a pro se Complaint against Respondent Affinity Care of NJ (“Affinity Care”) and Respondent WellCare New Jersey (“Wellcare”), alleging that defendants failed to provide adequate homecare services to Mr. Zhaoyan Liu between May and June 2019, resulting in Mr. Liu’s death on June 2, 2019. (Pa3)

On June 30, 2021, Affinity Care filed an Answer to Petitioner’s Complaint. (Pa7) On July 14, 2021, Affinity Care filed a motion to dismiss petitioner’s Complaint for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e). (Pa21) On August 16, 2021, Petitioner filed a separate motion to amend her Complaint to add additional allegations. (Pa35) Petitioner’s motion did not seek to change the named plaintiff in the case. (Pa35) On August 26, 2021, Petitioner filed opposition to Affinity Care’s motion to dismiss. On September 2, 2021, Affinity Care filed opposition to Petitioner’s motion to amend her Complaint. On October 11, 2021, Petitioner filed an additional opposition brief to Affinity Care’s motion to dismiss the Complaint. On October 12, 2021, Affinity Care filed a reply brief in further support of its motion to dismiss the Complaint. On October 13, 2021, Petitioner filed a brief in further support of her motion to amend her Complaint and in further opposition Affinity Care’s motion to dismiss the Complaint.

On October 22, 2021, following oral argument, the Honorable Jeffrey R. Jablonski, A.J.S.C. denied Petitioner's motion to amend her Complaint and granted Affinity Care's motion to dismiss Petitioner's Complaint. (Pa44) On October 25, 2021, Petitioner filed a brief responding to Judge Jablonski's written decision on the motions. On October 27, 2021, Petitioner filed a motion for reconsideration of the court's October 22, 2021 orders. (DA1) On November 4, 2021, Affinity Care filed opposition to Petitioner's motion for reconsideration. On November 17, 2021, Petitioner filed a reply brief in further support of her motion for reconsideration. After oral argument on November 19, 2021, Judge Jablonski denied Petitioner's motion for reconsideration. (DA2) On December 1, 2021, Petitioner filed a Notice of Appeal of Affinity Care's granted motion to dismiss Petitioner's Complaint, Petitioner's denied motion to amend her Complaint, and Petitioner's denied motion for reconsideration. On December 10, 2021, petitioner filed an Amended Notice of Appeal. On April 13, 2022, petitioner filed a Brief and Appendix in support of her appeal. On May 2, 2022, Affinity Care filed a responsive brief. On May 23, 2022, Petitioner filed a reply brief responding to Affinity's responsive brief. On May 24, 2022, the court issued an Order suppressing Petitioner's May 23, 2022 brief.

On November 9, 2022, the court held oral argument on Petitioner's appeal. By Opinion dated December 2, 2022, the court reversed and remanded the trial court's October 22, 2021 Orders, holding that Petitioner could proceed on her claims as administrator *ad prosequendum* for the Estate of Zhaoyan Liu (hereinafter "the Estate") but only with the assistance of a licensed attorney. (Pa49)

Upon the matter's return to the trial court, Respondent filed a motion for an order to set a date certain for Petitioner to comply with this court's Order requiring Petitioner to retain a licensed attorney. By Order dated March 3, 2023, Judge Jablonski required Petitioner to retain an attorney to "draft, file, and serve an Amended Complaint, which shall set forth the causes of action being pursued and the status of [Petitioner's] appointment of administrator ad prosequendum and administrator of decedent's estate" within 30 days. (Pa72)

On March 10, 2023, Petitioner filed a motion to compel the discovery of certain requested documents from Affinity Care and Wellcare. (Pa74) On March 23, 2023, both Affinity Care and Wellcare filed opposition to Petitioner's motion. On March 31, 2023, Petitioner filed a Reply Brief in response to the filed opposition to her motion. On the same date, Judge Jablonski denied Petitioner's motion to compel. (Pa103)

On April 17, 2023, Affinity Care filed a motion to dismiss Petitioner's Complaint with prejudice for failure to comply with the court-ordered deadline to retain counsel. (Pa105) On the same date, Petitioner filed correspondence with the court regarding the pending motion for dismissal. On April 20, 2023, WellCare filed a response to Petitioner's April 17, 2023 letter and joined in Affinity Care's motion for dismissal. By Order dated May 12, 2023, Judge Jablonski granted Affinity Care's motion and dismissed Petitioner's Complaint without prejudice. (Pa114)

On June 29, 2023, Petitioner filed a Notice of Appeal as to the trial court's March 31, 2023 and May 12, 2023 Orders. On July 6, 2023, the court issued a non-finality letter to Petitioner and required her within 15 days to move for leave to appeal or submit either a letter of explanation as to why the appealed orders were final or a letter withdrawing the appeal. (DA3) On July 13, 2023, Affinity Care filed a letter advising the court of its position that the appealed orders were not final and that Petitioner's filed appeal was improperly interlocutory. On July 17, 2023, Petitioner filed her own letter claiming that the appealed orders were final and ripe for appeal. On the same date, WellCare filed their own letter advising that the appealed orders were not final. By Order dated September 14, 2023, this court dismissed Petitioner's appeal without prejudice subject to the filing of a motion for leave to file an interlocutory appeal. (DA5)

On October 10, 2023, Petitioner filed a motion for leave to appeal. On October 11, 2023, Petitioner filed a motion for an extension of time to file a brief in support of her motion for leave to appeal. By Order dated October 23, 2023, this honorable court granted Petitioner's motion for an extension of time. On November 13, 2023, Petitioner filed a brief in support of her motion for leave to appeal. (Pa116) On November 16, 2023, Affinity Care filed opposition to Petitioner's motion for leave to appeal. By Order dated December 12 2023, the court denied Petitioner's motion for leave to appeal. (Pa150)

On February 14, 2024, Affinity Care moved to dismiss Petitioner's Complaint with prejudice due to Petitioner's continued failure to retain counsel in accordance with the court's prior orders. (Pa151) By Order dated March 1, 2024, Judge Jablonski granted Affinity Care's motion and dismissed Petitioner's Complaint with prejudice. (Pa1) Petitioner did not file opposition to Affinity Care's February 14, 2024 motion.

On March 8, 2024, Petitioner filed a notice of the instant appeal. (Pa161) On June 24, 2024, Petitioner filed her Brief and Appendix.

LEGAL ARGUMENT

POINT I

PLAINTIFF MAY NOT CHALLENGE THE TRIAL COURT'S MARCH 1, 2024 ORDER DISMISSING HER COMPLAINT WITH PREJUDICE SINCE SHE DID NOT OPPOSE RESPONDENT AFFINITY CARE'S MOTION FOR SAME

Despite basing her appeal primarily on the trial court's March 1, 2024 Order dismissing her Complaint with prejudice due to her failure to comply with multiple court orders to retain counsel, Petitioner never filed opposition to Respondent Affinity Care's February 14, 2024 motion seeking that dismissal. Thus, Petitioner's appeal of the March 1, 2024 Order is improper since she did not object to Respondent's request for a dismissal below. "An issue not raised below will not be considered for the first time on appeal." North Haledon Fire Co. No. 1 v. Borough of North Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012) (citing Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 391 (1997); Soc'y Hill Condo Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002)). "Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973))

As Petitioner did not raise any arguments in opposition to Respondents' motion for dismissal with prejudice, she may not appeal the court's resultant March 1, 2024 Order. Accordingly, the court must dismiss Petitioner's appeal of that ruling.

POINT II

THE TRIAL COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT WITH PREJUDICE DUE TO HER FAILURE TO COMPLY WITH COURT ORDERS TO RETAIN COUNSEL

In the event that the court considers Petitioner's arguments as to the March 1, 2024 Order of dismissal with prejudice despite her lack of filed opposition below, Respondent submits that the trial court's dismissal was entirely appropriate under the circumstances. This court ordered Petitioner to retain counsel on behalf of the Estate of Zhaoyan Liu in its Opinion dated December 2, 2022 since she cannot appear and prosecute the Estate's claims pro se. See Kasharian v. Wilentz, 93 N.J. Super. 479, 482 (App. Div. 1967); R. 1:21-1(a). Over a year-and-a-half later, Petitioner has still not retained an attorney on behalf of the Estate. This longstanding failure follows this court's original order, the trial court's March 3, 2023 Order setting a date certain for the retention of an attorney and filing of an Amended Complaint in Petitioner's capacity as the administrator ad prosequendum of the Estate, and the trial

court's May 12, 2023 Order dismissing the Complaint without prejudice for failure to comply with the prior orders.

As a result plaintiff's failure to obey multiple orders to retain counsel, R. 4:37-2 permitted the trial court to dismiss the Complaint with prejudice. See Zaccardi v. Becker, 88 N.J. 245, 254 (1982). R. 4:37-2 specifically applies to the failure to of a party to comply with "any order of court" and permits the court to specify that such dismissal is with prejudice. See R. 4:37-2. As this court held in Kohn's Bakery, Inc. v. Terracciano, "[t]here is no doubt at all of the right of a trial judge, as an exercise of discretion, to impose sanctions for violation of the rules or failure to obey the orders of the court, and those sanctions may include dismissal of the action." 147 N.J. Super. 582, 584-85 (App. Div. 1977) (citing Elmore S. & L. Ass'n v. D'Augustino, 103 N.J. Super. 301, 304 (App. Div. 1968)). Accordingly, the March 1, 2024 Order was plainly within the court's discretion.

Petitioner's excuse that she cannot retain counsel due to a lack of purportedly discoverable documents is unconvincing, particularly after a year-and-a-half since this court's December 2022 opinion and order. In reality, Petitioner has had since the decedent's passing in 2019 to retain counsel to represent the Estate. Her unspecific anecdotes that attorneys will not take on the case without obtaining certain documents do not change established case law

that requires the Estate to have proper legal representation. Kasharian v. Wilentz, supra, 93 N.J. Super. at 482; R. 1:21-1(a). Furthermore, Respondent's counsel previously offered to communicate with any potential attorney Petitioner was considering retaining in order to assist in providing any information needed to evaluate taking on the representation of the Estate. (1T 11:13-19)

Petitioner incorrectly characterizes this matter as an assertion of her personal rights to seek recovery from the Respondents. Of course, this is incorrect as any of the alleged claims belong to the decedent's Estate and therefore require the assistance of counsel on its behalf.

Where Petitioner has not provided any valid excuses for her failure to retain counsel after five years since the alleged cause of action would have theoretically accrued, the trial court was correct to bring finality to this matter. Enabling such finality was well within the trial court's discretion, and this court should therefore affirm the March 1, 2024 Order of dismissal.

A. PETITIONER'S STATUTE OF LIMITATIONS ARGUMENT HAS NO BEARING ON THE COURT'S MARCH 1, 2024 ORDER OF DISMISSAL

Petitioner contends that the trial court could not enter its March 1, 2024 dismissal with prejudice where she may assert certain causes of action that have six-year statutes of limitation. However, Petitioner's Complaint makes no such claims, the limited amount of which sound in wrongful death and are therefore

subject to a two-year statute of limitations that has long since expired following the 2019 passing of the decedent, Mr. Liu. See N.J.S.A. 2A:31-3. Accordingly, none of the cited six-year limitations period have any bearing on this action.

Furthermore, Petitioner's statute of limitations argument misses the point of the court's dismissal due to the failure to retain counsel. This court and the trial court have made clear to Petitioner that she may not personally pursue any claims on behalf of the Estate without the assistance of counsel. Kasharian v. Wilentz, supra, 93 N.J. Super. at 482; R. 1:21-1(a). Thus, limitations periods have no effect on the court's dismissal with prejudice where plaintiff has simply refused to comply with court orders to retain counsel since 2022. Accordingly, the dismissal below was proper.¹

POINT III

THE COURT MUST AFFIRM THE TRIAL COURT'S MARCH 31, 2023 ORDER DENYING PETITIONER'S "MOTION TO DEMAND DOCUMENTS" AS IT LACKS SUPPORT OF ANY APPLICABLE COURT RULE OR CASE LAW

Petitioner seeks to reverse the trial court's March 31, 2023 Order denying her "motion to demand documents." As an initial matter, Petitioner lacked standing to file this purported motion on March 10, 2023 after this court had

¹ Petitioner makes reference to certain constitutional arguments in her brief. Given Petitioner's failure to file opposition raising such issues below and because plaintiff's appeal lacks substantive merit as described herein, Respondent respectfully submits that Petitioner's constitutional arguments are irrelevant and have no bearing on this appeal.

already ruled that she could not continue to pursue this case herself without proper legal representation. Kasharian v. Wilentz, *supra*, 93 N.J. Super. at 482; R. 1:21-1(a). Petitioner filed the motion essentially as an attorney for the Estate and continued her unauthorized practice of law. *See* ibid.; Stubaus v. Witman, 339 N.J. Super. 38, 47-48 (App. Div. 2002). Thus, Petitioner's motion was improper *ab initio* and could not be properly heard on the merits.

Beyond this underlying defect, Petitioner's motion also lacked any basis in the court rules or case law. Plaintiff failed to cite any legal support for her motion. Solely for the sake of argument, even if the court were to liberally characterize Petitioner's motion as one for pre-suit discovery under R. 4:11-1, that rule still does not apply where plaintiff is explicitly trying to obtain documents that she believes will establish causes of action against the Respondents. R. 4:11-1 "was not intended to authorize pre-suit discovery for the sole purpose of assisting a perspective plaintiff in acquiring facts necessary to frame a complaint." Johnson v. Grayce Tighe, Inc. 365 N.J. Super. 237 (App. Div. 2003). Moreover, there is no suggestion that the discovery sought will be lost or destroyed before suit is filed. *See* Liberty Mutual v. Borgata Hotel, 456 N.J. Super. 471 (Law. Div. 2017). Nor is the application based upon claimed extraordinary circumstances to comply with the affidavit of merit requirement since the requirement does not apply to a claim against a home health aide.

Petition of Hall by and Through Hall, 147 N.J. 379, 393 (1997). In short, if the Rules of Court authorized pre-suit discovery for the purposes of determining whether a viable claim exists, “our trial courts would be inundated with petitions filed pursuant to this rule.” See Liberty Mutual v. Borgata Hotel, supra, 456 N.J. Super. at 479.

Where Petitioner’s action has remained dismissed continuously since the trial court’s original October 22, 2021 Order of dismissal, Petitioner does not have a right to seek to compel the production of any documents from Respondents, particularly where the Petitioner’s motion was not filed through an attorney and does not fit within any applicable court rule or case law. Accordingly, this court must affirm the trial court’s March 31, 2023 Order.

CONCLUSION

Based on the foregoing, Respondent VC Services, LLC t/a Affinity Care of NJ i/p/a Affinity Care of NJ respectfully requests that the court dismiss Petitioner’s appeal and affirm all challenged trial court orders.

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FANG LIU,

Appellant,

vs.

AFFINITY CARE OF NJ &
WELLCARE OF NEW JERSEY,

Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002058-23

CIVIL ACTION

ON APPEAL FROM THE SUPERIOR
COURT OF NEW JERSEY, LAW
DIVISION, HUDSON COUNTY,
DOCKET NO. HUD-L-002170-21
HON. JEFFREY R. JABLONSKI, A.J.S.C

**WELLCARE'S RESPONSE
IN OPPOSITION TO
APPELLANT'S BRIEF**

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<i>October 13, 2021,</i> Appellant’s Letter Brief in Further Support of her Motion to Amend and in Further Opposition to Affinity Care’s Motion to Dismiss	RA0021-24
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<i>November 17, 2021,</i> Appellant’s Letter Reply in Support of Motion for Reconsideration	RA0034-35
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Defendant-Respondent WellCare Health Plans of New Jersey, Inc. (improperly named as “WellCare of New Jersey”) (“WellCare”) hereby submits this response in opposition to the appellate brief (“Brief” or “Br.”) filed by *pro se* Appellant-Plaintiff Fang Liu (“Appellant”), and further states as follows:

PROCEDURAL HISTORY

On May 28, 2021, *pro se* Appellant filed a complaint (“Complaint”) asserting wrongful death and survivorship claims arising out of the death of Appellant’s father,¹ which occurred on June 2, 2019. *See* PA4-5²; *see also* Br. at 1. On June 30, 2021, Respondent Affinity Care (“Affinity Care”) filed its Answer, Crossclaims and Demands. PA9-PA20.

Thereafter, on July 14, 2021, Affinity Care filed a motion to dismiss the Complaint for failure to state a claim because Appellant did not have standing to pursue her claims, as she had not been appointed as administrator of the estate generally or *ad prosequendum*. PA21-34. On August 16, 2021, Appellant filed a separate motion to amend her Complaint to add additional allegations and demand documents (“Motion to Amend”). PA35-PA43. On August 26, 2021, Appellant filed an opposition to Affinity Care’s motion to dismiss. RA0001-3.³ On September 2,

¹ WellCare denies that it was responsible for overseeing decedent’s home health services, as Appellant suggests. *See* PA4-5.

² “PA” refers to Appellant-Plaintiff Fang Liu’s appendix.

³ “RA” refers to Respondent-Defendant WellCare’s appendix.

2021, Affinity Care filed an opposition to Appellant's Motion to Amend. RA0004-12. On October 11, 2021, Appellant filed an additional opposition to Affinity Care's motion to dismiss. RA0013-20. On October 13, 2021, Appellant filed a letter brief in further support of her Motion to Amend and again, in further opposition to Affinity Care's motion to dismiss the Complaint. RA0021-24. On October 22, 2021, the trial court denied Appellant's Motion to Amend and granted Affinity Care's motion to dismiss ("October 22, 2021 Order"). PA44-48.

On October 27, 2021, Appellant filed a motion for reconsideration ("Motion for Reconsideration") of the October 22, 2021 Order. DA1.⁴ On November 4, 2021, Affinity Care filed an opposition to the Motion for Reconsideration. RA0025-33. On November 17, 2021, Appellant filed a reply in support of her Motion for Reconsideration. RA0034-35. On November 19, 2021, the trial court denied Appellant's Motion for Reconsideration. DA2.

On December 7, 2021, Appellant appealed the October 22, 2021 Order granting Affinity Care's motion to dismiss the Complaint. During the pendency of the appeal, legislation was enacted which permitted the relation back of the untimely appointment as administrator to the date of the original filing of the Complaint. *See* PA61-62. As a result, on December 2, 2022, this Court overturned the trial court's dismissal ("December 2, 2022 Order"). PA49-66. In doing so, this Court held that

⁴ "DA" refers to Respondent-Defendant Affinity Care's appendix.

Appellant's claims could not be pursued on a *pro se* basis and thus would need to be pursued through legal counsel. PA62-65. Specifically, this Court ordered:

On remand, plaintiff must be represented by an attorney, who shall draft, file, and serve the amended complaint, which shall set forth the causes of action being pursued and the status of plaintiff's appointment as administrator ad prosequendum and administrator of decedent's estate. Plaintiff must be represented by an attorney throughout the renewed trial court proceedings.

PA64-65.

After remand, on February 7, 2023, Affinity Care filed a motion to set a date certain for Appellant to comply with this Court's December 2, 2022 Order. PA68-PA69. On March 3, 2023, the trial court granted Affinity Care's unopposed motion and ordered Appellant to comply with this Court's December 2, 2022 Order, requiring Appellant to proceed with counsel, within thirty (30) days ("March 3, 2023 Order"). RA0036-37.

Instead of complying with this Court's December 2, 2022 Order and the trial court's March 3, 2023 Order, Appellant filed an unauthorized motion on March 10, 2023, which demanded the production of documents from Affinity Care and WellCare ("Motion for Documents"). PA74-87. Specifically, the Motion for Documents argued that the requested documents were necessary for Appellant to hire counsel and formulate claims against Respondents. *Id.* Respondents opposed Appellant's Motion for Documents, arguing that she did not have standing to bring her motion as "Plaintiff is not an attorney and cannot appear in the trial court action

and purport to represent third parties.” PA93. Respondents also highlighted the fact that Appellant is not entitled to seek pre-complaint discovery, which this Court’s precedent has expressly rejected. PA93-96. On March 31, 2023, Appellant filed a reply in support of her Motion for Documents. RA0038-44. The trial court heard argument on Appellant’s Motion for Documents on March 31, 2023 and denied Appellant’s Motion for Documents for the reasons argued by Respondents (“March 31, 2023 Order”).⁵ RA0045-46. However, the trial court extended the deadline for Appellant to comply with this Court’s December 2, 2022 Order and the March 3, 2023 Order to retain counsel until April 17, 2023. *See id.*

Appellant failed to comply. Accordingly, on April 17, 2023, Affinity Care filed a motion to dismiss for failure to comply with the trial court’s March 31, 2023 Order, which WellCare joined. PA105-111. On May 12, 2023, the trial court dismissed the Complaint, *without prejudice*. PA114-115.

On November 10, 2023, Appellant filed a motion for leave to appeal (“Motion for Leave”). PA116-126. On November 27, 2023, Respondents both filed their oppositions to the motion for leave to appeal. PA127-135; PA136-149. On December 12, 2023, this Court denied Appellant’s Motion for Leave. PA150.

On February 14, 2024, Respondents filed a joint motion to dismiss

⁵ Wellcare notes that the March 31, 2023 Order included by Appellant in her appendix is an unsigned copy.

Appellant's Complaint with prejudice ("Motion to Dismiss with Prejudice"). PA151-160. Appellant did not file an opposition to the Motion to Dismiss with Prejudice. On March 1, 2024, the trial court granted the Motion to Dismiss with Prejudice ("March 1, 2024 Order"). PA1-2.

On March 8, 2024, Appellant filed the instant appeal. PA161-163. The notice of appeal purports to appeal the March 1, 2024 Order dismissing Appellant's complaint with prejudice. *Id.* On June 24, 2024, Appellant filed her Brief and Appendix.

LEGAL STANDARD

This Court uses an abuse of discretion standard when reviewing decisions by trial courts that dismiss complaints with prejudice due to failure to comply with court orders. *See Abtrax Pharm., Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499, 517 (1995). Appellate courts have generally declined to interfere with matters of discretion unless it appears that the trial judge has mistakenly exercised this discretion and an injustice has been done. *Allegro v. Afton Village Corp.*, 9 N.J. 156, 161, 87 A.2d 430 (1952); *Comeford v. Flagship Furniture Clearance Center*, 198 N.J. Super. 514, 517, 487 A.2d 1257 (App. Div. 1983). "While dismissal of a party's cause of action is a drastic sanction, it may be invoked where undue delay has occurred and where there is an inadequate explanation for delay in ... complying with the rules" *Comeford*, 198 N.J. Super. at 517.

Here, the trial court was well within its discretion to dismiss the Complaint with prejudice pursuant to Rule 4:37-2 because of Appellant's repeated failures to comply with various court orders. This Court should affirm the trial court's dismissal with prejudice.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion When It Dismissed Appellant's Complaint With Prejudice.

Rule 4:37-2 affords the trial court discretion to dismiss a complaint with prejudice if the plaintiff fails to comply with a court order. *See Zaccardi v. Becker*, 88 N.J. 245, 254 (1982) (explaining that "[d]ismissal for failure to comply with a court rule or order shall be without prejudice unless the order specifically states that it is to be with prejudice").

This Court's December 2, 2022 Order was clear—before Appellant could continue to pursue claims against Respondents, she would need to hire an attorney who would draft and file an amended complaint on behalf of the estate Appellant seeks to represent. PA62-65. After affording the Appellant over 1.5 years to comply with this Court's December 2022 Order,⁶ Appellant still had not retained an attorney or indicated she was even close to doing so. In fact, during that same time period

⁶ The trial court waited until March 3, 2023 to even set an initial deadline for Appellant to comply with this Court's December 2022 Order. At a hearing relating to the same, Appellant requested additional time to comply, which the trial court granted. However, Appellant yet again failed to comply.

Appellant attempted to continue to litigate the action *pro se* in defiance of this Court's December 2, 2022 Order by way of filing a discovery motion, which the trial court rightfully denied. PA74-87; RA0045-46.

As a result of Appellant's above-referenced failures to comply with this Court's and the trial court's orders, the trial court was well within its discretion to grant Respondents' February 14, 2024 Motion to Dismiss with Prejudice under Rule 4:37-2. *See Zaccardi v. Becker*, 88 N.J. 245, 254 (1982). Rule 4:37-2 specifically applies to the failure of a party to comply with "any order of court" and permits the court to specify that such dismissal is with prejudice. As this Court held in *Kohn's Bakery, Inc. v. Terracciano*, "[t]here is no doubt at all of the right of a trial judge, as an exercise of discretion, to impose sanctions or violation of the rules or failure to obey the orders of the court, and those sanctions may include dismissal of the action." 147 N.J. Super. 582, 584-85 (App. Div. 1977) (citing R. 4:37-2(a)).

A. Appellant's Arguments Against The Applicability Of Rule 4:37-2 Are Without Merit.

Appellant argues that the trial court should not have dismissed her Complaint with prejudice under Rule 4:37-2 because: 1) it violated her due process rights; and 2) the statute of limitations relating to her claims had not expired and because this Court's December 2, 2022 Order did not include a deadline for compliance. As noted herein, Appellant did not even attempt to oppose Respondents' Motion to Dismiss with Prejudice under Rule 4:37-2, which the Court granted. As such, the Court

should not even address Appellant's arguments because they were not raised in the trial court. *See N. Haledon Fire Co. No. 1 v. Borough of N. Haledon*, 425 N.J. Super. 615, 631 (App. Div. 2012) ("An issue not raised below will not be considered for the first time on appeal."). Regardless, even if the Court were to entertain such arguments, they have no bearing on a trial court's discretion to dismiss a complaint with prejudice under Rule 4:37-2.

1. The Trial Court Did Not Violate Appellant's Due Process Rights.

Appellant argues that the trial court's dismissal under Rule 4:37-2 violated her constitutional right of her liberty to petition. Br., at 11. Specifically, Appellant argues that she "followed New Jersey court procedures to file suit within the statute of limitations ... [,] to appeal the trial court's decisions" and "meets all requirements to continue her suit." Br., at 11. But Appellant has and continues to violate Rule 1:21-1, which provides that subject to certain exceptions that are not applicable here, "no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, is in good standing" and complies with various requirements. Rule 1:21-1.

Appellant does not attempt to represent herself. Instead, she admittedly seeks to represent the decedent's estate, which this Court expressly held Appellant cannot do. *See generally*, PA49-66. As this Court noted, "an individual acting as a fiduciary or in another representative capacity, asserting claims for a decedent or an estate,

cannot appear and prosecute the claim pro se.” PA63 (citing *Kasharian v. Wilentz*, 93 N.J. Super. 479, 482 (App. Div. 1967); R. 1:21-1(a); accord *Pressler & Verniero, Current N.J. Court Rules*, cmt. 1 on R. 1:21-1 (2023) (“prohibiting such appearances by non-lawyer fiduciaries where the action involves another’s beneficial interests”). Appellant’s only claims, which were brought under the Survivor’s Act and Wrongful Death Act, were filed on behalf of third parties, not herself. PA63 (citing *Kasharian*, 93 N.J. Super. at 482 (“explaining that a plaintiff prosecutes a wrongful death action ‘solely as administrator ad prosequendum in the interest of the entire class of the next of kin of the decedent’”); *Smith v. Whitaker*, 160 N.J. 221, 233 (1999) (“The Survivor’s Act preserves to the decedent’s estate any personal cause of action that decedent would have had if he or she had survived.”)).

Accordingly, the trial court’s dismissal under Rule 4:37-2 did not violate Appellant’s due process rights and the trial court’s March 1, 2024 Order should be affirmed.

2. The Expiration Of The Statute of Limitations Relating To Appellant’s Claims And Non-Inclusion Of A Deadline In This Court’s December 2, 2022 Order Is Irrelevant To Rule 4:37-2.

Whether or not a statute of limitations has expired has no bearing on the trial court’s authority under Rule 4:37-2. The trial court did not dismiss the Complaint with prejudice based on the expiration of the statute of limitations. *See* PA1-2. Instead, the trial court dismissed the Complaint pursuant to Rule 4:37-2 due to

Appellant's repeated failure to comply with this Court's and the trial court's orders. *Id.* R. 4:37-2 plainly does not require that the statute of limitations relating to a claim be expired to warrant dismissal. *See id.*; *see also Kohn's Bakery*, 147 N.J. Super. at 584-585. Moreover, Appellant attempts to support her argument by referencing the statute of limitations relating to breach of contract, breach of fiduciary duty, and consumer protection statutes (Br., at 10-11), but none of those claims were even pled in the Complaint. *See* PA4-5. Notably, the statute of limitations relating to the only claims pled in the Complaint (i.e., for wrongful death and survivorship claims arising out of the death of Appellant's father) have expired. *See* N.J.S.A. 2A:14-2; N.J.S.A. 2A:31-3. Accordingly, even if the Court were to consider Appellant's statute of limitations argument, it is wholly without merit.

Similarly, Appellant's argument that the trial court did not have the right to dismiss the Complaint under Rule 4:37-2 because this Court's December 2, 2022 Order did not impose a deadline to hire an attorney and file an amended complaint is wrong. Notably, Appellant cites no support for the same.

II. Appellant's Remaining Arguments Should Be Ignored Because They Are Not On Appeal And Nonetheless Are Without Merit.

Appellant's remaining arguments all raise issues that are not properly on appeal and thus should not be addressed by this Court. Pursuant to Rule 4:37-2, the trial court dismissed Appellant's Complaint with prejudice. PA1-2. Appellant did not even oppose the motion that lead to the trial court's dismissal order. Thus, to the

extent she can even assert arguments on appeal, she can only argue that the trial court abused its discretion in dismissing the Complaint with prejudice. *N. Haledon Fire Co. No. 1 v. Borough of N. Haledon*, 425 N.J. Super. 615, 631 (App. Div. 2012) (citing *Brock v. Pub. Serv. Elec. & Gas Co.*, 149 N.J. 378, 391, 693 A.2d 894 (1997); *State v. Berry*, 2006 WL 1565090, at *2 (N.J. Super. Ct. App. Div. June 9, 2006) (“Since none of the issues were presented or even the subject of the appeal to the Law Division, they are precluded from consideration by this court.”). The March 1, 2024 Order dismissing the Complaint with prejudice does *not* concern: 1) the trial court’s earlier order denying Appellant’s Motion for Documents; 2) any discussion regarding whether Respondents confirmed any allegations in non-plead complaints (which they did not); and 3) the question of whether Appellant should be appointed an attorney by the court. Accordingly, these issues are not within the scope of this appeal and this Court should ignore these arguments. *See Brock*, 149 N.J. at 391.

A. Appellant is Not Entitled To Pre-Suit Discovery.

Even if the Court were to entertain Appellant’s argument relating to her ability to obtain discovery—which is wholly outside the scope of this appeal—it should be rejected as another unauthorized effort to practice law and pursue the underlying litigation on behalf of an estate *pro se*. Appellant did not (and does not) have standing to demand these pre-suit documents. Appellant’s Motion for Documents, which the trial court denied in the March 31, 2023 Order, was in direct violation of

this Court's December 2, 2022 Order and was an unauthorized practice of law. *See* PA49-66. This Court previously held that "Plaintiff must be represented by an attorney *throughout* the renewed trial court proceedings." PA65 (emphasis added); *see also id.* ("Plaintiff may renew her motion for discovery *after* filing and serving her amended complaint for consideration in the first instance by the trial court.") (emphasis added). Appellant's renewed attempt to argue she is entitled to such discovery is another direct violation of both the law and this Court's prior ruling.

Moreover, the trial court is not the appropriate avenue to seek the documents Appellant requested. Appellant improperly substituted an administrative process for requesting medical documents with an unauthorized motion to the trial court. Regardless, as the trial court found, Appellant's attempt to use the court to compel documents to formulate claims against Respondents has been expressly rejected by this Court's precedent. *See Johnson v. Grayce Tighe, Inc.*, 365 N.J. Super. 237, 240-241 (App. Div. 2003); *see also Liberty Mut. Ins. Co. v. Borgata Hotel Casino & Spa*, 456 N.J. Super. 471, 478 (Law. Div. 2017).

B. WellCare Has Never Admitted Any Wrongdoing.

In addition to not being an issue on appeal, Appellant's argument that Respondents have admitted wrongdoing in prior trial court submissions is wrong. Although Appellant appears to allege that Respondents have admitted certain wrongdoing relating to the concealment of documents, she notably does not

reference a single statement made by WellCare in the lower court where it admitted any such allegations. *See Br.*, at 17. That is because it never did.

C. Appellant is Not Entitled To The Appointment Of An Attorney By The Court.

Appellant is also not entitled to appointment of counsel. The underlying action is a civil case, not a criminal case. The Appellate Division does not have the authority to appoint counsel for a *pro se* plaintiff. *See In re Civ. Commitment of D.L.*, 351 N.J. Super. 77, 85, 797 A.2d 166, 171 (App. Div. 2002) (“[T]he New Jersey Court Rules do not provide for appointment of counsel on appeal for any other matter [other than criminal cases].”). Though trial courts *may* appoint an attorney for a *pro se* plaintiff in a civil matter under certain circumstances – such appointment is limited to specific cases such as appointment of counsel for children in cases where custody is at issue. *See e.g.*, N.J. R. Ch. Div. Fam. Pt. R. 5:8A.

CONCLUSION

For the above stated reasons, Respondent WellCare respectfully requests that this Court enter an affirming the trial court’s March 1, 2024 Order dismissing the underlying case with prejudice, along with such other relief as this Court deems necessary, just and proper.

Dated: July 24, 2024

Resubmitted: July 25, 2024

By: /s/ Christopher Fontenelli
Christopher Fontenelli

*Counsel for WellCare Health Plans of
New Jersey, Inc.*

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002058-23

FANG LIU,
Plaintiff-Appellant,

v.

Affinity Care of NJ,
WellCare New Jersey,
Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
HUDSON COUNTY

Hon. Jeffrey R. Jablonski,
A.J.S.C.
Sat below

REPLY BRIEF
FOR
APPELLANT FANG LIU

FANG LIU
APPELLANT
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INTRODUCTION

Plaintiff is responding to the arguments presented in the respondent briefs filed by defendants Affinity Care of NJ ("Affinity Care") on July 12, 2024 and WellCare New Jersey (also known as WellCare Healthcare of NJ, Inc.) on July 24, 2024. For consistency with the caption in the trial court case, this brief will refer to the defendant as WellCare New Jersey ("WellCare").

ARGUMENT

Point I

The trial court dismissed the case with prejudice on March 1, 2024, based on a distortion of the facts, which constitutes a violation of R. 4:37-2.

A. The trial court distorted the facts by stating that plaintiff had failed to comply with the court's orders for over a year.

This case was reinstated after this court reversed the trial court's order of October 22, 2021, which had dismissed the case without prejudice (Pa44 – Pa48). The appellate court remanded the case, instructing plaintiff to retain counsel to pursue claims under wrongful death and survival actions at the trial court (Pa49 – Pa66). Plaintiff was uncertain whether defendant Affinity Care would appeal the decision and, therefore, waited until February 7, 2023, when Affinity Care filed a motion for non-dismissal at the trial court (Pa68 – Pa71).

The trial court issued an order on March 3, 2023, requiring plaintiff to retain counsel within 30 days, by April 3, 2023 (Pa72 – Pa73). On March 10, 2023, plaintiff filed a Motion to Demand Documents and requested the court's permission to extend the deadline for retaining an attorney to 30 days after receiving the requested documents (Pa74 – Pa87) and filed another supporting document on March 31, 2023 (Pa97 – Pa102). During the hearing on March 31, 2023, the trial court denied plaintiff's request as pre-trial discovery while permitting defendants to continue concealing necessary documents (2T, Pa103 – Pa104). This error left plaintiff without the necessary information to comply with the court order, although the court extended the deadline to retain counsel to April 17, 2023, to account for the time spent addressing the motion.

As a result, on May 12, 2023, the trial court dismissed the case without prejudice pursuant to R. 4:37-2(a) (Pa114 – Pa115). Since the trial court did not set another date for plaintiff to reopen the case, there were no court activities from May 12, 2023, to March 1, 2024. During this period, plaintiff had no need for representation, rather than failing to comply with the appellate court's order of December 2, 2022 and the trial court order of March 31, 2023 to retain counsel for over a year.

B. The trial court's statement contradicts its prior opinion regarding similar circumstances.

According to the trial judge's prior ruling, the judge appeared to understand how plaintiff might handle a case dismissed without prejudice based on the order issued on October 22, 2021 (Pa44 – Pa48), which stated:

"Although any subsequent filing under wrongful death or survival actions might be barred by the statute of limitations that governs these actions, the breach of contract causes of action included in the proposed amended complaint would not be similarly prohibited due to the longer limitations period. If recovery is sought under these causes of action, the plaintiff must bring a new complaint."

As the court acknowledged, both the original complaint filed on May 28, 2021 (Pa3 – Pa6) and the amendment filed on August 16, 2021 (Pa35 – Pa43) were validly submitted and accepted. Given that the statute of limitations for the three causes of action in this case—breach of contract, breach of fiduciary duty, and consumer protection statutes under the New Jersey Consumer Fraud Act—is six years, plaintiff was permitted to refile her case under these claims after the case was dismissed without prejudice for the

second time on May 12, 2023. This should be allowable until July 14, 2025.

C. The trial court's dismissal of the case with prejudice on March 1, 2024, violated R. 4:37-2, as well as the plaintiff's due process rights and liberty to petition.

The trial court's statement that plaintiff had failed to comply with the court orders for over a year distorts the facts. The dismissal with prejudice on March 1, 2024, lacked a legal basis (Pa1 – Pa2). According to R. 4:37-2(a), dismissal with prejudice is not permissible under these circumstances, especially given that the court had previously closed the case without prejudice for failure to comply with the same court orders. This dismissal also contradicts the trial court's opinion in the prior order of October 22, 2021 (Pa44 – Pa48). Consequently, the trial court violated procedural rules, created an exception by distorting the facts, and engaged in an abuse of discretion, thereby infringing on plaintiff's due process rights and constitutional right to petition, under the U.S. Const. amend. XIV, § 1, N.J.S.A. 10:6-2(a), as well as U.S. Const. amend. I, N.J. Const. of 1947 art. I, § 18.

Point II

Defendant Affinity Care's motion to dismiss filed on February 14, 2024, raised the same claims as those in the motion of April 17, 2023. All the claims were argued in the trial court and appealed to this court. New Jersey courts permit plaintiff to appeal a dismissal with or without prejudice.

On April 17, 2023, Affinity Care filed a second motion to dismiss with prejudice, arguing that plaintiff had failed to comply with the appellate court's order of December 2, 2022, and the trial court's order of March 31, 2023, to retain an attorney by April 17, 2023 (Pa105 – Pa113). Defendant WellCare joined this motion. The trial court again dismissed the case without prejudice on May 12, 2023 (Pa114 – Pa115). Plaintiff filed a motion for leave to appeal this decision on November 10, 2023, contending that the trial court improperly denied her motion to demand documents, allowing defendants to conceal information necessary for plaintiff to comply with the court's order (Pa116 – Pa126). However, the appellate court denied the appeal on December 12, 2023 (Pa150). The case remained closed at the trial court from May 12, 2023, to March 1, 2024.

On February 14, 2024, Affinity Care filed a third motion to dismiss with prejudice, repeating the same claims made in the second motion on April 17, 2023 (Pa151 – Pa160). Defendant WellCare did not join this motion. Plaintiff did not oppose this motion, as the trial court had already ruled on these issues on May 12, 2023 (Pa114 – Pa115), and the matter had been appealed on November 10, 2023 (Pa116

– Pa126). All issues raised in the brief had been previously argued in the trial court and presented in the appeal. Defendants cited North Haledon Fire Co. No. 1 v. Borough of North Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012) (citing Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 391 (1997)); Soc’y Hill Condo Ass’n v. Soc’y Hill Assocs., 347 N.J. Super. 163, 177–78 (App. Div. 2002) in their respondent briefs, however, in these cases, the court addressed circumstances that differ significantly from those in the present case, thereby not relevant to the issues at hand.

Additionally, during the hearing on March 31, 2023, regarding the motion to demand documents filed by plaintiff, the trial judge criticized plaintiff’s appeal, which reversed his decisions of October 22, 2021 (2T). The trial court mishandled the request by treating it as a pre-trial discovery matter and rejected plaintiff’s motion immediately following the hearing, while permitting defendants to continue concealing necessary documents (Pa103 – Pa104). Given this context, plaintiff felt uncomfortable further irritating the judge with the same arguments and the fact that the court order had been appealed again. Considering the judge’s abuse of discretion, violation of court procedures, and distortion of facts leading to the dismissal with prejudice on March 1, 2024, it appears the judge is biased and unsuitable to hear this case.

New Jersey courts permit plaintiff to appeal a dismissal with or without prejudice. This court has jurisdiction pursuant to R. 2:2-3.

Point III

The trial court erred in rejecting plaintiff's Motion to Demand concealed documents and mishandled it as Pre-Trial Discovery.

There are fundamental differences between demanding health service records and pre-trial discovery. In Johnson v. Grayce Tighe, Inc., 365 N.J. Super. 237 (App. Div. 2003), and Liberty Mutual v. Borgata Hotel, 456 N.J. Super. 471 (Law Div. 2017), the courts dealt with cases where the parties were involved in incidents unrelated to any service contracts. In these situations, the defendants had no obligation to provide documents, and pre-trial discovery was not permitted until a formal lawsuit was filed.

In contrast, the present case involves defendants who were under a service contract to provide home care. Defendants Affinity Care and WellCare failed to deliver the required services, thus breaching the contract. As the personal representative and court-appointed administrator for her father, plaintiff has the right to access relevant documents under the contract. Additionally, HIPAA privacy rules (45 C.F.R. § 164.502 (2002)), N.J.S.A. 45:9-22 to -27, and N.J.A.C. 8:43G-15.3 protect plaintiff's right to these service records. Therefore, plaintiff was entitled to demand these documents,

independent of concerns about the potential destruction of the documents. In fact, Affinity Care had already falsified documents during the five-year cover-up, as evidenced by discrepancies in its "Client Notes Report" (Pa92).

Given that defendants refused to provide these documents through administrative channels and violated HIPAA privacy rules, N.J.S.A. 45:9-22 to -27, and N.J.A.C. 8:43G-15.3, plaintiff had the right to demand these documents and to represent herself in court based on the current complaint and amendment. NJ courts generally permit pro se litigants to pursue their cases, and R. 1:21-1(a) does not apply in this situation. Furthermore, the appellate court's order of December 2, 2022, does not prohibit plaintiff from pursuing claims beyond wrongful death or survival actions (Pa49 – Pa66).

Plaintiff filed two motions to demand these documents: one on August 16, 2021 (Pa35 – Pa43), and a second on March 10, 2023 (Pa74 – Pa87). The initial motion was dismissed along with the complaint and amendment on October 22, 2021 (Pa44 – Pa48). During the hearing on March 31, 2023, the trial judge mishandled the request for service records by treating it as a pre-trial discovery matter and denied the request immediately after the hearing (2T, Pa103 – Pa104).

Point IV

Plaintiff's case has merit, but due to complications and defendants' fraudulent concealment, plaintiff faces challenges in securing legal representation. The court has the authority to exercise discretion to facilitate Justice.

Plaintiff's case is meritorious; however, due to the complexities of the incident and the defendants' fraudulent concealment, plaintiff faces difficulties in aligning with prospective attorneys. The court, as the final arbiter of justice, has the authority to take measures to resolve the dispute effectively.

A. Plaintiff has challenges in retaining counsel due to fraudulent concealment and case complexity.

The incident involving plaintiff's father, who was left unattended and subsequently passed away after falling and remaining on the floor for days, occurred while plaintiff was overseas (Pa3 – Pa6, Pa35 – Pa43). At that time, only the defendants' home care aides potentially witnessed the event. Since the incident, defendants have engaged in fraudulent concealment and filed three motions to dismiss plaintiff's case with prejudice. This ongoing concealment and litigation strategy have made it difficult for plaintiff to fully understand what transpired and to pursue legal action effectively. Although the defendants' attorneys have expressed a willingness to discuss information with prospective attorneys, this is ineffective as it is ultimately up to the attorneys to decide whom to communicate

with. Furthermore, it is inappropriate for the defendants, who have concealed documents and repeatedly dismissed the case, to control the dissemination of information to prospective attorneys.

Affinity Care's "Client Notes Report" acknowledges the breach of contract (Pa92). This report represents only a small portion of the violations, as further infractions need to be uncovered. However, uncovering additional violations is challenging due to the care beneficiary's death and the falsification of records, as evidenced by inconsistencies in the "Client Notes Report". Defendant WellCare also admitted to fraudulent concealment, highlighting its negligence and failure to monitor the service, which contributed to the death of plaintiff's father.

B. The court is the last resort for the victims to seek justice and may use discretion to facilitate the solving of dispute.

This court remanded the case with the directive for plaintiff to retain counsel to continue the case in the interest of the beneficiary, as supported by Kasharian v. Wilentz, 93 N.J. Super. 482 (App. Div. 1967) and R. 1:21-1(a) (Pa63). In practice, aligning with prospective attorneys has been difficult, as they often prioritize their interests over the beneficiaries' interests when evaluating cases. As noted in Argument Point IV of plaintiff's brief, the surviving wife of Mr. Liu, who was the estate's beneficiary, relinquished her rights to plaintiff, the administrator and

administrator ad prosequendum of the estate. This relinquishment should be respected in considering the beneficiary's interests. Plaintiff should have the exclusive right to manage her father's estate and appear in court, as the estate itself is not an entity or individual with its own legal rights but rather a collection of assets and obligations to be administered by the appointed representative. There is no New Jersey statute mandating the retention of an attorney by an administrator.

Given these circumstances, where the plaintiff is unable to meet the court's requirement for counsel, the court may exercise its discretion to either appoint an attorney or allow plaintiff to continue the case pro se. Failure to do so may jeopardize the plaintiff's liberty to petition and pursue justice, as guaranteed by U.S. Const. amend. I and N.J. Const. of 1947 art. I, § 18.

CONCLUSION

Plaintiff respectfully requests that this court:

1. **Reverse the Trial Court's Decision:** Vacate the trial court's order of March 1, 2024, which dismissed the case with prejudice, as this decision was based on a distortion of facts and procedural errors.
2. **Reassign the Case:** Assign the case to a different judge to ensure a fair and impartial review, given the trial court's prior errors and potential bias.

3. Compel the Release of Concealed Documents: Order defendants to release all documents that have been fraudulently concealed or improperly withheld, as these documents are essential to plaintiff's case.

4. Reconsider Representation Options: Either designate an attorney to represent plaintiff or permit plaintiff to continue the case pro se. This is necessary to ensure that plaintiff can adequately pursue the claims and seek justice.

By taking these actions, the court will help resolve the dispute, hold defendants accountable for their conduct, and uphold justice in the community.

Respectfully submitted,



Fang Liu

Dated: August 6, 2024