SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NUMBER: A-002074-23 T4

MARGARETE HYER,	:	CIVIL ACTION
	:	
Plaintiff-Appellant,	:	ON APPEAL FROM
	:	ORDER OF LAW
- against -	:	DIVISION GRANTING
	:	MOTION TO DISMISS
VILLAGE OF RIDGEWOOD BOARD	:	AND DENYING
OF EDUCATION, DANIEL FISHBIEN,	:	MOTION FOR
ANGELO DESIMONE, ANTHONY S.	:	RECONSIDERATION/
ORSINI, GREG WU, STEVEN	:	TO VACATE
TICHENOR, SODEXO A/K/A SODEXO	:	
USA AND/OR SODEXO, INC., GCA	:	SAT BELOW:
SERVICES GROUP INC. A/K/A GCA	:	
EDUCATION SERVICES INC.,	:	HON. MARY F.
ARAMARK A/K/A ARAMARK	:	THURBER, J.S.C.
SCHOOLS FACILITIES, LLC,	:	
ARAMARK SCHOOLS, INC.,	:	SUPERIOR COURT OF
ARAMARK EDUCATIONAL GROUP,	:	NEW JERSEY
LLC, ARAMARK EDUCATIONAL	:	BERGEN COUNTY
SERVICES, INC., ARAMARK	:	LAW DIVISION
EDUCATIONAL SERVICES, LLC	:	DOCKET NO.
AND/OR ARAMARK EDUCATIONAL	:	BER-L-4141-20
GROUP, INC. AND JOHN DOES 1-10,	:	
	:	
Defendants-Respondents.	:	

APPELLANT'S BRIEF IN SUPPORT OF APPELLANT'S NOTICE OF APPEAL

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PROCEDURAL HISTORY

Pleadings Filed in This Action

On July 16, 2020, Plaintiff-Appellant commenced this action by filing her Complaint. (This entry has since been deleted from the docket).

On July 23, 2020, Plaintiff-Appellant filed her First Amended Complaint. (Pa000001).

On December 18, 2020, defendants-respondents Village of Ridgewood Board of Education, Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu, and Steven Tichenor filed their Answer to the First Amended Complaint. (Pa000027).

On January 15, 2021, defendant-respondent Aramark Management Services Limited Partnership, i/s/h/a Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Educational Services, Inc., and Aramark Educational Services, LLC filed its Answer to the First Amended Complaint. (Pa000096).

On August 10, 2020, Plaintiff-Appellant filed a motion for order to delete from the docket the original Complaint filed on July 16, 2020. (Pa000021).

On August 28, 2020, the Court granted the motion to delete and removed the Complaint from the docket. (Pa000027).

On March 1, 2023, Defendant-Respondent Sodexo a/k/a Sodexo USA and/or Sodexo, Inc. filed its Answer to Plaintiff-Appellant's First Amended Complaint. (Pa000615).

Defendant-Respondent Village of Ridgewood Board of Education Moved to Dismiss the First Amended Complaint's First and Fifth Counts

On December 30, 2020, Defendant-Respondent Village of Ridgewood Board of Education filed its motion to dismiss the first and fifth counts of Plaintiff-Appellant's First Amended Complaint. (Pa000043).

On January 26, 2021, Plaintiff-Appellant opposed the motion.

On January 29, 2021, Defendant-Respondent Village of Ridgewood Board of Education filed two reply briefs in further support of the motion.

On February 5, 2021, Hon. Robert C. Wilson, J.S.C. heard oral argument of the motion and issued an order denying the motion "without prejudice to discovery being exhausted." (Pa000110).

Defendant-Respondent Village of Ridgewood Board of Education Moved for Leave to File an Amended Answer

On September 22, 2021, Defendant-Respondent Village of Ridgewood Board of Education filed its motion for leave to file an amended answer. (Pa000112).

No party opposed the motion.

On October 8, 2021, Hon. Robert C. Wilson, J.S.C. issued an order granting the motion as unopposed and permitted the filing of an amended answer. (Pa000123).

On October 15, 2021, Defendant-Respondent Village of Ridgewood Board of Education filed its Amended Answer. (Pa000125).

Defendant-Respondent Village of Ridgewood Board of Education Moved to Dismiss the First Amended Complaint for Failure to Answer Discovery

On December 20, 2021, Defendant-Respondent Village of Ridgewood Board of Education filed its motion to dismiss Plaintiff-

Appellant's First Amended Complaint without prejudice, pursuant to R. 4:23-5(A)(1), for failure to answer discovery. (Pa000128).

On January 20, 2022, Defendant-Respondent Village of Ridgewood Board of Education withdrew the motion by filing a letter with the Law Division stating that "plaintiff has complied with our discovery request."

Plaintiff-Appellant Moved to Extend Discovery

On January 28, 2022, Plaintiff-Appellant filed a motion to extend discovery. (Pa000219).

On February 1, 2022, Defendant-Respondent Village of Ridgewood Board of Education joined in the motion to extend discovery by filing a certification, brief, and exhibits.

On February 18, 2022, Hon. Robert C. Wilson, J.S.C. granted the motion to extend discovery and ordered that the discovery end date was extended for 120 days, depositions were to be completed by April 15, 2022, Plaintiff-Appellant's expert reports were to be served by May 2, 2022, Defendant-Respondents' expert reports were to be served by June 17, 2022, expert depositions were to be completed by

July 2, 2022, and the new discovery end date was July 2, 2022. (Pa000227).

Defendant-Respondent Village of Ridgewood Board of Education Moved to Dismiss the First Amended Complaint for Failure to Answer Interrogatories

On April 22, 2022, Defendant-Respondent Village of Ridgewood Board of Education filed its motion to dismiss the First Amended Complaint without prejudice, pursuant to R. 4:23-5(A)(1), for failure to answer interrogatories. (Pa000128).

On April 25, 2022, Plaintiff-Appellant filed a motion to extend discovery. No one opposed this motion. (Pa000183).

On May 13, 2022, Hon. Robert C. Wilson, J.S.C. granted Plaintiff-Appellant's motion to extend discovery as unopposed. Judge Wilson ordered that the completion of discovery was extended for 120 days from the previous discovery end date, all depositions were to be completed by June 15, 2022, Plaintiff-Appellant's expert reports were to be served by July 30, 2022, Defendants-Respondents' expert reports were to be served by August 30, 2022, expert depositions were to be completed by September 30, 2022, and the new discovery end date was to be October 30, 2022. (Pa000227).

On May 27, 2022, Defendant-Respondent Village of Ridgewood Board of Education filed a letter with the Court withdrawing its motion to dismiss for failure to answer interrogatories and noted that the reason was "plaintiff has complied with our discovery request."

Plaintiff-Appellant Moved to Extend Discovery

On August 22, 2022, Plaintiff-Appellant filed a motion to extend discovery. No one opposed the motion. (Pa000246).

On September 9, 2022, Hon. Robert C. Wilson, J.S.C. granted Plaintiff-Appellant's motion to extend discovery as unopposed. Judge Wilson ordered that the completion of discovery was extended for 120 days from the previous discovery end date, all depositions were to be completed by October 27, 2022, Plaintiff-Appellant's expert reports were to be served by November 27, 2022, Defendants-Respondents' expert reports were to be served by December 27, 2022, expert depositions were to be completed by January 27, 2023, and the new discovery end date was to be February 27, 2023. (Pa000253).

Defendant-Respondent Village of Ridgewood Board of Education Moved to Extend Discovery

On November 30, 2022, Defendant-Respondent Village of Ridgewood Board of Education filed a motion to extend discovery. (Pa000256).

On December 1, 2022, Defendants-Respondents Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu, and Steven Tichenor filed a letter with the Court joining in the request to extend discovery.

On December 2, 2022, Defendants-Respondents Village of Ridgewood Board of Education, Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu, and Steven Tichenor filed a motion to compel Plaintiff-Appellant's in-person deposition. (Pa000272).

On December 7, 2022, Defendant-Respondent Village of Ridgewood Board of Education filed a motion seeking to compel Plaintiff-Appellant to provide medical authorizations. (Pa000280).

On December 13, 2022, Plaintiff-Appellant filed a motion to compel discovery responses from Defendant-Respondent Village of Ridgewood Board of Education. (Pa000294).

On December 16, 2022, Hon. Robert C. Wilson, J.S.C. granted Plaintiff-Appellant's motion to extend discovery as unopposed. Judge Wilson ordered that the completion of discovery was extended for 90 days from the previous discovery end date, all depositions were to be completed by February 27, 2023, Plaintiff-Appellant's expert reports were to be served by February 27, 2023, Defendants-Respondents' expert reports were to be served by March 27, 2023, expert depositions were to be completed by April 27, 2023, and the new discovery end date was to be May 29, 2023. (Pa000303).

On December 16, 2022, Plaintiff-Appellant filed a letter with the Court withdrawing the motion to compel filed on December 13, 2022.

On December 21, 2022, Defendant-Respondent Village of Ridgewood Board of Education filed a letter with the Court withdrawing its motion to compel (filed on December 7, 2022, as "Plaintiff has provided the requested information." (Pa000305).

On December 29, 2022, Plaintiff-Appellant filed opposition to Defendants-Respondents Village of Ridgewood Board of Education, Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu,

and Steven Tichenor's motion to compel Plaintiff-Appellant's in-person deposition (filed on December 2, 2022). (Pa000306).

On December 30, 2022, Defendants-Respondents Village of Ridgewood Board of Education, Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu, and Steven Tichenor filed their reply in further support of the motion to compel Plaintiff-Appellant's in-person deposition. (Pa000317).

On January 6, 2023, Hon. Robert C. Wilson, J.S.C. granted Defendants-Respondents' motion to compel and ordered that Plaintiff-Appellant was "hereby compelled to appear for an in-person deposition on a date and location to be determined by mutual consent . . . ." Further, if she "fails to appear for said deposition in accordance with this Order, her testimony may be barred at the time of trial . . . ." (Pa000323).

On January 6, 2023, Hon. Robert C. Wilson, J.S.C. granted Plaintiff-Appellant's motion to compel Defendant-Respondent Village of Ridgewood Board of Education to produce its answers to interrogatories and responses to notice to produce, ordering

responses to be served within 20 days of the date of entry of the Order. (Pa000325).

Defendant-Respondent Village of Ridgewood Board of Education Moved for Sanctions Against Plaintiff-Appellant for Causing the Defense Neurology IME To Be Cancelled

On January 17, 2023, Defendant-Respondent Village of Ridgewood Board of Education filed a motion for sanctions against Plaintiff-Appellant for causing the defense neurology independent medical examination to be cancelled. (Pa000327).

On January 26, 2023, Plaintiff-Appellant filed a cross-motion for a protective order and to bar an independent medical examination by Dr. Samuel Kahnowitz. (Pa000347).

On January 30, 2023, Defendant-Respondent Village of Ridgewood Board of Education filed a brief in opposition to Plaintiff-Appellant's cross-motion and in further support of its motion for sanctions.

On February 3, 2023, Hon. John D. O'Dwyer, P.J.Cv. issued an Order stating that Plaintiff-Appellant was required to allow her driver's license to be photographed at all IMEs scheduled in this case, the request for monetary sanctions was denied, and the portion

of motion seeking to preclude a representative from being present at the IME was denied without prejudice. (Pa000480).

On February 3, 2023, Hon. John D. O'Dwyer, P.J.Cv. issued an Order denying without prejudice Plaintiff-Appellant's motion for a protective order and referred the parties to the order, dated February 3, 2023, regarding the protocol for Plaintiff-Appellant's appearing at IMEs in this matter. (Pa000482).

Defendants-Respondents Sodexo, Inc. and Sodexo Operations, LLC i/p/a Sodexo a/k/a Sodexo USA and/or Sodexo, Inc. Moved to Dismiss the First Amended Complaint in lieu of Answer

On January 31, 2023, Defendants-Respondents Sodexo, Inc. and Sodexo Operations, LLC i/p/a Sodexo a/k/a Sodexo USA and/or Sodexo, Inc. filed a motion to dismiss the First Amended Complaint in lieu of an Answer. (Pa000401).

On February 9, 2023, Plaintiff-Appellant filed a cross-motion to vacate dismissal regarding Defendants-Respondents Sodexo a/k/a Sodexo USA and/or Sodexo, Inc. (Pa000484).

On February 16, 2023, Defendants-Respondents Sodexo a/k/a Sodexo USA and/or Sodexo, Inc. filed a reply brief in further support

of their motion to dismiss and in opposition to Plaintiff-Appellant's cross-motion to vacate dismissal.

On February 17, 2023, Hon. Mary F. Thurber, J.S.C. issued an Order denying the motion to dismiss and attached and incorporated a written statement of reasons. (Pa000562).

On February 17, 2023, Hon. Mary F. Thurber, J.S.C. issued an Order granting Plaintiff-Appellant's cross-motion, vacating the dismissal for lack of prosecution, extending discovery to July 28, 2023, ordering that Sodexo answer the amended complaint within ten days, ordering Plaintiff-Appellant to supply to Sodexo within ten days copies of all discovery exchanged between the parties, ordering depositions to occur sooner than thirty days from the filing of Sodexo's answer, and ordering that within that thirty-day window, Sodexo shall serve any written discovery requests and any other party seeking written discovery of Sodexo shall serve such requests within that thirty-day period. (Pa000562, Pa000571).

Plaintiff-Appellant Moved for a Protective Order Allowing Third-Party Companion to Attend IMEs

On February 22, 2023, Plaintiff-Appellant filed a motion seeking a protective order allowing a third-party companion to attend IMEs with Plaintiff-Appellant. (Pa000580, Pa000629).

On February 23, 2023, Defendant-Respondent Village of Ridgewood Board of Education filed opposition to the motion. (Pa000604).

On March 7, 2023, Defendants-Respondents Daniel Fishbein, Angelo DeSimone, Gregory Wu, Steven Tichenor, and Anthony Orsini filed their opposition to the motion.

On March 8, 2023, Defendants-Respondents Sodexo, Inc. and Sodexo Operations, LLC i/p/a Sodexo a/k/a Sodexo USA, and/or Sodexo, Inc. filed their opposition to the motion.

On March 15, 2023, Plaintiff-Appellant withdrew the motion. (Pa000637).

Plaintiff-Appellant Moved to Extend Discovery

On May 22, 2023, Plaintiff-Appellant filed a motion to extend discovery by 120 days. (Pa000638).

On June 9, 2023, Hon. Mary F. Thurber, J.S.C. issued an Order granting Plaintiff-Appellant's motion. Judge Thurber ordered that the completion of discovery was extended for 120 days from the previous discovery end date, all depositions were to be completed by September 30, 2023, Plaintiff-Appellant's expert reports were to be served by October 15, 2023, Defendants-Respondents' expert reports were to be served by October 30, 2023, expert depositions were to be completed by November 15, 2023, and the new discovery end date was to be November 25, 2023. Judge Thurber also stated that "no further discovery extensions will be considered without a case management conference, which counsel may request at any time." (Pa000656).

The Court Holds a Case Management Conference on July 28, 2023

On July 20, 2023, Defendant-Respondent Village of Ridgewood Board of Education requested a case management conference based on Plaintiff-Appellant's production of over 10,000 pages of documents.

The Court scheduled a case management conference for July 28, 2023.

Following the case management conference, the Court issued a case management order requiring Plaintiff-Appellant to provide dates for continuing her deposition between August 14, 2023 and September 30, 2023, Defendant-Respondent Village of Ridgewood Board of Education to identify by August 4, 2023 the HIPAA releases that it has received, Plaintiff-Appellant to produce to Defendants-Respondents by August 11, 2023 contact information, Plaintiff-Appellant was not permitted to supplement her document production after August 11, 2023, and that if the parties are not meeting the discovery dates in the Court's June 9, 2023 Order, the parties may submit an agreed-upon revised case management order for completing discovery. (Pa000656).

Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor's Motion to Bar

On October 4, 2023, Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor filed a motion to bar Plaintiff-Appellant's expert report for failure to provide discovery pursuant to R. 4:10-2(d) and for fees. (Pa001010).

On October 16, 2023, Plaintiff-Appellant filed opposition to the motion to bar.

On October 23, 2023, Hon. Mary F. Thurber, J.S.C. issued an Order denying the motion to bar without prejudice. The Order required Plaintiff-Appellant to return signed HIPAA forms by 4:00pm on October 25, 2023 for 18 medical providers or otherwise would be barred from relying on any evidence for any provider she did not return the signed HIPAA forms for. The Order also required that Plaintiff-Appellant provide to Defendants-Respondents the names, addresses, and contact information for each of her siblings, to provide dates between October 30, 2023 and November 10, 2023 for continuing her deposition, and to provide copies of all documents concerning Dr. Scott W. McMahon. The Court also ordered that if Plaintiff-Appellant failed to comply with paragraph 7 of the Order, she would be barred from using Dr. McMahon's expert report. (Pa001056).

Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor Moved to Dismiss for Failure to Obey Court Order for Discovery

On September 20, 2023, Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor filed a motion to dismiss for Plaintiff-Appellant's alleged failure to comply with the Court's July 28, 2023 case management order. (Pa000744).

On September 21, 2023, Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor filed a second motion to dismiss, pursuant to R. 4:23-2(b)(3), and an award of counsel fees, pursuant to R. 4:23-2(b)(4). (Pa000966).

On October 26, 2023, Plaintiff-Appellant filed a cross-motion to extend the discovery end date. (Pa001049).

On October 30, 2023, Defendant-Respondent Village of Ridgewood Board of Education filed opposition to the motion. (Pa001046).

On November 6, 2023, Plaintiff-Appellant filed a reply in further support of the cross-motion to extend discovery.

On November 27, 2023, Hon. Mary F. Thurber, J.S.C. granted Defendant-Respondent Village of Ridgewood Board of Education's motion to dismiss and ordered that counts 1 and 5 of Plaintiff-Appellant's Complaint is dismissed with prejudice. (Pa001278).

On November 27, 2023, Hon. Mary F. Thurber, J.S.C. granted Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor's motion to dismiss and dismissed counts 1 and 5 of Plaintiff-Appellant's Complaint with prejudice and that "[a]ll defendants other than the Ridgewood Board of Education are dismissed from the matter. Plaintiff and defendant shall complete discovery as set forth in Order 3 of 3 [below]." (Pa001280).

On November 27, 2023, Hon. Mary F. Thurber, J.S.C. issued an Order (3 of 3) granting, in part, Plaintiff-Appellant's cross-motion to extend discovery. The Court ordered that the discovery end date was extended to May 31, 2024, that Defendant-Respondent Village of Ridgewood Board of Education was required to submit within one

week any document requests related to the remaining claims, Plaintiff-Appellant having had two weeks to respond thereafter, fact witness depositions being required to be completed by February 16, 2024, Plaintiff-Appellant's expert reports being served by March 15, 2024, Defendant-Respondent's expert reports being served by April 19, 2024, and expert depositions being completed by May 31, 2024. (Pa001282).

Plaintiff-Appellant Moved for Reconsideration of the Three November 27, 2023 Orders *

On December 12, 2023, Plaintiff-Appellant filed a motion for reconsideration of the three Orders dated November 27, 2023. (Pa001285).

On December 28, 2023, Defendant-Respondent Village of Ridgewood Board of Education filed its opposition to the motion. (Pa001306).

On January 8, 2024, Plaintiff-Appellant filed a reply. (Pa001364).

On January 11, 2024, Defendant-Respondent Sodexo, Inc. (named as Sodexo, Inc. and Sodexo Operations, LLC i/p/a Sodexo

*T1, transcript of November 27, 2023

a/k/a Sodexo USA and/or Sodexo, Inc.) filed opposition to the motion.

On January 11, 2024, Defendant-Respondent Aramark filed opposition to the motion.

On January 12, 2024, Defendant-Respondent Village of Ridgewood Board of Education filed a reply to the motion.

On January 23, 2024, Plaintiff-Appellant filed a reply in further support of the motion.

The Court scheduled oral argument of the motion for February 22, 2024.

On February 22, 2024, after oral argument, Hon. Mary F. Thurber, J.S.C. denied Plaintiff-Appellant's motion for reconsideration. (Pa001413, Pa001415).*

Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor Moved to Dismiss for Failing to Comply with Court's Order

On December 19, 2023, Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor filed a motion

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to dismiss the Complaint for failing to comply with the Court's order and for an award of counsel fees. (Pa001306).

On January 8, 2024, Plaintiff-Appellant filed opposition to the motion. (Pa001362).

On January 25, 2024, Defendant-Respondent Village of Ridgewood Board of Education filed a supplemental certification in support of the motion. (Pa001379).

On February 22, 2024, Hon. Mary F. Thurber, J.S.C. granted the motion and ordered that "Plaintiff's Complaint is hereby dismissed in its entirety and with prejudice." The Court further ordered that "Plaintiff and/or her counsel reimburse Defendants in the amount of $770.00 for litigation fees and expenses incurred for the filing of the instant Motion." (Pa001413, Pa001415).

APPELLANT'S STATEMENT OF FACTS

As a former art teacher at Benjamin Franklin Middle School in Ridgewood, New Jersey, Plaintiff-Appellant Margarete Hyer was in a basement classroom where it was poorly ventilated, damp, dark, and smelled musty. (Pa000003-5). There was black mold.

(Pa000006) Water leaks had contributed to these conditions, and Plaintiff-Appellant reported those water leaks. (Pa000007).

These conditions resulted in Plaintiff-Appellant becoming severely ill. (Pa000005, Pa000006). She has received treatment from numerous medical providers, and meanwhile, she has pursued this lawsuit against the Defendants-Respondents to determine who is liable for creating these conditions—and to what extent. (Id.)

Discovery in the Law Division was lengthy—particularly because of Plaintiff-Appellant's extensive medical treatment. There were several motions to extend discovery, most of which the Law Division court granted as unopposed. (See Pa000190, Pa000227, Pa000738, Pa001278). There were also motions to dismiss for failure to make discovery, each of which the movants withdrew or the trial court denied in substance—until the Orders that form the basis for this appeal. (See Pa000110, Pa000562).

Defendants-Respondents Village of Ridgewood Board of Education, Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu, and Steven Tichenor moved to dismiss Plaintiff-Appellant's First Amended Complaint as against them with the

allegation that Plaintiff-Appellant had failed to comply with the trial court's case management order. (Pa000744, Pa000966). Plaintiff-Appellant vigorously opposed the motion as, by this point, Plaintiff-Appellant had produced over ten thousand pages of documents in discovery, Plaintiff-Appellant had appeared for hours of depositions despite not having any opportunity to depose any of the Defendants-Respondents, and Defendants-Respondents had not demonstrated any prejudice suffered related to their allegations that Plaintiff-Appellant had failed to make discovery.

But, inexplicably—and without any articulable basis—the trial court not only granted the motion to dismiss the moving Defendants-Respondents from the case; the trial court *sua sponte* dismissed every claim in the Amended Complaint—in its entirety—as to every Defendant-Respondent—with prejudice. (Pa0001280, Pa001282).

The trial court's decision was not only out-of-step with the progression of the case: it also deprived Plaintiff-Appellant due process and goes against any notion of fairness and justice.

Plaintiff-Appellant moved for reconsideration of the decision—positing that the trial court had violated due process—but to no avail: the trial court denied the motion. (See Pa001285, Pa001413, Pa001415).

This appeal follows.

LEGAL ARGUMENT

Standard of Review

The "standard of review for dismissal of a complaint with prejudice for discovery misconduct is whether the trial court abused its discretion . . . ." Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995). Although that standard "defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Service, 779 F.2d 1260, 1265 (7th Cir. 1985)). A "functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." Flagg, 171 N.J. at 571.

POINT I: THE TRIAL COURT ERRED BY *SUA SPONTE* DISPOSING OF THIS MATTER (Pa001413)

The rules "must be 'construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.'" Klier v. Sordoni Skanska Const. Co., 337 N.J.Super. 76, 83 (App. Div. 2001) (quoting R. 1:1-2). "The cornerstone of our judicial system is that justice is the polestar and the procedures utilized by the courts must 'be moulded and applied with that in mind.'" Klier, 337 N.J.Super. at 83 (quoting N.J. Highway Authority v. Renner, 18 N.J. 485, 495 (1955)).

The judicial system's "goal is not, and should not be, swift disposition of cases at the expense of fairness and justice." Klier, 337 N.J.Super. at 83. Instead, the goal "is the fair resolution of controversies and disputes." Id. Additionally, [e]agerness to move cases must defer to our paramount duty to administer justice in the individual case." Id. (citing Audubon Volunteer Fire Co. No. 1 v. Church Const. Co., 206 N.J.Super. 405, 405 (App. Div. 1986)). In other words, "[s]hortcuts should not be utilized at the expense of justice." Klier, 337 N.J.Super. at 83.

At the heart of this analysis is Plaintiff-Appellant's right to due process. The New Jersey Supreme Court has recognized that "[t]he minimum requirements of due process of law are notice and an opportunity to be heard." Klier, 337 N.J.Super. 76, 84 (App. Div. 2001) (citing Doe v. Poritz, 142 N.J. 1, 106 (1995)).

In this matter, Defendants-Respondents Village of Ridgewood Board of Education, Angelo DeSimone, Gregory Wu, Anthony Orsini, Daniel Fishbein, and Steven Tichenor moved to dismiss the First Amended Complaint—on the tenuous basis that Plaintiff-Appellant had not complied with the Court's case management order.

The Court, *sua sponte* and without basis, dismissed the Amended Complaint with prejudice as against every Defendant-Respondent.

There were no arguments advanced in support of—nor notice of—dismissing the Amended Complaint in its entirety, and with prejudice, as against every Defendant-Respondent.

The Court's dismissal of the Amended Complaint disregarded Plaintiff-Appellant's right to due process and was at the expense of fairness and justice in this matter.

POINT II: THE TRIAL COURT ERRED IN GRANTING THE MOVING DEFENDANTS-RESPONDENTS' MOTIONS TO DISMISS (Pa001413)

Separate from the Law Division's dismissal of the Amended Complaint *sua sponte* as against all Defendants-Respondents, the Law Division improperly dismissed the Amended Complaint on the basis that Plaintiff-Appellant had failed to comply with the trial court's case management order—which delineated dates for completing discovery in this matter.

The "[d]iscovery rules are designed to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability[,] and security in the conduct of litigation." Abtrax Pharmaceuticals, Inc., 139 N.J. at 512. Courts "must be prepared to impose appropriate sanctions for violations of the rules." Oliviero v. Porter Hayden Co., 241 N.J.Super. 381, 387 (App. Div. 1990) ("[I]f discovery rules are to have any meaningful effect upon calendar control and early disposition of litigation, they must be adhered to unless, for good cause shown, they are relaxed under R. 1:1-2.").

The applicable Rule here, R. 4:23-2, allows for dismissal of a complaint "with or without prejudice" if a party fails to comply with an order to provide discovery.

Although a court "has an array of available remedies to enforce compliance with a court rule or one of its orders," (Williams v. Am. Auto Logistics, 226 N.J. 117, 124 (2016)), that court "must . . . carefully weigh what sanction is the appropriate one, choosing the approach that imposes a sanction consistent with fundamental fairness to both parties, (Id. at 125). In selecting a sanction, a court must consider "[t]he varying levels of culpability of delinquent parties," (Georgis v. Scarpa, 226 N.J.Super. 244, 251 (App. Div. 1988), and "[t]he extent to which [one party] has impaired [the other's] case may guide the court in determining whether less severe sanctions will suffice," (Williams, 226 N.J. at 125).

In determining whether dismissal is appropriate, a court must consider the "facts, including the willfulness of the violation, the ability of plaintiff to produce the [outstanding discovery], the proximity of trial, and prejudice to the adversary." Casinelli v. Manglapus, 181 N.J. 354, 365 (2004).

Dismissal is the "ultimate sanction" and is to be used "only sparingly." Abtrax Pharms., 139 N.J. at 514. "If a lesser sanction than dismissal suffices to erase the prejudice to the non-delinquent party, dismissal of the complaint is not appropriate and constitutes an abuse of discretion." Georgis, 226 N.J.Super. at 251. It is to "be ordered only when no lesser sanction will suffice to erase the prejudice." Robertet Flavors, Inc. v. Tri-Form Const., Inc., 203 N.J. 252, 274 (2010).

The Appellate Division has held that dismissal of a claim for failure to comply with discovery is "the last and least favorable option." Il Grande v. DiBenedetto, 366 N.J.Super. 597, 624 (App. Div. 2004). Further, as the Supreme Court of New Jersey has held, "dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious." Abtrax Pharms., 139 N.J. at 514 (quoting Lang v. Morgan's Home Equipment Corp., 6 N.J. 333, 339 (1951)).

The trial court disregarded this backdrop of case law interpreting the Rules. Dismissal, particularly in this instance—

where discovery was nearly completed in a matter where the Plaintiff-Appellant had significant injuries and medical treatment—was unwarranted and far from the standard for dismissal. Plaintiff-Appellant, at no point, withheld discovery responses that went to the "very foundation of the cause of action" or exhibited "deliberate and contumacious" refusal to comply with discovery requests.

The trial court's Orders—especially in view of the procedural history of this matter—show that it did not view dismissal for failure to make discovery as the "last and least favorable option." There were many options the trial court could have exercised, in its discretion, to ensure that the case moved toward trial and that the parties had a fair and full opportunity to present their claims and defenses. Instead of permit the parties that opportunity—to which they are entitled—the trial court opted to dispose of the matter entirely, dismissing the Amended Complaint with prejudice as against all Defendants-Respondents.

POINT III: THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR RECONSIDERATION (Pa001415)

Plaintiff-Appellant persisted in pursuing her case, moving for reconsideration of the Orders dismissing the matter—with

prejudice—against all Defendants-Respondents. Yet, the trial court denied the motion for reconsideration.

R. 4:49-2 provides that a motion for reconsideration "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred . . . ."

Reconsideration is to be utilized in cases "in which either 1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence." Medina v. Pitta, 442 N.J.Super. 1, 18 (App. Div. 2015) (quoting D'Atria v. D'Atria, 242 N.J.Super. 392, 401 (Ch. Div. 1990)). The motion for reconsideration "provides the court, and not the litigant, with an opportunity to take a second bite at the apple to correct errors inherent in a prior ruling." Medina, 442 N.J.Super. at 18.

R. 4:50-1 provides that a "court may relieve a party . . . from a final judgment or order" based on "(a) mistake, inadvertence, surprise, or excusable neglect" or "(f) any other reason justifying relief from the operation of the judgment or order."

R. 4:50-1 "is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." See Baumann v. Marinaro, 95 N.J. 380, 392 (1984).

Incorrectly, and irrationally, the trial court denied Plaintiff-Appellant's motion for reconsideration. On its face, the motion afforded the trial court a second opportunity to take inventory of the facts and law and conclude that dismissal—particularly with prejudice—was not warranted in this matter, as against any of the Defendants-Respondents but especially not all of them.

Looking through the lens of the body of law on motions to dismiss for failure to make discovery being a last option for trial courts, the Orders dismissing this Complaint are inexplicable. The basis for the decision is either incorrect or irrational, or the trial court simply overlooked that body of law.

In either event, the Orders warrant reversal and remanding this matter to the trial court so that the parties may complete discovery and proceed to trial—so that Plaintiff-Appellant may pursue her claims and Defendants-Respondents may put up their defenses.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests that the Court grant her appeal and reverse and remand the matter to the trial court.

Respectfully Submitted,

/s/ Scott Piekarsky, Esq.

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Dated: August 21, 2024

4865-1677-4093, v. 2

Margarete Hyer, Plaintiff- Appellant, v. Village of Ridgewood Board of Education, Daniel Fishbien, Angelo Desimone, Anthony S. Orsini, Greg Wu, Steven Tichenor, Sodexo a/k/a Sodexo USA and/or Sodexo, Inc., GCA Services Group Inc. a/k/a GCA Education Services Inc., Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Educational Services, Inc., Aramark Educational Services, LLC and/or Aramark Educational Group, Inc., Defendants-Respondents.	Superior Court of New Jersey: Appellate Division-Docket No.:A-2074-23 T4 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4141-20 November 27, 2023 Order Dismissing the First and Fifth Counts of Plaintiff's Complaint and the February 22, 2024 Order Denying Plaintiff's Motion for Reconsideration Sat Below: The Honorable Mary F. Thurber, retired

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Brief of Defendant/Respondent,
Village of Ridgewood Board of Education,
as to the Dismissal of the First and Fifth Counts

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Gina M. Zippilli, of counsel and on the brief

Submitted: November 11, 2024

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TABLE OF TRANSCRIPTS[1]

[1] Appellant did not submit the July 28, 2023 or the October 23, 2023 transcripts to the Court despite them being germane to this Appeal. Defendant references the (4) transcripts in chronological order pursuant to R. 2:6-8 as follows: the July 28, 2023 transcript is 1T; the October 23, 2023 transcript is 2T; the November 27, 2023 transcript is 3T; and the February 22, 2024 transcript is 4T.

TABLE OF ORDERS BEING APPEALED[2]

November 27, 2023 order dismissing the First and Fifth Counts (Pa001280-Pa001281)

February 22, 2024 order denying Plaintiff's motion for reconsideration (Pa001285)

[2] Plaintiff's Case Information Statement indicates she is appealing (2) orders, the November 27, 2023 and the February 22, 2024 orders, however Plaintiff's Table of Orders contains a total of 19 orders. Defendant's brief will only address the November 2023 and February 2024 orders.

TABLE OF CASE CITATIONS, RULES AND STATUTES

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STATUTES

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I. PRELIMINARY STATEMENT

This lawsuit involves an intentional act exception claim arising out of the employment of Margarete Hyer ("Plaintiff"), a teacher with the Village of Ridgewood Board of Education ("Defendant"). Plaintiff, an art teacher, alleged that she developed chronic inflammatory respiratory syndrome ("CIRS") after being exposed to what she believed was mold in her classroom from 2007 up until the time of her retirement in 2020. This appeal arises from the trial court's dismissal of the First and Fifth Counts of Plaintiff's First Amended Complaint ("Complaint") pursuant to R. 4:23-2(B)(3). After Plaintiff failed to comply with the trial court's July 28, 2023 and October 23, 2023 orders, the court granted Defendant's motion to dismiss the Complaint on November 27, 2023. Plaintiff unsuccessfully moved for reconsideration on February 22, 2024 and this appeal ensued.

The dismissal of the action in November 2023 came 1,225 days after Plaintiff filed the Complaint on July 23, 2020. Defendant filed multiple discovery motions throughout the litigation and discovery had been extended no less than 7 times. Prior to the dismissal in November, the trial judge warned Plaintiff that if she did not bring herself in compliance with the July and October orders, her Complaint would be dismissed with prejudice. Plaintiff never complied and the Complaint was dismissed.

While the trial judge considered options other than dismissal, (3T40:7-25 and 3T41-42), the court ultimately concluded that dismissal was the appropriate sanction given: (1) that Plaintiff was selectively producing documents for tactical purposes while withholding others (3T18:19-23 and 3T42); (2) that Plaintiff was engaging in a practice of "document-dumping," whereby Plaintiff would reproduce thousands upon thousands of pages of documents multiple times while assigning different Bates-numbers to the same document (3T13:20-25; 3T14:1-3; 3T14:8-10 3T23:22-25; 3T24:1-25; and 3T25:8-10); (3) the number of allowances afforded Plaintiff to cure the deficiencies (3T15:13-15, 3T42:17-25); (4) the fact that Plaintiff, rather than her attorney, sent all documents directly to Dr. McMahon, Plaintiff's expert, but refused to provide them to Defendant or Plaintiff's counsel; (5) the fact that Plaintiff's attorney, Scott Piekarsky, had no knowledge as to what documents Plaintiff had actually sent to the expert and therefore could not confirm what documents were provided to Defendant (3T41:18-47 and 3T42:1-25); (6) that the case was over 3 years old; (7) that Defendant was not delinquent in discovery; and (8) that Plaintiff served Dr. McMahon's expert report, which contained 179 footnotes, but refused to provide to Defendant the documents; peer reviews; articles; case studies; etc. that were referenced in his 119-page report (3T42:20-25).

Following extensive argument, the trial judge found Plaintiff's course of conduct to be deliberate and intentionally burdensome on Defendant. The trial judge also determined that Plaintiff had not been diligent in pursuing discovery, despite having over 3 years to do so, and had not satisfactorily explained why discovery had not been completed. Defendant, on the other hand, had not engaged in any inappropriate conduct and had been persistent in its efforts to obtain discovery that was essential to the case.

The record before this Appellate Court is replete with reasons why the trial judge not only determined that dismissal was the appropriate sanction but also why the court felt that no lesser sanction was sufficient. The trial court did not abuse its discretion and Plaintiff's appeal should be denied as to this Defendant.

II. PROCEDURAL HISTORY

1. Plaintiff filed a First Amended Complaint ("Complaint") on July 23, 2020 (Pa000410-Pa000428).

2. The original discovery end date was March 4, 2022 (BOEa001).

3. Discovery had been extended no less than 7 times (BOEa001).

4. Defendant filed no less than 5 discovery motions:

   a. On December 20, 2021, Defendant moved to dismiss Plaintiff's complaint for failing to answer discovery (BOEa006-BOEa014).[3]

   b. On April 22, 2022, Defendant again moved to dismiss Plaintiff's complaint for failing to answer discovery (BOEa033-BOEa055).

   c. On December 2, 2022, Defendant moved to compel Plaintiff's in-person deposition (Pa000272-Pa000279).

   d. On December 7, 2022, Defendant moved to compel Plaintiff to provide HIPAA authorizations (Pa000280-Pa000293).

   e. On January 17, 2023, Defendant moved for sanctions after Plaintiff appeared for, but refused to move forward with, Defendant's medical examination (Pa000327-Pa000345).

5. On September 21, 2021, Defendant requested that Plaintiff produce all

[3] Some documents Bates-numbered by Plaintiff were not the documents they purported to be. As such, Defendant is resubmitting a few of those documents with a corresponding Bates-label.

documents that supported her damage claims (BOEa002-BOEa005).

6. On January 11, 2023, Defendant served its Third Request for Documents on Plaintiff again requesting she produce, *inter alia*, medical literature, records, treatises and other documents that Plaintiff's experts relied upon in rendering their reports (BOEa060-BOEa064).

7. On June 9, 2023, the trial court granted Plaintiff's motion seeking to extend discovery until November 25, 2023 (BOEa185-BOEa186).

Defendant seeks the trial court's assistance

8. By July 2023, Plaintiff had perfected a discovery tactic of "document-dumping," whereby Plaintiff would produce and reproduce the same document production consisting of thousands upon thousands of pages of documents on Defendant multiple times (Pa000648; Pa000655-Pa000657; and Pa000659-Pa000660).

9. Plaintiff's "document-dumping" practice became so overwhelming and costly that by July 20, 2023, Defendant wrote to the trial court for help:

> On June 9, 2023, Your Honor entered an Order extending discovery and further ordered a request for a case management conference be made prior to any further discovery extensions would be entertained.
>
> **Over the last two days, Plaintiff has produced over 10,000 pages of documents**. In light of this, the Board requests a case management conference with Your Honor to discuss the current discovery deadlines and to discuss

> future discovery production by Plaintiff. [Pa000648, **emphasis added**].

10. A case management conference was held on July 28, 2023 (Pa000655).

11. On July 26, Defendant provided a "sample" of the type and kind of documents that Plaintiff was producing in discovery. The sample included pictures of, *inter alia*, Plaintiff's arm pit and paint cans (Pa000650).

12. On July 28, 2023[4] after a lengthy discussion of Plaintiff's discovery practices, the trial court entered the following order:

> **No later than August 11, 2023**, Plaintiff shall produce to defendants:
>
> Contact information including names and addresses plus fully executed HIPAA releases (if not previously provided) for every care provider who provided services to Plaintiff during the time period relevant to this lawsuit, including all providers included in Plaintiff's recent document productions;
>
> **An Index of all Bate-stamped documents produced by Plaintiff and an itemized identification of the discovery requests to which the documents are responsive**; and
>
> **Bate-stamped copies of any other documents responsive to discovery requests or on which Plaintiff intends to rely at trial, including any documents previously produced but not bate-stamped, also indexed and linked to discovery requests** as in paragraph 1(b) above.

---

[4] Plaintiff did not provide the July 28 or the October 23, 2023 transcripts. Pursuant to R. 2:6-8, the transcripts are provided here and are numbered chronologically. The July 28, 2023 transcript is labeled 1T; the October 2023 transcript is 2T; the November 2023 transcript is labeled as 3T; and the February 2024 transcript is labeled 4T.

***

> **Plaintiff may not supplement her document production after August 11, 2023,** nor rely at trial on documents that are not produced in accordance with this Order. To seek relief from this paragraph, Plaintiff must file a motion for relief and demonstrate the documents or information were not reasonably available to or discoverable by Plaintiff prior to August 11, 2023. Any such application must be made promptly following Plaintiff's receipt or discovery of any such documents or information [Pa000655-Pa000657, **emphasis added**].

13. On July 31, 2023, Defendant sent a letter to Plaintiff again identifying outstanding discovery that included, *inter alia*, tax returns, the names and addresses of Plaintiff's siblings; medical authorizations not yet received; and other outstanding discovery (BOEa187).

14. August 11, 2023 was the deadline set forth in the July 28 order for Plaintiff to provide outstanding discovery (Pa000656).

15. On August 15, 2023, 4 days after the court-ordered deadline, Plaintiff reproduced the same 10,000-page document production that she produced prior to the July 28 conference. Defendant also received (1) non-compliant HIPAA authorizations in favor of providers with whom Plaintiff never treated;[5] (2)

[5] Once Defendant obtained HIPAA compliant releases, Defendant sent the releases to the providers, who were first identified by Plaintiff after the August 11 deadline and were advised that Plaintiff was never a patient at their facilities.

documents reflecting, for the first time, that Plaintiff treated in states other than New Jersey; and (3) documents indicating that Plaintiff, 3 years into the litigation, was now also claiming orthopedic injuries (Pa000659-000660).

16. On August 16, 2023, Defendant sent the following email to Plaintiff's counsel:

> The HIPAAS you provided are not compliant and thus the reason we sent you blank forms, to avoid this very issue. I note that you included prior doctors and thus are, once again, mass producing documents in duplicates. I am now receiving notice of providers in Ohio and other states never identified in deposition, answers to discovery or otherwise. The HIPAAS are not tailored in time, among other things.
>
> We deem your response is this regard not compliant with the court's order and will be contacting the court once again.
>
> None of the information requested during deposition has been provided, including names and addresses of employees and siblings;
>
> The newly produced pictures have no notation as to what they are showing (there are a few pics of Plaintiff's armpit);
>
> There is a picture of paint;
>
> The column "lists" contains no definition as to what they are supposed to mean. This issue was specifically addressed by the Court during our last call;
>
> The "receipts and bills" have no information as to what they are supposedly showing;

> There is no explanation for why your client's dental receipts are being provided or why her dental visits are listed and why we are receiving EOB's for, inter alia, dental cleaning.
>
> This is not an exhaustive list [BOEa191, emphasis added].

17. On September 21, 2023, Defendant moved to dismiss Plaintiff's complaint pursuant to R. 4:23-2(B)(3) and for an award of counsel fees pursuant to R. 4:23-2(B)(4). That motion had a return date of Friday, October 20, 2023 (Pa000966-Pa001007).

18. Defendant's September 21st motion to dismiss was not heard until November 27th. The trial judge, on at least 2 more occasions, extended previously amended discovery deadlines to give Plaintiff additional time to bring herself in compliance with the July 28 and October 23 orders (3T7:14-25).

19. On October 4, 2023, Defendant moved to bar plaintiff's expert report. That motion was returnable October 20, 2023 (Pa001010-Pa001042).

20. On Monday, October 23, 2023,[6] rather than barring Plaintiff's expert on the 20th of October, the trial court entered another discovery order that again extended the deadlines for Plaintiff to provide outstanding discovery and to cure her deficiencies:

---

6 The October 23, 2023 transcript is identified as 2T. The October 23, 2023 transcript was not provided by Plaintiff but is germane to the appeal.

> Plaintiff shall return signed HIPAA forms no later than 4:00 p.m. on Wednesday, October 25, 2023 for [the 18] providers listed.
>
> If Plaintiff fails to comply, then for any provider for whom Plaintiff does not provide the HIPAA release as set forth in paragraph 3, Plaintiff shall be barred from relying on or introducing any evidence concerning treatment by any of these providers, including but not limited to any reference to any records or treatment by any of these providers by any witness, including experts and other providers.
>
> ***
>
> **No later than 4:00 p.m. on Friday, October 27, 2023**, Plaintiff shall provide to Defendants Bate-stamped copies of all documents Defendants requested concerning Dr. Scott W. McMahon, including but not limited to:
>
> **Dr. McMahon's entire medical treatment file relative to this matter** including but not limited to his hand-written interview and treatment notes;
>
> **Copies of Plaintiff's medical records from Center for Functional Medicine, Cyrex Laboratories, and Genova Diagnostics**;
>
> **Copies of all medical literature** relied upon to arrive at his conclusion in his report; and
>
> Any exhibits or models Dr. McMahon intends to use at trial.
>
> **If Plaintiff fails to comply with … this Order, Dr. McMahon's expert report shall be barred, and Plaintiff shall be barred from relying on his expert opinion at trial** [Pa001056-Pa001059, **emphasis added**].

21. October 27, 2023 was the new deadline for Plaintiff to cure all deficiencies

and to bring herself in compliance with the July and October orders (Pa001058).

22. On November 27, 2023, after extensive argument and a review of the procedural history of this case, the trial court granted Defendant's motion to dismiss the first and fifth counts of the Complaint (Pa001280-Pa1281).[7] This order resulted from Defendant's September 21, 2023 motion to dismiss the bodily injury claims asserted in the First and Fifth Counts pursuant to R. 4:23-2(B)(3).

23. On February 22, 2024, Plaintiff unsuccessfully moved for reconsideration of the November 27th order (Pa001285).

24. During oral argument on reconsideration, the trial judge noted that Plaintiff "did not recite any applicable standard" (4T17:22-24) and there was:

> **a failure to acknowledge in the papers and in the argument the extent, duration, and magnitude of the discovery failings that led to the Court's decision** [4T19:18-21, **emphasis added]**.

III. COUNTERSTATEMENT OF FACTS

1. Plaintiff was an art teacher at Benjamin Franklin Village Board of Education from 1998 through her retirement in 2020 (Pa000411).

2. In her First Amended Complaint filed on July 23, 2020 ("Complaint"),

---

[7] On November 27, 2023, the trial court granted Defendant's motion to dismiss the bodily injury claims asserted in the first and fifth counts as to the Board of Education. The trial court labeled this order 1 out of 3 and is indexed at Pa001280-Pa001281. The trial court also dismissed the first and fifth counts as to the individually named Board employees, specifically Daniel Fishien, Angelo Desimone, Anthony S. Orsini, Greg Wu and Steven Tichenor as well as Sodexo, CGA Servies and Aramark on November 27. That order is labeled 2 out of 3 and is indexed at Pa001282-001283.

Plaintiff alleged that she developed asthma-like symptoms (sneezing, coughing) in 2008 from being exposed to what she believed was black mold (Pa000414).

3. In or around February 2023, Plaintiff alleged that she developed CIRS, Chronic Inflammatory Respiratory Syndrome (BOEa015-BOE018).

Plaintiff's refusal to provide documents, literature and other records refenced and relied upon by Plaintiff's CIRS expert, Dr. McMahon

4. On May 3, 2023, Plaintiff served the report of Dr. Scott McMahon, Plaintiff's purported expert in CIRS (BOEa065-BOEa184).

5. Dr. McMahon did not receive any treatment records, discovery or any other document relating to Plaintiff's treatment or case from Plaintiff's counsel, Scott Piekarsky (3T17:22-24).

6. Rather, Plaintiff herself provided records and documents to Dr. McMahon directly (3T17:22-24).

7. Mr. Piekarsky admittedly had no knowledge of what documents Plaintiff provided to Dr. McMahon and therefore could not confirm that Plaintiff provided the same, if any, documents to Defendant:

> THE COURT: So the material that your expert has presumably was provided to the expert by you. For you not to be able to provide the same materials to the defendants is something the court can't understand [3T17:14-16].
>
> MR. PIEKARSKY: I believe all the materials were provided by the client. The client directly retained him

[3T17:22-24].

> THE COURT: [**This is] problematic because you can't even verify in any way that you're giving us everything that you gave the doctor because you didn't have it go through your office** [3T18:4-7, **emphasis added**].
>
> ***
>
> THE COURT: **If your client had those files to provide to the doctor, why weren't they produced in discovery**?
>
> MR. PIEKARSKY: **I don't know**.
>
> THE COURT: Right. Because your client is not cooperating. **[I]t may be the client more than you … but things are being dribbled out … perhaps with some tactical calculations about whether they'll be helpful or not. That's not the way it works** [3T18:14-23, **emphasis added**].

8. The report was 119 pages, 12 of those pages contained 179 footnotes that identified case studies, human and animals including monkeys; medical research studies; textbooks; medical literature; and world-wide journals (BOEa138-BOEa183).

9. Dr. McMahon's report begins:

> I have been evaluating patients with reported mold and mycotoxin illness for over 13 years…Our **research group has published 31 peer-reviewed articles, 1 book and 2 book chapters with 3 additional peer-reviewed consensus statements and 14 commissioned chapters for a medical textbook (peer-reviewed). Of these 34**

> **books and papers, I have authored or co-authored 12**...
> …
>
> **The medical literature contains** two peer-reviewed case definitions (CD)… using the case definitions simplifies the process by also tying in symptoms found in the scientific and medical literature… [BOEa066, **emphasis added**].

10. By the time the trial court dismissed Plaintiff's complaint in November 2023, Plaintiff had not produced any of the 31 peer-reviewed articles; book chapters; papers authored or co-authored by Dr. McMahon or the literature referenced above (3T19:4-13 and BOEa160-BOEa166).

11. Plaintiff also never produced the medical files required by the July and October orders (3T19:4-3 and Pa001056-Pa001059).

12. Likewise, Plaintiff had not produced any supplemental documentation concerning Dr. McMahon after the July 28, 2023 Order was entered (3T11:11-25, 3T12:1-25 and 3T13:1-16)

13. In his report, Dr. McMahon concluded that the exposure to mold "likely occurred in substantial part from or on goods and products intended for human bodily consumption…" (BOEa151).

14. No "goods" or "products" were identified (BOEa151).

15. Dr. McMahon was not licensed to practice medicine in the state of New Jersey (BOEa150).

Plaintiff's refusal to provide complete treatment records from other experts and treating physicians

16. Dr. McMahon identified himself as Plaintiff's treating physician (BOEa065).

17. Dr. Arthur Lubitz also identified himself as Plaintiff's treating physician (BOEa022 and BOEa028).

18. On December 14, 2022, Plaintiff identified Dr. Lubitz also as an expert. At that time, she served an expert report from Dr. Lubitz that was authored on December 9, 2020 but inexplicably was not produced to Defendant until December 2022, (2) years later (BOEa056-BOEa058).

19. Plaintiff also identified Dr. Boyle as a treating physician (3T29:1-10).

20. Despite Defendant's repeated requests, Plaintiff never produced the complete medical file for various doctors:

> We also need our request for Dr. [Lubitz'] and Dr. Boyles' reports and their complete file since we do not have that either. That was again requested on November 15, 2023. We were told we would get those. We have not received them.
>
> We're getting bits and pieces of [Boyle's] and [Lubitz'] records. We received a new correspondence from last year from Dr. [Lubiz]. He was referencing extensive lab testing. We have no idea what lab testing was performed. We don't have any data. We don't have any results. We weren't advised of anything. We're in the dark about that

[3T11:18-25 and 3T12:1-6].

Document dumping, reproduction of thousands of pages of documents multiple times and assigning different Bates-numbers to the same documents

21. Throughout discovery, Plaintiff would serve anywhere between 4,000 and 10,000 documents on Defendant at one time:

> MS. KUMAR THOMPSON: 4,125 documents were served on October 26th. On October 15th, 6,589 documents. On July 26th, 7,981 documents. And before that it was around 10,000 [3T22:19-23].

22. The documents were not originally Bates-numbered and no index originally provided (Pa000656).

23. Plaintiff would reproduce the same thousand-page production multiple times:

> MRS. ZIPPILLI-MATERO: [**W]e are getting another production of documents, 90% of which were the same documents that we had already received**...
>
> THE COURT: **And some have new Bates numbers** apparently?
>
> MRS. ZIPPILLI-MATERO: **Yes**… [3T12:14-22, **emphasis added**].
>
> ***
>
> MRS. ZIPPILLI-MATERO: [**S]o from the last time we were before Your Honor, the only new thing that we have received was a handful of documents that we have no idea what they are for.** And a few new documents that are referencing testing and everything and that could have been produced last year or even six

> months ago and have not been and we have no idea why [3T12:24-25; 3T13:1-2, **emphasis added**].

24. This resulted in Defendant having to review thousands of pages of documents it had already reviewed 4, 5 and 6 times previously to determine if new records were being produced (3T:24:1-9).

25. After the trial court ordered Plaintiff to Bates-stamp her thousand-plus page document productions, Plaintiff then engaged in a practice where she would assign different Bates-numbers to the same document:

> THE COURT: **Is it true that you've assigned different bates-numbers to the same document and different productions**?
>
> MR. PIEKARSKY: That's possible [3T14:8-11, **emphasis added**].

26. Plaintiff also produced pictures of armpits; paint cans; dirty rags; water fountains; and other random pictures with no explanation as to why they were being produced or what they were intended to show (3T32:14-15 and Pa000650).

27. By the time the trial court dismissed Plaintiff's Complaint in November 2023, the judge had at least twice ordered Plaintiff to cure these deficiencies:

> THE COURT: The document production has been problematic and appears to continue to be problematic. When you have an obligation at the outset of a case, as Plaintiff's counsel, [to] marshal … your client's information, organize it and produce it matching--you know Bates stamping the documents and matching them to the request. **15,000 documents without a comprehensive uniform identification and indexing is**

unacceptable [3T13:20-25; 3T14:1-4, **emphasis added**].

***

THE COURT: [**I]nstead of dismissing the complaint a month ago, I said… you'll have a last chance to clean it up** [3T15:13-14, **emphasis added**].

***

THE COURT: I think the issue, Mr. Piekarsky, is that on the Plaintiff side, the work wasn't done to organize the records and produce them in an organized non duplicative way. **So then you take another batch of documents which includes many that you already produced, you give them new bates numbers, and try to shift to the defendants the burden of going through those, another in the last month, over 10,000 documents to go through them and discern and identify what's new, what's there that they haven't already seen and how it relates**. And that's not reasonable or fair that's an unreasonable burden.

It's Plaintiff not doing what Plaintiffs is supposed to do. And defendants don't have to keep bearing the cost of looking again at documents that you know, the burden of going through the new records and seeing what was already produced and what's new should be on you. **But not having them organized to identify what was previously produced and not using the same bates number is problematic and giving you more time and letting you keep curing it and having the defendants have to do the same work over again** … I think that the Plaintiff is making it unduly more expensive. [3T23:22-25; and 3T24:1-25; and 3T25:1-25, **emphasis added**].

THE COURT: I haven't heard any complaints from you about the defendants' dumping documents on you dumping duplicates, failing to index them …[3T25:16-18].

***

THE COURT: I'm going back to the Court's [October 23rd] order … most of which was included in the July order had not been complied with correct?

MRS. ZIPPILLI-MATERO: Yes, Judge…

***

THE COURT: **And the last production on October 23 I ordered to be produced by October 27th. This is paragraph seven of the order of October 23rd. This was to include Dr. [McMahon]'s entire medical treatment file relative to this matter, including but not limited to handwritten interview and treatment notes. Has that been produced**?

MS. KUMAR-THOMPSON: **No** [3T28:1-11, **emphasis added**].

***

MRS. ZIPPILLI-MATERO: **On November 15, I again renewed the [Defendant's] request ... for Dr. Boyle and Dr. Lubitz' records. To which we received an e-mail that said OK we'll get them to you. It's now November 27th. We have not received anything**.

THE COURT: And these were due by October 27th from the courts prior order?

MS. KUMAR-THOMPSON: Yes [3T30:8-18, **emphasis added**].

MRS. ZIPPILLI-MATERO: **Judge within that production … we are receiving random photos again of a water fountain. Just a water fountain. A cloth that's dirty. Several of them**… [3T32:13-16, **emphasis added**].

***

And they were dated several years ago [3T33:1].

THE COURT: **So no good reason they would not have been produced earlier** [3T33:8-10, **emphasis added**].

***

I've said multiple times already that Plaintiff and or Plaintiff's counsel failed to provide discovery in this complicated case, where you've produced tens of thousands of documents in a way that … unfairly shifted the burden of figuring out what you're producing for the second time, the third time, what's new, how it relates to the case, shifted that to the defendants.

And so there are really just a couple of options here. One is [to] dismiss the case. Because this is the second order that's still not fully complied with. Or giving Plaintiff yet another opportunity to cure but shifting back to Plaintiff the costs that these failures to comply have caused [3T39:23-25 and 3T40:1-12, **emphasis added**].

***

And I'm suggesting that if I were not dismissing the complaint, is there any way to give Plaintiff yet another chance to have the case survive in a way that would be fair to the defendants? And the only way I can see doing that is requiring Plaintiff to reimburse the defendants for those costs.

And I don't think I -- even at that, I don't know how … that would really be fair at this point in this case.

[It's] three years old. It's brought as a toxic tort case. There's been a failure to comply with court orders. **I deferred this with sort of what I call the last chance… In that it's a month after the deadline of that [October] order and there's still not compliance with respect to documents certainly concerning Dr. McMann**

> [3T40:20-25 and 3T41:1-12, **emphasis added**].
>
> ***
>
> **I think your client selectively produced**. She decided to produce some stuff. Then she decided she wanted to send things to an expert. **She sent to the expert things she hadn't sent to you, things she hadn't sent to the [Defendant]. And it's not acceptable**. It's not tolerable and it may be that dismissal is the sanction, the appropriate sanction. Dismissal with prejudice at least of Counts One and Five [3T42:1-7, **emphasis added**].
>
> ***
>
> **I ... have made a lot of allowances in this case, Mr. Piekarsky.… For you not to have the material that was provided to the expert when you're trying to introduce this expert so late in the game, has now brought about the consequence that your client didn't comply with the order** and you weren't able to [3T42:18-25, **emphasis added**].[8]

28. Notably, Plaintiff's failure to produce discovery and her ongoing document dumping practices was addressed by the trial court as early as July 28, 2023, when oral argument was held in response to Defendant's requests for the trial judge's assistance:

[8] On August 30, 2023, Mr. Piekarsky switched law firms and claimed that the document dumps and late productions were due to his old firm essentially holding his file hostage (3T15:17-17 and 3T14:8-16). However, these discovery tactics occurred several months if not years before Mr. Piekarsky left his prior firm. The constant production of thousands of thousands of documents ultimately culminated in Defendant seeking the trial court's help on July 28, 2023; long before Mr. Piekarsky left his firm. (July 28 letter); 3T16:5-12.) Even more, the documents that were being produced pre-dated the filing of the Complaint (treatment notes from 2007 on) and Plaintiff had no explanation as to why they had not been produced earlier in the litigation. The trial judge also noted that Mr. Piekarsky never advised the court of any such problem and never sought relief from the court[3T15:14-17].

MS. ZIPPILLI-MATERO: **There's been 5 or 6 drop boxes over the last two weeks that have been over 18,000 pages.**

THE COURT: **On a case that's at 1000 days of discovery already**? [1T6:5-8, **emphasis added**].

***

MS. ZIPPILLI-MATERO: Yes, **Your Honor…and what happens is we keep getting these large document productions several days before her deposition. In the past I've just moved and continued on with the deposition… and it's getting to the point where it's not becoming resourceful to having these documents dropped on us especially when some of them are dated years and years and years ago for me to then move forward and then only maybe depose her half the day go back and review 10,000 documents, then another Dropbox of 15,000 documents. Some are being stamped some are not I have portions of tax returns but not all of them** OK I'll get emails that are pages one of two but I only have page one of the I have receipts, some of which are blank. **Some have covid written on them. I'm not quite sure what these receipts are. I have other receipts with amounts on them I have no idea what they're for** [1T6:19-25 and 1T7:1-11, **emphasis added**].

***

THE COURT: **If we're talking about documents, some of which go back 20 years, why are they being produced after day 1000 of the case**?

MR. DISTEFANO: **Because I received I think about four or five binders of paper documents from my client**.

THE COURT: **Well that explains why the law firm didn't deliver them sooner… it doesn't explain why**

Plaintiff didn't deliver them sooner. She's had a case pending for more than 1000 days [1T9:10-21, **emphasis added**].

***

Ms. Kumar-Thompson: [There] were also videos and a Dropbox that were produced recently, about 25, and they indicate that they were videos from 2019. There's absolutely no reason that these videos should be appearing in 2023 [1T13:8-13].

***

THE COURT: It's my suggestion that we put a pause on the depositions, that Plaintiff index the bate stamp documents that have been produced, that he provide a list, and identify which bait stamp documents are responsive to which document request. If Plaintiff tends to rely or wishes to rely or use any document or things such as videos or pictures those have to be bate stamped and indexed as well with the same requirement. They have to be added to the Bates stamp production [1T15:4-14].

Thereafter any defendant [can] make any motion with respect to this production, meaning to bar anything if you claim there's undue prejudice, to move for sanctions … any relief that defendants feel is necessary to try and address what the defendants are identifying as Plaintiff's failure to comply with the basic rules of discovery and court orders in this matter [1T15:25 and 1T16:1-10].

***

THE COURT: **I'm distressed at this extensive document production this far into the case… I wasn't particularly persuaded by the explanation you gave me on your feet in response to my question now …that a lot of these documents are ones that would have been responsive to earlier requests**. But let's see where you guys are after this period of time [1T17:5-15, **emphasis added**].

***

> If you obtain additional documents after this [two-week deadline] that you seek to introduce, that you make a motion for permission to supplement the discovery and give the explanation for why it couldn't have been … produced sooner. And if I determine that a good faith effort was made and that these couldn't have been produced sooner, okay [1T18:12-21].

29. Plaintiff never complied with the July 28th Order and never moved to supplement her response (3T11:11-25; 3T12:2-25; and 3T13:1-6).

30. After the July 28 conference, Defendant moved to bar plaintiff's expert report (Pa001010-Pa001042). That motion was returnable on Friday, October 20, 2023 (Pa001010).

31. Instead of ruling on Defendant's motion to bar on Friday, October 20, 2023, the trial court held oral argument on Monday, October 23, 2023 to address Plaintiff's failure to comply with the court's July 28, 2023 order (Pa001056-Pa001059).

32. During the October 23, 2023 argument, the trial court: (1) addressed Plaintiff's demand that Defendant pay Plaintiff's expert's retainer agreement before producing any treatment or file records; (2) addressed Plaintiff's failure to comply with the deadlines in the July 28 order; and (3) advised Plaintiff that if Plaintiff did not meet the new deadlines to be set forth in the October 23rd order then the complaint would be dismissed with prejudice:

THE COURT: In response to the [Defendant's] motion to bar your expert, you really don't address the issues… You attach a retainer agreement from doctor McMahon. Have you signed the retainer agreement on behalf of your client?

MR. PIEKARSKY: No, I have not. He was retained by the client many months ago to undertake an exam and write a report. Plaintiff paid him a retainer to do that [2T10:18-25; 2T11].

***

THE COURT: Did she sign this retainer agreement? Your client directly retained the expert.

MR. PIEKARSKY: I believe she did.

THE COURT: Well, you believe she did. Is this the agreement that governs her agreement with Dr. McMahon?

MR. PIEKARSKY: To the best of my knowledge, yes.

THE COURT: **Do you have any authority whatsoever for the proposition that a defendant wishing to depose your expert should be signing a retainer agreement**?

MR. PIEKARSKY: I think it would be appropriate for the court to enter an order.

THE COURT: **What possible authority is there to refuse to produce … medical records, file that he has as a treating doctor, or the documents he reviewed without the other side paying his fees or a court order? Where does that come from? You have an obligation you're naming this expert. You have to produce these documents. You're in default. You, meaning the Plaintiff is in default** [2T11:1-25 and 2T12:1-4, **emphasis added**].

MR. PIEKARSKY: I understand. I tried to get these

> records … and then we're given this agreement and told that this fee was required [2T12:7-10].
>
> ***
>
> The COURT: Then **your client has to pay that fee if she wants to use this doctor. The defendants don't have to pay to get his records. They don't have to pay, and they certainly don't have to sign a retainer agreement with your expert** [2T12:13-17, emphasis added].
>
> ***
>
> THE COURT: Well, you produce medical records and the documents that doctor reviewed to prepare his report in advance of the deposition. We don't spend $500.00 an hour for the expert to sit there while lawyers see his records for the first time period that's not how it's done [2T12:22-25 and 2T13:1-2].
>
> MS. ZIPPILLI-MATERO: [Defendant is] …learning for the first time that apparently, she went under some type of examination, the board has absolutely no idea what that examination was, when it occurred [2T14:19-22].
>
> ***

33. In addressing Plaintiff's failure to comply with the July 28th order, which required, *inter ali*a, Plaintiff to immediately provide dates for Plaintiff's deposition, the trial judge stated:

> THE COURT: So Mr. Piekarsky, it's three months [since the July 28, 2023 case management conference]. You were supposed to give the dates immediately. It's three months. You cannot litigate this case this way.
>
> MR. PIEKARSKY: Understood.
>
> THE COURT: **I'm going to give you dates and deadlines, and if they're not met, the Plaintiff's case is**

> **going to be dismissed with prejudice. We're not going to keep doing this (emphasis added**.)
>
> MR. PIEKARSKY: [O]kay [2T16:7-15, **emphasis added**].

34. After the October 23 order was entered, Plaintiff continued to mass produce thousands of pages of the same documents and assign different Bates-number to the same document (Pa000659-Pa000600).

35. Plaintiff's Complaint was then dismissed on November 27, 2023. (Pa001280-Pa001281).

36. Plaintiff unsuccessfully moved for reconsideration on February 22, 2024 (Pa001415-Pa001416).

IV. LEGAL ARGUMENT

POINT I: THE RECORD CONTAINS ADEQUATE, SUBSTANTIAL AND CREDIBLE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT PLAINTIFF DELIBERATELY EMPLOYED INAPPROPRIATE DISCOVERY TACTICS AND WILLFULLY DISREGARDED THE JULY AND OCTOBER 23 CASE MANAGEMENT ORDERS

Plaintiff's ongoing attempt to thwart the discovery process; her selectively producing documents she deemed helpful while withholding other documents (3T42:1-7); her refusal to provide the literature, treatises, books, articles and other documents referenced in her expert's 119-page report (3T42:1-7); her assigning different Bates-numbers to the same documents and reproducing them multiple

times (3T14:8-11); her document-dumping tactics (3T39:23-25 and 3T40:1-12); and Plaintiff's multiple other discovery infractions, as well as her intentional defiance of 2 order, are all evidence of Plaintiff's deliberate failure to engage in proper discovery. It cannot be said that the trial court abused its discretion by dismissing her complaint, especially after the trial judge warned Plaintiff that dismissal was impending if she did not comply with the orders by October 27, 2023 (2T16:7-15). Plaintiff did not comply, and her Complaint was dismissed.

The dismissal of Plaintiff's Complaint in November 2023 arose from Defendant's September 21, 2023 motion to dismiss pursuant to R. 4:23-2B(3)(Pa000966-Pa001007).[9] That rule provides in pertinent part:

> If a party … fails to obey an order to provide … discovery … the court in which the action is pending may make such orders …
>
> (3) dismissing the action… [R. 4:23-2B(3)].

A trial court's dismissal of a complaint, and denial of a motion for reconsideration, are reviewed under an abuse of discretion standard. Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517(1995); see also Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). This standard is one that cautions appellate courts not to interfere. Abtrax, 139 N.J. at 514. Indeed, if the record

[9] Defendant originally moved to dismiss Plaintiff's complaint for violating discovery orders on September 21, 2023. That motion was adjourned until November 23, 2023 to allow Plaintiff additional time to cure the deficiencies.

below contains "adequate, substantial, and credible evidence" to support a trial court's factual findings, then those findings will not be disturbed. Id. at 521.

In assessing the appropriate sanction for the violation of one of its orders, the court considers a number of factors, including whether: (1) the plaintiff acted willfully; (2) whether the defendant suffered harm, and if so, to what degree, see e.g., Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995); and (3) the ability of Plaintiff to produce the evidence, see Casinelli v. Manglapus, 181 N.J. 354, 365 (2004). Trial courts will ordinarily give the offending party at least a second opportunity to comply, see Lang v. Morgan's Home Equipment Corp., 6. N.J. 333, 339 (1951).

Dismissal under R. 4:23-2(B)(3) has been found appropriate when: (1) a party invites dismissal by deliberately pursuing a course that thwarts persistent efforts to obtain necessary facts, Interchemical Corp. v. Uncas Printing & Finishing Co., 39 N.J. Super, 318 (App. Div. 1956), (2) the violation of an order evinces "'a deliberate and contumacious disregard of the court's authority," Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 575 (2003); and (3) the disregard of an order impairs "the defendant's ability to present a defense on the merits," resulting in a defendant being irreparably prejudiced. State v. One 1986 Subaru, 120 N.J. 310, 315 (1990); see also Perna v. Pirozzi, 92 N.J. 446, 457 (1983).

In addition to the above, dismissals of complaints have also been upheld: (1) when the litigant was at fault, see Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995); (2) to penalize those whose conduct warrant it and to deter others who may be tempted to violate the rules absent such a deterrent. Zaccardi v. Becker, 162 N.J. Super 329, 332 (App. Div.), certif. denied, 79 N.J. 464 (1978); and (3) where a party's refusal to comply with discovery orders was "deliberate and contumacious." Id. at 326.

Notably, on September 11, 2024, the Appellate Division upheld a trial court's dismissal of a plaintiff's complaint with prejudice under R. 4:37-2 after plaintiff failed to amend the complaint and failed to respond to discovery after being twice ordered to do so. Eil Invs. LP v. Angstreich, 2024 WL 4138395 at *31 (App. Div., September 11, 2024)(BOEa196-BOEa207).[10] This Appellate Court also took note of the attorney's concession that he had not been fully diligent in discovery. Ibid. This Court in Eil explained:

> Given the extent of plaintiff's disregard of the trial court's orders directing them to file an amended complaint and respond to defendant's discovery demands, as well as counsel's concession 'that [he had] been less than fully diligent in prosecution of the case' due to the firm's internal case management, we discern no abuse of discretion in the dismissal of plaintiff's complaint with prejudice [Id. at *31].

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10 This case is identified in Defendant's Appendix pursuant to R. 2:6-1(a)(1)(H) and a copy submitted as required.

The same rationale is not only applicable here, but the opportunities extended by the trial judge to Plaintiff in this case far exceed those extended by the Appellate Court in Eil. For example, at the July 28, 2023 case management conference (requested by Defendant to address Plaintiff's ongoing discovery tactics) the trial judge: (1) advised Plaintiff that the court was "distressed" with the "extensive document production" so late in discovery (1T17:5-7); (2) gave Plaintiff until August 11, 2023 to cure the deficiencies (Pa00656); and (3) put Plaintiff "on notice" that Defendant could seek any relief it deemed appropriate if Plaintiff failed "to comply with the basic rules of discovery and court orders …." (1T15:25 and 1T16:1-9).

The trial judge made clear at that time that anything Plaintiff intended to rely upon, whether documents or photographs, needed to be "Bates-stamped and indexed…." (1T15:11-15). When asked if Plaintiff could "comply with [the] order in two weeks," Plaintiff responded "Yes." (1T17:16-18). Plaintiff never did so.

Thereafter on October 23, 2023, 88 days after the July 28 conference, the trial judge gave Plaintiff a second opportunity to cure the deficiencies (Pa001056-Pa001059). The trial judge again extended the discovery deadlines for Plaintiff. The trial judge not only warned Plaintiff that this was Plaintiff's "last chance," but also warned her that the Complaint would be dismissed if she failed to comply:

THE COURT: **I'm going to give you dates and**

> **deadlines, and if they're not met, the Plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this.**
>
> MR. PIEKARSKY: [O]kay [2T16:12-16, **emphasis added]**.
>
> ***
>
> THE COURT: **This is sort of a last chance**, Okay? You've got to bring yourself and your client into **compliance with the Court's orders rapidly, or there are going to be more permanent consequence**s forthcoming Okay?
>
> MR. PIEKARSKY: Thank you [2T31:1-6, **emphasis added**].

Like the court in Eil, the trial judge here twice ordered Plaintiff to cure discovery deficiencies, the first on July 28, 2023 and the second, 3 months later, on October 23, 2023. Not only was Plaintiff afforded a second opportunity to cure, satisfying Lang supra, but the trial judge went a step further when Her Honor warned Plaintiff's counsel that dismissal was "forthcoming" if Plaintiff did not comply with the July and October orders by October 27, 2023 (2T16:12-16). Plaintiff did not bring herself in compliance and the Complaint was dismissed on November 27, 2023 - 123 days after the trial judge entered the July 28 case management order (Pa001280-Pa001281).

Also similar to Eil is the existence of concessions made by counsel for the delinquent party. Unlike the attorney concessions made in Eil though, Mr. Piekarsky's admissions illustrate how Defendant was substantially prejudiced by

Plaintiff's conduct. Most notable was Mr. Piekarsky's admission that his office could not verify that the same documents, records and treatment notes that his client was sending to Plaintiff's expert, Dr. McMahon, were also being sent to Defendant:

> THE COURT: So the material that your expert has presumably was provided to the expert by you. For you not to be able to provide the same materials to the defendants is something the court can't understand [3T17:14-16].
>
> MR. PIEKARSKY: **I believe all the materials were provided by the client. The client directly retained him** [3T17:22-24, **emphasis added**].
>
> THE COURT: **[This is] problematic because you can't even verify in any way that you're giving us everything that you gave the doctor because you didn't have it go through your office** [3T18:4-7, **emphasis added**].

More than 2 decades before this Court's holding in Eil, the New Jersey Supreme Court also examined how a party's course of conduct assists a court in determining the appropriate sanction. Gonalez v. Safe & Sound Sec. Corp., 185 N.J. 100 (2005). In Gonzalez, plaintiff refused to provide deposition testimony in violation of a court order. Id. at 116. The court deemed plaintiff's defiance of the order as an affront to the court's authority so much so that plaintiff should have been advised that the dismissal of his complaint was imminent. Id. at 119. The court determined that dismissal was appropriate if plaintiff continued to defy the

court order after being warned. Ibid.

Here, the trial court not only warned Plaintiff that the Complaint was "going to be dismissed with prejudice," but also reiterated that the October order was Plaintiff's "last chance," and "permanent consequences would be forthcoming" if Plaintiff did not comply with the new October 27 deadline (2T16:12-16 and 2T31:1-6). Plaintiff did not comply, and the Complaint was dismissed on November 27 (Pa001280-Pa001281).

In the end, Plaintiff invited the sanction of dismissal by engaging in a deliberate course of conduct that prevented Defendant from being able to investigate and defend against her allegations. Plaintiff "selectively producing" documents; withholding peer review studies, research articles, case studies, records, literature and other documents referenced and relied upon by her own experts represent only a portion of Plaintiff's conduct that the trial court found to be deliberate and deceptive.

Despite Plaintiff's belief, the trial judge did in fact contemplate if a lesser sanction was appropriate but ultimately determined there was no other appropriate recourse. The record before this Court is replete with detailed reasons why the trial judge felt dismissal was appropriate. Consequently, Plaintiff is woefully mistaken that the trial judge dismissed the Complaint "without basis" (See Pb26). The trial judge's reasons for dismissal are not only amply supported by the record but are

explained in great detail by Her Honor in the July 28, 2023 and October 23, 2023 transcripts.

Plaintiff is equally wrong that the "trial court's Orders show that it did not view dismissal as … the 'last and least favorable option.'" (See Pb30). On the contrary, the trial judge examined options other than dismissal (3T40:20-25; 3T41:1-25); and (3T42:1-10) but ultimately determined that no other sanction was appropriate under the circumstances (3T42:1-12). Plaintiff, in good faith, cannot argue that she was deprived a "full and fair opportunity" after being afforded over 1,000 days to do so. (Pb30)

POINT II: PLAINTIFF FAILED TO RECITE ANY APPLICABLE STANDARD IN HER RECONSIDERATION MOTION

The trial judge's denial of Plaintiff's motion to reconsider the November 2023 order dismissing the first and fifth counts as to Defendant was equally not an abuse of discretion. Indeed, during oral argument, the judge not only indicated that Plaintiff "did not recite any applicable standard (4T17:22-24)" but the trial judge also advised Plaintiff that there was:

> [A] failure to acknowledge in the papers and in the argument the extent, duration, and magnitude of the discovery failings that led to the Court's decision [4T19:18-21].

Plaintiff is not only mistaken that the trial court "incorrectly, and irrationally" denied her motion, but her position in this regard goes against the weight of the evidence.

V. CONCLUSION

Plaintiff's lack of compliance with the July 28 and October 23 orders along with her continuous engagement of discovery tactics meant to overwhelm and confuse Defendant, despite being advised by the trial judge that her Complaint would be dismissed, justified the sanction and cannot be said to be an abuse of discretion.

Respectfully submitted,

Gina M. Zippilli
Attorney for Defendant/Respondent,
Village of Ridgewood Board of Education
as to the First and Fifth Counts

MARGARETE HYER PLAINTIFF-APPELLANT V. VILLAGE OF RIDGEWOOD BOARD OF EDUCATION, DANIEL FISHBIEN, ANGELO DESIMONE, ANTHONY S. ORSINI, GREG WU, STEVEN TICHENOR, SODEXO A/K/A SODEXO USA AND/OR SODEXO, INC., GCA SERVICES GROUP INC. A/K/A GCA EDUCATION SERVICES INC., ARAMARK A/K/A ARAMARK SCHOOLS FACILITIES, LLC, ARAMARK SCHOOLS, INC., ARAMARK EDUCATIONAL GROUP LLC, ARAMARK EDUCATIONAL SERVICES, LLC AND/OR ARAMARK EDUCATIONAL GROUP, INC. AND JOHN DOES 1-10 DEFENDANTS-RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION DOCKET NO.: A-2074-23 T4 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-4141-20 NOVEMBER 27, 2023 ORDER DISMISSING THE FIRST AND FIFTH COUNTS OF PLAINTIFF'S COMPLAINT AS TO ALL DEFENDANTS AND THE FEBRUARY 22, 2024 DENYING PLAINITFF'S MOTION FOR RECONSIDERATION SAT BELOW: HON. MARY THURBER, RETIRED SUBMITTED: NOVEMBER 18, 2024

BRIEF OF DEFENDANT-RESPONDENT, SODEXO, AS TO DISMISSAL OF THE FIRST AND FIFTH COUNTS OF PLAINTIFF'S COMPLAINT

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TABLE OF CONTENTS

TABLE OF TRANSCRIPTS[1]

[1] Appellant did not submit the July 28, 2023 or October 23, 2023 transcripts to this Court, despite them being germane to this Appeal. Sodexo references the four (4) transcripts in chronological order as follows: the July 28, 2023 transcript is 1T; the October 23, 2023 transcript is 2T; the November 27, 2023 transcript is 3T; and the February 22, 2024 transcript is 4T.

TABLE OF ORDERS BEING APPEALED

November 27, 2023	Order dismissing First and Fifth Counts (Pa001280-Pa001281)
February 22, 2024	Order denying Plaintiff's motion for reconsideration (Pa001285)

TABLE OF AUTHORITIES

Page(s)

Cases

RULE

I. PRELIMINARY STATEMENT

This appeal presents the following issue for this Appellate Division's consideration: does the record contain adequate, substantial, and credible evidence to support the trial court's dismissal of the bodily injury causes of action continue din Counts One and Five of the Complaint? Sodexo respectfully submits that the answer is a resounding, "yes."

The instant action involved bodily injury claims made by Margarete Hyer (hereinafter, "Plaintiff"), a former art teacher at Benjamin Franklin Middle School, where Sodexo was contracted to provide facilities management services for a portion of Plaintiff's time at the school (Pa000001). Plaintiff alleged that she developed Chronic Inflammatory Respiratory Syndrome ("CIRS") after being exposed to what she believed was mold in her classroom from 2007 up until her retirement in 2020 (Pa000001). This appeal arises from the trial court's November 27, 2023 dismissal of the Firth and Fifth Counts (*i.e.*, the bodily injury causes of action) of Plaintiff's Amended Complaint (hereinafter, "Complaint") pursuant to R. 4:23-2(B)(3).

The dismissal of counts One and Five of the Complaint resulted from Plaintiff's failure to comply with two "last chance" discovery orders issued by the trial court on July 28 and October 23, 2023 to address Plaintiff's long-history of deliberate, dilatory, and prejudicial tactics, and to provide Plaintiff

opportunities to comply with her discovery obligations (3T40:20-25 and 3T21:1-12). In fact, prior to the November dismissal, the trial judge warned Plaintiff that if she did not bring herself in compliance with the July and October orders, her Complaint would be dismissed with prejudice (2T16:7-15). Plaintiff failed to comply, and her Complaint was thus dismissed (3T44:8-12).

Though trial judge considered options other than dismissal (3T40:7-25), dismissal was deemed the appropriate sanction given, *inter alia*: (1) that Plaintiff was selectively producing documents for tactical purposes while withholding others (3T18:19-23 and 3T42); (2) that Plaintiff engaged in a practice of "document-dumping," whereby Plaintiff would reproduce thousands upon thousands of pages of documents while assigning different Bates-numbers to the same document (3T13:20-25; 3T14:1-3; 3T14:8-10; 3T23:22-25; 3T24:1-25; and (3T25:8-10); (3) the number of allowances afforded Plaintiff to cure her deficiencies (3T15:13-15 and 3T42:17-25); (4) the fact that the litigant, herself, rather than her attorney, directly provided materials to her expert, Dr. Scott W. McMahon, but refused to provide them to Defendants, or to her counsel (3T41:18-47 and 3T42:1-25); (5) the fact that Plaintiff's attorney, Scott Piekarsky, had no knowledge as to what documents Plaintiff had actually sent to her expert, Dr. McMahon, and therefore could not confirm what documents were provided to Defendants (3T41:18-47 and 3T42:1-25); (6) that Plaintiff

refused to provide Defendants with the materials referred to and relied-upon by Dr. McMahon in his 119-page expert report (3T42:2-25); (7) that the case was over three (3) years old (DAa0017); and (8) that Defendants were not delinquent in discovery (3T25:16-18).

Following extensive motion-practice and argument, the trial judge found Plaintiff's course of conduct to be a deliberate disregard of her discovery obligations and of the trial court's authority, which resulted in undue burden and prejudice to Defendants (3T39:23-25; 3T40:1-12; 3T40"20-25; and 3T21:1-12. The trial judge also determined that Plaintiff had not been diligent in pursuing discovery, despite having over three (3) years to do so, had not satisfactorily explained why discovery had not been completed, and that Plaintiff, herself, was to blame for many of the discovery issues (1T9:10-21; 3T43:5-10; and 3T44:8-12). Defendants, on the other hand, had not engaged in inappropriate conduct and were persistent in their efforts to obtain discovery that was essential their ability to defend against Plaintiff's bodily injury allegations (3T25:16-18).

All in all, it cannot be said that the trial court's decision to (1) dismiss the First and Fifth Counts of Plaintiff's Complaint, and (2) deny Plaintiff's reconsideration motion was an abuse of discretion. Therefore, these decisions should be affirmed on appeal.

II. PROCEDURAL HISTORY

Procedural History as to Sodexo

1. Plaintiff filed a First Amended Complaint ("Complaint") on July 23, 2021, which asserted bodily injury claims (Counts One and Five) against various defendants, including Sodexo, Inc. and Sodexo Operations, LLC i/p/a Sodexo a/k/a Sodexo USA and/or Sodexo, Inc. (hereinafter, "Sodexo") (Pa000410-Pa000428).

2. On January 29, 2021, the trial court administratively dismissed the Complaint against Sodexo without prejudice for lack of prosecution; Plaintiff ultimately served the Complaint on Sodexo nearly two (2) years later on December 19, 2022 (DAa0171; DAa0178; and DAa0016).

3. On February 17, 2022 the trial court extended the discovery end date in light of Sodexo's addition to the matter and *inter alia*, ordered all parties to provide Sodexo with the discovery previously exchanged in the matter, and for Sodexo to serve discovery demands on Plaintiff within thirty days (Pa000571-Pa000579 and DAa0148-DAa0156).

4. On March 9, 2022, Sodexo served discovery on Plaintiff and requested that Plaintiff produce all documents that supported her damage claim(s) (DAa0212-DAa0220).

5. The discovery end date has been extended approximately seven (7) times since the inception of this matter (DAa0017).

Trial Court Involvement Regarding Discovery Issues in July 2023

6. By July 2023, Plaintiff had repeatedly produced, and reproduced, thousands of pages of documents on Defendants, including on the eve of depositions, with no explanation as to their relevance or why they were being produced so late in discovery (Pa000648; Pa000655-Pa000657; and Pa000659-Pa000660).

7. Plaintiff's habit of "document-dumping" on Defendants led counsel for co-defendant, the Ridgewood Board of Education (for Counts One and Five of the Complaint – the bodily injury causes of action) (hereinafter, the "BOE"), to write the trial court seeking assistance on July 20, 2023 (Pa000648).

8. On July 26, 2023, counsel for the BOE again wrote the trial court to provide recent examples of the types of documents contained in Plaintiff's production that had no apparent relevance to Plaintiff's claims, such as images of Plaintiff's arm pit and random paint cans (Pa000650).

9. A case management conference was held on July 28, 2023 where Plaintiff's discovery practices were discussed at length, resulting in the trial court entering the following order:

> **No later than August 11, 2023**, Plaintiff shall produce to defendants:
>
> Contact information including names and addresses plus fully executed HIPPA releases (if not previously provided) for every care provider who provided services to Plaintiff during the time period relevant to this lawsuit, including all providers included in Plaintiff's recent document productions;
>
> An Index of all Bate-stamped document produced by Plaintiff and an itemized identification of the discovery requests to which the documents are responsive; and
>
> Bate-stamped copies of any other documents responsive to discovery requests or on which Plaintiff intends to rely at trial, including any documents previously produced but not bate-stamped, also indexed and linked to discovery requests as in paragraph 1(b) above.
>
> **Plaintiff may not supplement her document production after August 11, 2023**, nor rely at trial on documents that are not produced in accordance with this Order. **To seek relief from this paragraph, Plaintiff must file a motion for relief and demonstrate the documents or information or not reasonably available to or discoverable by Plaintiff prior to August 11, 2023**. Any such application must be made promptly following Plaintiff's receipt or discovery of any such documents or information

Pa000655-Pa000657 (emphasis added).

10. On July 31, 2023, counsel for the BOE wrote to Plaintiff and listed all outstanding discovery that had not been provided to Defendants (DAa0172-DAa0174).

11. On August 15, 2023, four days after the August 11, 2023 court-ordered deadline for Plaintiff to provide outstanding discovery, Plaintiff reproduced the *same* document production produced prior to the July 28, 2023

conference (Pa000655-Pa000657). Defendants also received (1) non-compliant HIPPA authorizations for providers with whom Plaintiff never treated; (2) documents reflecting, for the first time, that Plaintiff treated in states other than New Jersey; and (3) documents indicating that Plaintiff was, three (3) years into the litigation, also claiming orthopedic injuries (Pa000659-Pa000660).

12. On August 16, 2023, counsel for the BOE again wrote to Plaintiff with a non-exhaustive list of outstanding discovery (DAa0003-DAa0009).

Motions to Dismiss Plaintiff's Complaint for Failure to Comply With Court Orders

13. On September 20, 2023, the Ridgewood Board of Education (for Counts Two, Three, and Four of the Complaint – the employment-related claims) and Daniel Fishbein, Angelo Desimone, Anthony S. Orsini, Greg Wu, and Steven Tichnor (hereinafter, collectively, the "Board and Individual Defendants") moved to dismiss Plaintiff's Complaint pursuant to R. 4:23-2(B)(4) for Plaintiff's failure to comply with the trial court's July 28, 2023 discovery order (Pa000744-Pa000902).

14. Similarly, on September 21, 2023, the BOE moved to dismiss Plaintiff's Complaint pursuant to R. 2:23-(B)(3) for Plaintiff's failure to comply with the trial court's July 28, 2023 discovery order, and for an award of counsel fees pursuant to R. 4:23-2(B)(4) (Pa000966-Pa001007).

15. The return dates of the BOE and the Board and Individual Defendants' motions to dismiss were extended approximately five (5) times, ultimately resulting in a return date of November 27, 2023 (DAa0179-DAa0208).

16. Moreover, while the BOE and the Board and Individual Defendants' motions to dismiss were pending, the Board and Individual Defendants filed another motion on October 4, 2023, which sought to bar Plaintiff's expert report authored by Dr. Scott W. McMahon for Plaintiff's failure to provide discovery (*e.g.*, Dr. McMahon's treatment file relative to his treatment of Plaintiff and documents reviewed and relied upon to reach the conclusions outlined in his report) (Pa001010-Pa001042).

17. On October 20, 2023, Sodexo filed a letter brief to indicate support of the BOE and the Board and Individual Defendants' pending motions to dismiss, along with the Board and Individual Defendants' pending motion to bar Plaintiff's expert report, and to expressly join in the request for relief made within the aforementioned motions (DAa0209-DAa0211).

18. The Board and Individual Defendants' motion to bar Plaintiff's expert report was heard on October 23, 2023 (Pa001056-Pa001059). Rather than bar Plaintiff's expert report at that time, the trial court entered *another* discovery

order that again extended the deadlinse for Plaintiff to provide outstanding discovery and to cure her deficiencies:

> Plaintiff shall return signed HIPPA forms **no later than 4:00 p.m. on Wednesday, October 25, 2023** for [the 18] providers listed.
>
> **If Plaintiff fails to comply, then for any provider for whom Plaintiff does not provide the HIPPA release as set forth in paragraph 3, Plaintiff shall be barred from relying on or introducing any evidence concerning the treatment by any of these providers**, including but not limited to any reference to any records or treatment by any of these providers by any witness, including experts and other providers.
>
> ***
>
> **No later than 4:00 p.m. on Friday, October 27, 2023**, Plaintiff shall provide to Defendants Bate-stamped copies of all documents Defendants requested concerning Dr. Scott W. McMahon, including but not limited to:
>
> Dr. McMahon's entire medical treatment file relative to this matter including but not limited to his hand-written interview and treatment notes;
>
> Copies of Plaintiff's medical records from Center for Functional Medicine, Cyrex Laboratories, and Genova Diagnostics;
>
> Copies of all medical literature relied upon to arrive at his conclusion in his report; and
>
> Any exhibits or models Ms. McMahon intends to use at trial.
>
> **If Plaintiff fails to comply with . . . this Order, Dr. McMahon's expert report shall be barred, and Plaintiff shall be barred from relying on his expert opinion at trial**

Pa001056-Pa001059, emphasis added.

19. In addition, while the September 2023 motions to dismiss the Complaint were pending, the trial court, on at least two (2) occasions, extended

previously amended discovery deadlines to give Plaintiff additional time to bring herself in compliance with discovery orders (3T14-25).

20. The September 2023 motions to dismiss were ultimately heard by the trial court on November 27, 2023 (Pa001280-Pa001281). After extensive argument and a thorough review of the procedural history of this matter, the trial court granted the BOE's September 21, 2023 motion to dismiss the First and Fifth Counts of Plaintiff's Complaint, as those were the counts most affected by Plaintiff's discovery failures at that time (Pa001280-Pa001283).

21. On February 22, 2023, Plaintiff unsuccessfully moved for reconsideration of the November 27, 2023 order that dismissed Counts One and Five of the Complaint (Pa001285).

III. COUNTERSTATEMENT OF FACTS

Background

22. Plaintiff was an art teacher with Ridgewood Public Schools from 1998 through her retirement in 2020, spending the bulk of her career at Benjamin Franklin Middle School (Pa000411). Plaintiff identified Sodexo as one of the facilities management companies contracted at Benjamin Franklin Middle School for a portion of her time at the school. (Pa000410-Pa000428).

23. Plaintiff alleged that she developed asthma-like symptoms in 2008 from exposure to what she believed was black mold (Pa000414).

24. In or around February 2023, Plaintiff alleged that she developed Chronic Inflammatory Respiratory Syndrome (CIRS) (DAa0160).

Plaintiff Refused to Provide Materials Referenced and Relied-Upon by Her CIRS Expert

25. On May 3, 2023, Plaintiff served the report of her purported CIRS expert, Dr. Scott W. McMahon (DAa0029-DAa0147).

26. Dr. McMahon is not licensed to study medicine in the state of New Jersey (DAa0114-DAa0118).

27. The litigant herself, Margarete Hyer, directly retained Dr. McMahon and provided materials, including documents and records, to him – no materials were provided to Dr. McMahon by Plaintiff's counsel, Mr. Piekarsky, or his office (3T17:22-24).

28. Mr. Piekarsky admittedly had no knowledge of what documents Plaintiff provided to Dr. McMahon and therefore could not confirm that Plaintiff provided the same, if any, documents to Defendants:

> THE COURT: So the material that your expert has presumably was provided to the expert by you. For you to not be able to provide the same materials to the defendants is something the court can't understand (3T17:14-16).
>
> MR. PIEKARSKY: I believe all the materials were provided by the client. The client directly retained him (3T17:22-24).
>
> THE COURT: **[This is] problematic because you can't even verify in any way that you're giving us everything that you**

> **gave the doctor because you didn't have it go through your office** (3T18:4-7, emphasis added)
>
> * * *
>
> THE COURT: If your client had those files to provide to the doctor, why weren't they produced in discovery?
>
> MR. PIEKARSKY: I don't know.
>
> THE COURT: Right**. *Because your client is not cooperating*, [I]t may be the client more than you . . . but things are being dribbled out . . . perhaps with some tactical calculations about whether they'll be helpful or not. That's not the way it works** (3T18:14-23, emphasis added).

29. Dr. McMahon's expert report was 119 pages – 12 of those pages contained 179 footnotes that identified case studies, medical research studies, textbooks, medical literature, and world-wide journals (DAa0029-DAa0147). His report further noted, *inter alia*, that he had "been evaluating patients with reported mold and mycotoxin illness for over 13 years" and that his research group "published 31 peer-reviewed articles, 1 book and 2 book chapters with 3 additional peer-reviewed consensus and 14 commissioned chapters for a medical textbook (peer-reviewed)," and that "of these 34 books and papers," he authored or co-authored twelve (DAa0029-DAa0147).

30. By the time the trial court dismissed Counts One and Five of the Complaint in November 2023, Plaintiff failed to produce materials referenced in Dr. McMahon's report, which was required by the trial court's July and

October 2023 orders (3T19:4-13; DAa0001-DAa0002; and Pa001056-Pa001059).

31. Further, Dr. McMahon's report also concluded that Plaintiff's purported exposure to mold "likely occurred in substantial part from or on goods and products intended for human bodily consumption," though no specific "goods" or "products" were identified therein (DAa0031).

Plaintiff Refused to Provide Complete Treatment Records From Her Experts and Treating Physicians

32. Dr. McMahon, Plaintiff's CIRS, expert identified himself as Plaintiff's treating physician in his expert report (DAa0029-DAa0030).

33. Plaintiff, however, failed to produce Dr. McMahon's medical files pertaining to Plaintiff, despite repeated requests made by Defendants, and which was required by the trial court's July and October orders (3T19:4-13; 3T11:18-25; 3T12:1-6; DAa0001-DAa0002; and Pa001056-Pa111059).

34. Additionally, on December 14, 2022, Plaintiff identified Dr. Arthur Lubitz as an expert and served a report authored by him dated December 9, 2020 (DAa0175-DAa0177). Plaintiff provided no explanation as to why the report was not produced to Defendants until nearly two years later (DAa0175-DAa0177).

35. Dr. Arthur Lubitz also identified himself as Plaintiff's treating physician (DAa0176).

36. Correspondence received from Dr. Lubitz referenced extensive lab testing; however, Defendants were not advised that any lab testing was performed and were not provided with any data or results (3T11:18-25 and 3T12:1-6).

37. In fact, despite repeated requests, Plaintiff never produced any of Dr. Lubitz's medical files pertaining to Plaintiff (3T11:18-25 and 3T12:1-6).

38. Furthermore, Dr. Elizabeth Boyle was also referenced as Plaintiff's treating physician (3T29:1-10).

39. Here too, despite repeated requests, Plaintiff never produced any of Dr. Boyle's medical files pertaining to Plaintiff (3T11:18-25 and 3T12:1-6).

40. Dr. McMahon's expert report, however, purported to rely upon Drs. Lubitz and Boyle's medical records of Plaintiff in forming the conclusions outlined in his report (DAa0052-DAa0053; and DAa0100).

Plaintiff's Practice of "Document-Dumping" and The Trial Court's Response

41. Throughout discovery, Plaintiff would serve anywhere between 4,000 and 10,000 documents on Defendants at one time (3T22:19-23). The documents were not originally Bates-numbered and did not contain an index (3T22:19-23).

42. Moreover, Plaintiff often reproduced the same production multiple times, including on the eve of depositions, with only a few, if any, new documents provided within the production (3T12:24-25 and 3T13:1-2). This practice resulted in Defendants having to review, and re-review, thousands upon thousands of documents to determine what, if any, new records were being produced (3T24:1-9).

43. After the trial court ordered Plaintiff to Bates-stamp her document productions, Plaintiff began a practice where she would assign different Bates-numbers to the same document in different productions (3T14:8-11).

44. Plaintiff's productions also included images of random items with no explanation as to why they were being produced or what they were intended to show, including: armpits, paint cans, dirty rags, and water fountains (3T32:14-15 and Pa000650).

45. Likewise, Plaintiff's productions included documents that referenced testing, etc. dating months or years prior, with no explanation as to why they were being produced so late in discovery (DAa0029-DAa0147; DAa0176-0177; and 3T11:18-25 and 3T12:1-6).

46. By the time the trial court dismissed the bodily injury causes of action (Counts One and Five of the Complaint) in November 2023, the trial court had at least twice ordered Plaintiff to cure her discovery deficiencies:

THE COURT: **The document production has been problematic and appears to continue to be problematic**. When ***you have an obligation at the outset of a case, as Plaintiff's counsel***, [to] marshal . . . your client's information, organize it and produce it matching – you know Bates stamping the documents and matching them to the request. 15,000 pages or documents without a comprehensive uniform identification and indexing is unacceptable (3T12:20-22 and 3T 14:1-4, emphasis added).

* * *

THE COURT**: [I]nstead of dismissing the complaint a month ago, I said . . . you'll have *a last chance* to clean it up** (3T15:13-14, emphasis added)**.**

* * *

THE COURT: I think the issue, Mr. Piekarsky, is that **on the Plaintiff side, the work wasn't done** to organize the records and produce them in an organized non duplicative way. So then you take another batch of documents which includes many that you already produced, you give them new bate numbers, and **try to shift to the defendants the burden** of going through those, another in the last month, over 10,000 documents to go through them and discern and identify what's new, what's there they haven't already seen and how it relates. And **that's not reasonable or fair *that's an unreasonable burden***.

It's Plaintiff not doing what Plaintiffs is supposed to do. And defendants don't have to keep bearing the cost of looking again at documents . . . the burden of going through the new records and seeing what was already produced and what's new should be on you. But not having them organized to identify what was previously produced and not using the same bate number is problematic and **giving you more time and letting you keep curing it and having the defendants have to do that same work over again . . . *I think the Plaintiff is making it unduly more expensive*** (3T23:22-25; 3T24:1-25; and 3T25:1-25, emphasis added).

***

THE COURT: I haven't heard any complaints from you about the defendants' dumping documents on you dumpling duplicates, failing to index them . . . (3T25:16-18).

* * *

THE COURT: **I've said *multiple times* already that Plaintiff and or Plaintiff's counsel failed to provide discovery in this complicated case**, where you've produced tens of thousands of documents in a way that . . . **unfairly shifts the burden** of figuring out what you're producing for the second time, the third time, what's new, how it relates to the case, shifted that to the defendants.

And so there really are just a couple of options here. One is [to] dismiss the case. **Because this is the second order that's still not fully complied with**. Or giving Plaintiff yet another opportunity to cure but shifting back to Plaintiff the costs that these failure to comply have caused (3T39:23-25 and 3T40:1-12).

* * *

THE COURT: And I'm suggesting that if I were not dismissing the complaint, is there any way to give Plaintiff yet another chance to have the case survive in a way that would be fair to defendants? And the only way I can see doing that is requiring Plaintiff to reimburse the defendants for those costs.

And I don't think I – even at that, I don't know how . . . that would really be fair at this point in this case.

[It's] three years old. It's brought as a toxic tort case. There's been a failure to comply with court orders. I deferred this with sort of what I call the last chance . . . In that it's been a month after the headline of that [October] order and there's still not compliance with respect to the documents certainly concerning Dr. McMahon (3T40:20-25 and 3T21:1-12, emphasis added).

* * *

THE COURT: **I think *your client* selectively produced.** She decided to produce some stuff. Then she decided she wanted to

> send things to an expert. She sent to the expert things to hadn't sent to the [Defendants]. And it's not acceptable. It's not tolerable and it may be that dismissal is the sanction, the appropriate sanction. Dismissal with prejudice at least of Courts One and Five (3T42:1-7, emphasis added).
>
> * * *
>
> THE COURT: ***I . . . have made a lot of allowances in this case*, Mr. Piekarsky . . . For you to not have the material that was provided to the expert when you're trying to introduce this expert so late in the game, has now brought about the consequence that your client didn't comply with the order and you weren't able to** (3T42:18-25, emphasis added)**.**

47. Notably, Plaintiff's failure to produce discovery and her ongoing "document-dumping" practices was also addressed by the trial court as early as July 28, 2023, when oral argument was held in response to the BOE's request for the trial court's assistance regarding Plaintiff's discovery tactics:

> THE COURT: If we're talking about documents, some of which go back 20 years, why are they being produced after day 1000 of the case?
>
> MR. DISTEFANO: Because I received I think about four or five binders of paper documents from my client.
>
> THE COURT: **Well that explains why the law firm didn't deliver them sooner . . . it doesn't explain why *Plaintiff* didn't deliver them sooner. She's had a case pending for more than 1000 days** (1T9:10-21).
>
> * * *
>
> THE COURT: It's my suggestion that we put a pause on the depositions, that Plaintiff index the bate stamp documents that have been produced, that she provide a list, and identify which Bates-stamped documents are responsive to which document request. If Plaintiff intends to rely or wishes to rely or use any document or things such as videos or pictures those have to be

> bate stamped and indexed as well with the same requirement. They have to be added to the Bates stamp production (1T15:25 and 1T16:1-10).
>
> **Thereafter any defendant [can] make any motion with respect to this production**, meaning to bar anything if you claim there's undue prejudice, to move for sanctions . . . **any relief that defendants feel is necessary to try and address what the defendants are identifying as Plaintiff's failure to comply with the basic rules of discovery and court orders in this matter** (1T17:5-15, emphasis added).
>
> * * *
>
> THE COURT: **I'm distressed at this extensive document production this far into the case . . . I wasn't particularly persuaded by the explanation you gave me on your feet in response to my question now . . . that a lot of these documents are ones that would have been responsive to earlier requests**. But let's see where you guys are after this period of time (1T17:5-15, emphasis added).
>
> If you obtain additional documents after this [two-week deadline] that you seek to introduce, that you make a motion for permission to supplement the discovery and give the explanation for why it couldn't have been . . . produced sooner. And if I determine that a good faith effort was made and that there couldn't have been produced sooner, okay (1T18:12-21).

48. Plaintiff never complied with the July 28, 2023 order and never once moved to supplement her discovery responses (3T11:11-25; 3T12:2-25; and 3T12:1-6).

49. On October 23, 2023 the trial court noted Plaintiff's failure to comply with the July 28, 2023 order; specifically, the trial court: (1) addressed Plaintiff's demand that Defendants pay Plaintiff's expert's retainer agreement before producing any treatment or file records; (2) addressed Plaintiff's failure

to comply with the deadlines in the July 28, 2023 order; and (3) advised Plaintiff that if Plaintiff did not meet the new deadlines to be set forth in the order dated October 23, 2023, then the Complaint would be dismissed with prejudice:

> THE COURT: In response to the motion to bar your expert, **you really don't address the issues** . . . You attach a retainer agreement from doctor McMahon. Have you signed the retained agreement on behalf of your client?
>
> MR. PIEKARSKY: No, I have not. He [Dr. McMahon] **was retained by *the client*** many months ago to undertake an exam and write a report**. Plaintiff paid him a retainer to do that** (2T10:18-25 and 2T11, emphasis added)**.**
>
> * * *
>
> THE COURT: Did she sign this retainer agreement? **Your client directly retained the expert?**
>
> MR. PIEKARSKY: I believe she did . . .
>
> THE COURT: Do you have any authority whatsoever for the proposition that a defendant wishing to depose your expert should be signing a retainer agreement?
>
> MR. PIEKARSKY: I think it would be appropriate for the court to enter an order.
>
> THE COURT: What possible authority is there to refuse to produce . . . medical records, file that he has as a treating doctor, or the documents he reviewed without the other side paying his fees or a court order? Where does that come from? **You have an obligation you're naming this expert. You have to produce these documents. You're in default. You meaning *the Plaintiff* is in default** (2T11:1-25 and 2T12:1-4, emphasis added)
>
> Mr. PIEKARSKY: I understand. I tried to get these records . . . and then we're given this agreement and told that this fee was required (2T12:13-17, emphasis added)
>
> * * *

> THE COURT: Then your client has to pay that fee if she wants to use this doctor. The defendants don't have to pay to get his records. They don't have to pay, and they certainly don't have to sign a retainer agreement with your expert (2T12:13-17).
>
> * * *
>
> THE COURT: Well, you produce the medical records and the documents that the doctor reviewed to prepare his report in advance of the deposition. We don't spend $500.000 an hour for the expert to sit there while lawyers see his records for the first time period that's not how it's done (2T12:22-25 and 2T13:1-2).
>
> MS. ZIPPILLI-MATERO: [Defendants are] . . . learning for the first time that apparently, she went under some type of examination, the board has absolutely no idea what that examination was, when it occurred (2T14:19-22).
>
> * * *
>
> THE COURT: So, Mr. Piekarsky, it's three months [since the July 28, 2023 case management conference]. You were supposed to give dates immediately. It's three months. **You cannot litigate this case this way**.
>
> MR. PIEKARSKY: Understood.
>
> THE COURT: **I'm going to give you dates and deadlines, and if they're not met, the Plaintiff's case is going to be dismissed with prejudice. *We're not going to keep doing this*.**
>
> MR. PIEKARSKY: Okay (2T16:7-15).

50. After the October 23, 2023 order was entered, however, Plaintiff continued to "document-dump" – Plaintiff again mass produced thousands of pages of the same documents and assigned different Bates-numbers to them (Pa000659-Pa000600).

51. Given Plaintiff's failure to comply with the "last chance" July 28, 2023 and October 23, 2023 orders, on November 27, 2023, the trial court

determined that dismissal of the bodily injury causes of action (the First and Fifth Counts of Plaintiff's Complaint) was appropriate:

> THE COURT: [I]f there was complete compliance with the . . . October 23rd [order], which was trying to get compliance with the July 28th order, then I might be extending discovery, But I'm not. I'm granting the – the board's motion to dismiss Counts One and Five (3T43:5-10).
>
> ***
>
> THE COURT: **I am dismissing Counts One and Five as to all defendants. Those – that's what these discovery breaches are the most egregious and those are the counts that are affected by that and not cured, *despite numerous repeated opportunities to do so*** (3T44:8-12).

52. Plaintiff did not express disagreement with the proposition that dismissal of the First and Fifth Counts of the Complaint applied to all Defendants:

> MR. PASSLER: If the personal injury claims are - - are out, I would think that . . . Sodexo and Aramark would both be out of the case.
>
> THE COURT: Well, that's what I was going to ask . . . are you defendants only on those?
>
> MR. PASSLER: That's it.
>
> THE COURT: Does everyone agree that – that if I'm dismissing courts One and Five, then those – those two defendants are dismissed in their entirety (3T50:17-25 and 3T51:1-3).

53. Plaintiff unsuccessfully moved for reconsideration on February 22, 2024 (Pa001415-Pa1416).

IV. LEGAL ARGUMENT

A. The Trial Court Properly Exercised its Discretion Pursuant to R. 4:23 (B)(3) When It Dismissed Counts One and Five of The Complaint For Plaintiff's Failure to Obey Two "Last Chance" Discovery Orders

i. The Record is Replete with Adequate, Substantial, and Credible Evidence to Support the Trial Court's Dismissal of Counts One and Five of the Complaint

The trial court did not abuse its discretion when it dismissed the First and Fifth Counts of the Complaint (*i.e.*, the bodily injury causes of action) on November 27, 2023 given Plaintiff's lengthy history of dilatory, contumacious, and prejudicial discovery tactics that included *inter alia*: selective production of documents; refusal to provide materials referenced in her expert report; "document-dumps" on the eve of depositions; the assignment of different Bates-numbers to the same documents in different productions; and her intentional defiance of two discovery orders (3T42:1-7; 3T14:8-11; 3T39:23-25; and 3T40:1-12). Plaintiff was provided with numerous opportunities to cure her discovery deficiencies (Pa000655-Pa000657; Pa001056-Pa1059; and Pa001280-Pa001283). In fact, Plaintiff was specifically warned by the trial court that if she did not comply with discovery orders, her Complaint would be dismissed with prejudice (2T16:7-15). By November 2023, enough was enough. Plaintiff failed to comply with two "last chance" discovery orders, and as a result, the bodily injury causes of action contained in her Complaint were dismissed (Pa001280-Pa001283).

R. 4:23(B)(3) provides in pertinent part that, "If a party fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failures . . . (3) dismissing the action.: R. 4:23(B)(3)

Dismissal of a complaint with prejudice for discovery misconduct, along with denial of reconsideration, are reviewed under an abuse of discretion standard. Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995); see also Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). This standard is one that cautions appellate courts not to interfere. Abtrax, 139 N.J. at 514. A trial court abuses its discretion when its "decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." United States ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (quoting Flagg v. Essex Cnty Prosecutor, 171 NJ. 661, 571 (2002). However, the record below contains "adequate, substantial, and credible evidence" to support a trial court's determination, then the factual findings and legal conclusions of the trial judge will not be disturbed. Abtrax 139 N.J. at 514.

Discovery rules are designed "to further the public policy of expeditious handing of cases, avoiding stale evidence and providing uniformity, predictability, and security in the conduct of litigation." Id. at 512 (quoting

Zaccardi v. Becker, 88 N.J. 425, 252 (1982)). "It necessarily follows, if such rules are to be effective, that the courts impose appropriate sanctions for violations thereof." Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990) (quoting Evtush v. Hudson Bus Transp. Co., 7 N.J. 167, 173 (1951)). Moreover, "sanctions are particularly necessary in matters of discovery" and the "trial court is free to apply them, subject only to the requirement that they be just and reasonable in the circumstances." Lang v. Morgan's Home Equipment Corp., 6 N.J. 333, 339 (1951). All in all, discovery rules serve to ensure the outcome of litigation depends on the "merits in light of all the available facts, rather than on the craftiness of the parties or the guile of their counsel." Id. at 333.

Certainly, competing policies are involved when a trial court contemplates sanctions for discovery violations. Crews v. Garmoney, 141, N.J. Super. 93, 96 (App. Div. 1976). As such, a range of sanctions are available so that the trial court can use its discretion to apply the appropriate sanction under the circumstances, taking into consideration varying levels of culpability. Gnapinsky v. Goldyn, 23 N.J. 243. Moreover, trial courts generally impose lesser sanctions short of dismissal, at least initially, to balance competing policies and to give the offending party an opportunity to cure its deficiencies. See, e.g., Ribertet Flavors v. Tri-Form Const., 203 N.J. 252, 274. When

weighing whether, and what, sanctions are appropriate, trial courts ordinarily give the offending party at least a second opportunity to comply. Lang v. Morgan's Home Equipment Corp., 6 N.J. at 333, 339 (1951). Ultimately, however, "no attorney should assume that despite his failure to comply with the rules, the Court will allow the case to proceed." Gnapinsky v. Goldyn, 23 N.J. 243, 256 (1957) (Vanderbilt, C.J. dissenting).

The factors considered by trial courts when assessing the appropriate discovery violation, includes: (1) whether the plaintiff acted willfully; (2) whether the defendant suffered harm and if so, to what degree, See e.g. Abtrax, 139 N.J. at 514; Gonzalez v. Saf & Sound Sec. Corp., 185 N.J. 100, 115 (2005); and (3) the ability of Plaintiff to produce the evidence. See Lang 6 N.J. at 339.

Regarding the ultimate sanction of dismissal, dismissal under R. 4:23-2(B)(3) has been upheld when:

(1) A party invites dismissal by deliberately pursuing a course that thwarts persistent efforts to obtain necessary facts. Interchemical Corp. v. Uncas Printing & Finishing Co., 39 N.J. Super 318 (App. Div. 1956);

(2) The violation of a discovery order evinces "a deliberate and contumacious disregard of the court's authority" Kosmowski v. Atl. City med. Ctr., 175 N.J. 568, 575 (2003);

(3) The violation of a discovery order impairs "the defendant's ability to present a defense on the merits," resulting in a defendant being irreparably prejudiced. State v. One 1986 Subaru, 120 N.J. 310, 315 (1990); see also Perna v. Pirozzo, 92 N.J. 446, 457 (1983);

(4) The litigant was at fault. See Abtrax 139 N.J. 514; and

(5) The party in default provides no satisfactory explanation for protracted delays and failure to comply with discovery rules. Id. at 517 (quoting Comeford v. Flagship Furniture Clearance Center, 198 N.J. Super. 514, 518 (App. Div. 1983).

Dismissal is also appropriate to penalize those whose conduct warrants it and to deter others who may be tempted to violate the rules absent such a deterrent. Zaccardi v. Becker, 162 N.J. Super 329, 332 (App. Div.), certify. denied, 79 N.J. 464 (1978). As stated by the New Jersey Supreme Court in Abex, "we are sensitive to the legitimate concerns by the trial [court] that if our discovery rules are to have any meaningful impact upon our civil dockets they must be strictly enforced" and that "we [are] mindful of the perils and

gravitational pull of the slippery slope wherein the efficacy of our rules is destroyed by the gradual cumulation of exceptions." Abex 139 N.J. at 517-518. The Abex court further noted that:

> A litigant that deliberately obstructs full discovery corrupts one of the fundamental precepts of our trial practice – the assumption by the litigants and the court that all parties have made full disclosure of all relevant evidence in compliance with the discovery rules. A litigant who willfully violates that bedrock principle should not assume that the right to an adjudication on the merits of its claims will survive so blatant an infraction.

Id. at 521.

By way of example, on December 1, 2021, this Appellate Division upheld a trial court's dismissal of a plaintiff's complaint with prejudice after the plaintiff repeatedly ignored defendants' requests to appear for depositions and to provide discovery (despite many extensions provided by the trial court) and for the plaintiff's ultimate failure to comply with multiple court orders pertaining to discovery. Carlin v. Feuer, 2021 WL 5626481 (App. Div., December 1, 2021) (DAa0010-DAa0015)[2]. The Carlin Court stated that, despite the blatant discovery violations, "the [trial judge] waited . . to dismiss plaintiffs' complaint . . . more than two years after plaintiffs filed their complaint and months after they defied the judge's order." Id. at *14. Thus, this Appellate

[2] This case is identified in Defendant's Appendix, with a copy submitted.

Court determined that it was "satisfied the judge correctly determined . . . that plaintiff's dilatory tactics were 'beyond the pale' and that even after [the trial judge] provided plaintiffs with ample opportunity to prosecute [the] case, they d[id] everything to prevent that from occurring." Id.

More recently, on September 11, 2023, this Appellate Division upheld a trial court's dismissal of a plaintiff's complaint with prejudice after the plaintiff failed to amend their complaint and respond to discovery, despite being twice ordered to do so. Eli Invs. LP v. Angstreich 2024 WL 4138395 at *31 (App. Div., September 11, 2023) (DAa0018-DAa0028)[3]. Further, in Eli, this Appellate Division took note of the plaintiff's attorney's concession that he had not been fully diligent in discovery, explaining:

> Given the extent of plaintiff's disregard of the trial court's orders directing them to file an amended complaint and respond to defendant's discovery demands, as well as counsel's concession 'that [he had] been less than fully diligent in prosecution of the case due to the firm's internal case management, we discern no abuse of discretion in the dismissal of plaintiff's complaint with prejudice

Id. at *31

Here, just as in Carlin and Eli, Plaintiff was provided with numerous opportunities to cure her discovery deficiencies and litigate her case. For example, at the July 28, 2023 case management conference, the trial judge: (1)

[3] This case is identified in Defendant's Appendix, with a copy submitted.

advised Plaintiff that the Court was "distressed" with the "extensive document production" so late in discovery (T1T17:5-7); (2) gave Plaintiff until August 11, 2023 to cure the deficiencies (Pa00656), and (3) put Plaintiff "on notice" that Defendants could seek any relief they deemed appropriate if Plaintiff failed to "comply with the basic rules of discovery and court orders. . ." (1T15:25 and 1T16:1-9). Moreover, the trial judge made clear that anything Plaintiff intended to rely upon needed to be "Bates-stamped and indexed" (1T15:11-15). Though Plaintiff indicated that she could comply with the trial court's order in two weeks, she never did so (1T17:16-18). Thereafter on October 23, 2023, 88 days after the July 28 conference, the trial judge gave Plaintiff *yet another* opportunity to cure her discovery deficiencies (Pa001056-Pa001059). The trial judge again extended the discovery deadlines for Plaintiff – Her Honor not only warned Plaintiff that this was Plaintiff's "last chance," but also advised her that the Complaint would be dismissed if she failed to comply:

> THE COURT: I'm going to give you dates and deadlines, and if they're not met, the Plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this.
>
> MR. PIEKARSKY: [O]kay (2T16:12-16).
>
> COURT: This is sort of a last chance, okay? You've got to bring yourself and your client in to compliance with the Court's orders rapidly, or there are going to be more permanent consequences forthcoming okay.
>
> MR. PIEKARSKY: Thank you (2T31:1-6).

Similar to Carlin and Eli, the trial judge here ordered Plaintiff to cure discovery deficiencies on multiple occasions, the first on July 28, 2023, and the second, three (3) months later, on October 23, 2023 (Pa000659-Pa000660 and Pa001056-Pa001059). Not only was Plaintiff afforded a second opportunity to cure her discovery deficiencies, satisfying Lang supra, but the trial judge went a step further and warned Plaintiff's counsel that dismissal was "forthcoming" if Plaintiff did not comply with the July and October discovery orders. (2T16:12-16). Plaintiff never brought herself in compliance, and on November 27, 2023, the First and Fifth Counts of her Complaint were dismissed with prejudice as a result – 123 days after the trial judge entered the July 28 case management order (Pa001280-Pa001281).

Also similar to Eli is the existence of concessions made by counsel for the delinquent party here (3T18:4-7). In contrast to the attorney concessions made in Eli however, Mr. Piekarsky's admissions illustrate how Defendants were substantially prejudiced by Plaintiff's conduct. Most notably was Mr. Piekarsky's admission that his office could not verify that the same documents, records and treatment notes that his client was sending to Plaintiff's CIRS expert, Dr. McMahon, were also being sent to Defendant:

> THE COURT: So the material that your expert has presumably was provided to the expert by you. For you to not be able to provide the same material to the defendants is something the court can't understand (3T17:14-16).
>
> MR. PIEKARSKY: I believe all the materials were provided by the client. The client directly retained him (3T17:22-24).
>
> THE COURT: [This is] problematic because you can't even verify in any way that you're giving us everything that you gave the doctor because you didn't have it go through your office (3T18:4-7).

The New Jersey Supreme Court has also examined how a party's course of conduct assists a court in determining the appropriate sanction. For example, in Gonzalez the New Jersey Supreme Court deemed plaintiff's refusal to provide discovery in defiance of a court order as an affront to the court's authority and noted that dismissal would be appropriate if the plaintiff continued to defy the court order after being warned. Gonzalez 185 N.J. 100, 115.

The Supreme Court of New Jersey has also noted that equitable considerations suggest dismissal when discovery delays have "so prejudiced the defendant that his ability to defend his case is seriously impaired." Central R.R. v. Neeld, 26 N.J. 172, 177 (1958); see e.g. State v. One 1986 Subaru, 120 N.J. 310, 315 (1990); see also Perna v. Pirozzo, 92 N.J. 446, 457 (1983). This Appellate Division too has repeatedly found dismissal to be appropriate when a party deliberately pursues a course that prevents the non-delinquent party from obtaining the necessary facts, despite persistent efforts to obtain such facts by

the non-delinquent party. See e.g. Abtrax 139 N.J. at 515; Interchemical Corp. 39 N.J. at 318. For example, in Interchemical Corp., this Appellate Division upheld the entry of a default judgment against a defendant due to the defendant's failure to produce requested discovery materials and provide answers to interrogatories, despite numerous follow-up requests from plaintiff and a court order that required defendant to answer interrogatories within 30 days. The Interchemical Corp. court noted that dismissal was appropriate because defendant's discovery violations were deliberate and "went to the very foundation" of plaintiff's causes of action. Another example lies in Crews, where this Appellate Division dismissed a plaintiff's personal injury complaint due to the plaintiff's failure to answer interrogatories and provide discovery within a reasonable time. The Crews court found dismissal to be warranted, *inter alia*, because defendant was prejudiced by their lack of early information concerning plaintiff's medical status, and because the litigant failed to respond to their own attorneys' written communications concerning outstanding discovery. In fact, regarding this last point, this Appellate Division has frequemtly deemed dismissal an appropriate sanction when the litigant, in addition to or instead of the attorney, is at fault. See e.g., Abtrax 139 N.J. at 514.

Here, Plaintiff ultimately invited the sanction of dismissal by *repeatedly* engaging in a deliberate course of conduct that prevented Defendants from being

able to investigate and defend against her bodily injury allegations (3T12:20-2; 3T14:1-4; 3T23:22-25; 3T24:1-25; 3T25:1-25; 3T39:23-25; 3T40:1-12; 3T40:20-25; 3T21:1-12; 3T42:1-7; and 3T42:18-25). Throughout the litigation, plaintiff, *inter alia*, selectively produced documents and failed to respond to discovery in a complete and timely manner, despite numerous attempts by Defendants to obtain full and complete discovery and two (2) court orders directing the same (3T39:23-25 and 3T40:1-12). Incredibly, Plaintiff herself also withheld materials, including materials that she provided to her own experts and that were relied upon in their respective reports, though were never provided to Defendants despite numerous requests (2T11:1-25; 2T12:1-4; Pa001056-Pa001059; 3T19:4-13; 3T11:18-25; 3T12:1-6; and 3T42:1-7). In the end, these deliberate and contumacious actions by Plaintiff, with no satisfactory explanation for the protracted delays and failures, resulted prejudice to the Defendants (3T12:20-2; 3T14:1-4; 3T23:22-25; 3T24:1-25; 3T25:1-25; 3T40:20-25; 3T21:1-12; and 1T18:12-18).

Despite Plaintiff's baseless assertions, the trial court did, in fact, contemplate whether a sanction short of dismissal would be appropriate; ultimately, however, the trial court determined that after 1,225 days of discovery and Plaintiff's repeated failures to comply with "last chance" discovery orders, there was no other appropriate recourse under the circumstances (1T18:12-18;

3T39:23-25; 3T40:1-12; 3T40:20-25; 3T43:5-10; 3T44:8-12; and 3T21:1-12). The record before this Court is replete with detailed reasons as to why the trial judge felt dismissal was appropriate, backed by adequate, substantial, and credible evidence supporting the determination. Consequently, Plaintiff is also incorrect in her claim that the trial court dismissed the Complaint "without basis."

For the reasons stated herein and amply supported by the record, it cannot be said that the trial court abused its discretion when it dismissed Counts One and Five of Plaintiff's Complaint. Thus, this Appellate Division should affirm the trial court's determination.

ii. Plaintiff Had Sufficient Notice and Opportunity to Be Heard Regarding the Dismissal of Counts One and Five of the Complaint as to Sodexo

The trial court similarly did not abuse its discretion when it dismissed Sodexo, as the claims specific to Sodexo in Plaintiff's Complaint were contained only in Counts One and Five (*i.e.*, the bodily injury causes of action) (Pa000410-Pa000428). The basis of the trial court's dismissal of Counts One and Five, described in detail in the proceeding section, was for Plaintiff's repeated and contumacious failure to provide discovery to *all* Defendants to defend against the bodily injury claims contained in the Complaint (3T43:5-10 and 3T44:8-12). Dismissal as to Sodexo was not based on anything that Plaintiff did not have

notice of, or a full and complete opportunity to respond to (DAa0209-DAa0211; 3T50:17-25; and 3T51:1-3).

The minimum requirements of due process are notice and the opportunity to be heard. Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 83 (App. Div. 2001) (quoting Doe. V. Poritz, 142 N.J. 1, 106 (1995)).

Regarding notice, Sodexo filed a letter brief with the trial court on October 20, 2023 joining co-defendants' motions to dismiss Counts One and Five of the Complaint for Plaintiff's failure to comply with court orders regarding discovery (DAa0209-DAa0211 and Pa001280-Pa001283). Argument for these motions was held on November 27, 2023 – over one month later (Pa001280-Pa001283). Consequently, not only was Plaintiff well-aware that there were pending motions where the relief sought was dismissal of her Complaint, but she was also provided with over one month's notice that Sodexo too sought the same relief (DAa0209-DAa0211and Pa001280-Pa001281). Likewise, Plaintiff was made aware by the trial court on October 23, 2023 that the court was considering dismissal of her Complaint for her failure to provide discovery to all Defendants, and Plaintiff was certainly made aware that the trial court was, again, contemplating dismissal of, at least, Counts One and Five of the Complaint, during the November argument (3T15:13-14; 1T17:5-15; 2T16:7-15; 3T15:13-14; 3T43:5-10; 3T44:8-12; 3T50:17-25; and 3T51:1-3).

Regarding the opportunity to be heard, Plaintiff was provided ample opportunity to be heard regarding the dismissal of Counts One and Five of the Complaint, and consequently the dismissal of Sodexo (3T15:13-14; 1T17:5-15; 2T16:7-15; 3T15:13-14; 3T43:5-10; 3T44:8-12; 3T50:17-25; and 3T51:1-3). Plaintiff had over a month to respond to Sodexo's letter brief that joined in the request for the dismissal of Counts One and Five (to which Plaintiff failed to respond), not to mention the opportunity to be heard during the November argument (DAa0209-DAa0211; 3T50:17-25; and 3T51:1-3). In fact, when asked if the dismissal of Counts One and Five meant that Sodexo would be dismissed from the case, Plaintiff placed no argument or objection on the record:

> MR. PASSLER: If the personal injury claims are - - are out, I would think that . . . Sodexo and Aramark would both be out of the case.
>
> THE COURT: Well, that's what I was going to ask . . . are you defendants only on those?
>
> MR. PASSLER: That's it (3T50:17-25).
>
> THE COURT: Does everyone agree that – that if I'm dismissing courts One and Five, then those – those two defendants are dismissed in their entirety (3T51:1-3).

Nevertheless, the dismissal of Counts One and Five of Plaintiff's Complaint as to Sodexo was not based on anything that Plaintiff did not have a full and complete opportunity to respond to by responding to the motions filed by the other defendants (Pa000744; Pa000966; Pa001049; and DAa0209-

DAa0211). There was nothing that a response to Sodexo's letter brief by Plaintiff, or a completely separate motion filed by Sodexo, would have added. The dismissal of Counts One and Five as to all Defendants was based on the same facts that Plaintiff undeniably had the opportunity to fully and entirely address, to no avail (Pa000744; Pa000966; Pa001049; DAa0209-DAa0211).

Finally, Plaintiff assertion that the trial court introduced dismissal as to all parties "*sua sponte* and without basis" is not only patently incorrect, but completely unsupported by the record. The record is replete with instances demonstrating that Defendants – not the Court on its own – requested dismissal of Plaintiff's Complaint as relief for Plaintiff's countless discovery failures (3T43:5-10 and 3T44:8-12). The trial court, using the discretion afforded to it pursuant to R. 4:23(B)(3), agreed with the points set forth by the Defendants and granted the requests for dismissal as to Courts One and Five of the Complaint (3T43:5-10 and 3T44:8-12). For all of the reasons set forth in this brief, Plaintiff cannot in good faith argue that she was deprived of a "full and fair opportunity" to litigate her case after being afformed ample opportunity to do so.

In conclusion, it can not be said that the trial court abused its discretion when it dismissed Counts One and Five of Plaintiff's Complaint as to all Defendants, nor can it be said that this determination denied Plaintiff of due process – in fact, the record is brimming with adequate, substantial, and credible

evidence to the contrary. Thus, this Appellate Division should affirm the trial court's dismissal of Counts One and Five of Plaintiff's Complaint, as to all Defendants.

B. Plaintiff Failed to Recite Any Applicable Standard in Her Reconsideration Motion

The trial judge's denial of Plaintiff's motion to reconsider the November 27, 2023 order dismissing the First and Fifth Counts of Plaintiff's Complaint as to all Defendants was likewise not an abuse of discretion. Indeed, during oral argument for Plaintiff's reconsideration motion on February 22, 2024, the trial judge advised Plaintiff that she "did not recite any applicable standard" (4T17:22-24). Still, the trial court noted that, on Plaintiff's part, there was a "failure to acknowledge in the papers and in the argument the extent, duration, and magnitude of the discovery failings that led to the Court's decision" (4T19"18-21). Accordingly, Plaintiff's assertion that the trial court "incorrectly and irrationally" and "inexplicably" denied her reconsideration motion is not only false, but also goes against the weight of the evidence. For these reasons, here too it cannot be said that the trial court abused its discretion when it denied Plaintiff's reconsideration motion as there is adequate, substantial, and credible evidence supporting the denial. Therefore, this Appellate Division should affirm the trial court's denial of reconsideration.

V. CONCLUSION

For the reasons set forth above, Defendant-Respondent, Sodexo, respectfully requests that this Appellate Division affirm the dismissal of Counts One and Five of Plaintiff's Complaint, which resulted from Plaintiff's failure to comply with two, "last chance" discovery orders, and to affirm the court's denial of Plaintiff's reconsideration motion.

Respectfully submitted,

GOLDBERG SEGALLA, LLP
Attorneys for Respondent, Sodexo

By: *Kerry L. Jones*
Kerry L. Jones, Esq.

Dated: November 18, 2024

MARGARETE HYER, Plaintiff/Appellant, vs. VILLAGE OF RIDGEWOOD BOARD OF EDUCATION, DANIEL FISHBIEN, ANGELO DESIMONE, ANTHONY S. ORSINI, GREG WU, STEVEN TICHENOR, SODEXO a/k/a SODEXO USA and/or SODEXO, INC., GCA SERVICES GROUP, INC. a/k/a GCA EDUCATION SERVICES, INC., ARAMARK a/k/a ARAMARK SCHOOLS FACILITIES, LLC, ARAMARK SCHOOLS, INC., ARAMARK EDUCATIONAL GROUP, LLC, ARAMARK EDUCATIONAL SERVICES, INC., ARAMARK EDUCATIONAL SERVICES, LLC and/or ARAMARK EDUCATIONAL GROUP, INC., and JOHN DOES 1-10. Defendants/Respondents	**SUPERIOR COURT OF NEW JERSEY-APPELLATE DIVISION** **DOCKET NO.: A- 2074-23-T4** **On Appeal from:** Superior Court of New Jersey, Law Division, Bergen County Docket No. BER-L-4141-20 **Sat Below**: The Honorable Mary F. Thurber, J.S.C., ret. **Re-Submitted**: December 5, 2024

BRIEF FOR RESPONDENT VILLAGE OF RIDGEWOOD BOARD OF EDUCATION AS TO COUNTS TWO, THREE, AND FOUR AND FOR ANGELO DI SIMONE, GREGORY WU, ANTHONY ORSINO, DR. DANIEL FISHEIN, STEVEN TICHENOR AS TO COUNTS ONE AND FIVE OF PLAINTIFF'S AMENDED COMPLAINT

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PRELIMINARY STATEMENT

In the matter at bar, it cannot be disputed that Plaintiff Margarete Hyer deliberately ignored the Trial Court's Orders regarding discovery, namely the timely and orderly production of HIPAA releases, medical records, photographs, videos, that were entered on the dates of July 28, 2023 and October 23, 2023 and in contravention of said Orders as well as the Court Rules, had repeatedly produced thousands of pages of all types of documents without any explanation as to how they were relevant to Plaintiff's claims in order to intentionally burden and thwart defendants' ability to be prepared for trial. Despite engaging in such discovery misconduct, Plaintiff has filed this appeal so as to appeal the November 27, 2023, Order dismissing the First and Fifth Counts of the Complaint containing workplace bodily injury claims and alleging intentional wrongdoing against all Defendants, and the two February 22, 2024 Orders, denying Plaintiff's Motion for Reconsideration of said dismissal Order and granting Defendant Ridgewood Board of Education's motion to dismiss the remaining counts (2-4) asserted solely against the Board under CEPA and LAD (see CIS filed by Plaintiff on March 14, 2024). However, Plaintiff's Brief makes arguments with respect to only the Orders entered on February 22, 2024.

The dismissal of this action in its entirety on February 22, 2024 came 1,309 days after Plaintiff first filed her Complaint, as amended, on July 23, 2020

(see Pa001413-001414). By the undersigned's calculations, this is approximately ten times the normal amount of time afforded under our Court Rules for a personal injury claim and four times the normal amount of time afforded under the Court rules for discovery on an employment claim under Track 3. Prior to the total dismissal entered in February 2024 and the partial dismissal in November 2023, the Trial Court had warned Plaintiff that if she did not bring herself in compliance with the July 28, 2023 and October 23, 2023 Orders, her Complaint would be dismissed with prejudice. Plaintiff did not comply with said Orders and continued to be deliberately non-compliant with the Court's July 28, 2023, October 23, 2023 and again with the November 27, 2023 Order regarding production of discovery as to her remaining discrimination and retaliation claims in Counts Two, Three and Four of the Complaint. Thus, the dismissal of Plaintiff's bodily injury claims against the Individual Board Defendants on November 27, 2023 when the new discovery end date of November 25, 2023 had already passed, and the later dismissal of the claims for disability discrimination and retaliation pursuant to the LAD and CEPA on February 22, 2024 for the failure to provide discovery to support those claims was not an abuse of discretion but an appropriate sanction under R. 4:23-2(b) since Plaintiff's failure to comply with the Court's orders regarding discovery significantly prejudiced the Board Defendants' ability to rebut

Plaintiff's claims at trial, and if dismissal were denied, such method of production would have afforded Plaintiff an unfair advantage over all of the defendants in the eleventh hour of discovery.[1]

Furthermore, no lesser sanction would suffice regarding Plaintiff's employment-related CEPA and LAD claims contained in Counts 2, 3, and 4 of the Amended Complaint against the Board alone, since, if the deficiencies were permitted to continue, despite having almost four (4) years to do so, the failure to point to or produce any relevant evidence to support the claims for discrimination and retaliation would have ultimately resulted in a successful Summary Judgment motion by the Board. For these reasons and for the reasons set forth in Co-Counsel for the Board in the separate Brief filed on behalf of the Board as to the dismissal of Counts One and Five, Plaintiff's appeal of the orders for dismissal should be denied as to the Individual Board Defendants and as to the Board on all Counts of the Complaint.

PROCEDURAL HISTORY

The Board Defendants hereby incorporate and rely upon the Procedural History and Counter-Statement of Material Fact set forth in Co-Counsel for the Board's separate Responsive Brief and respectfully request that the Appellate

[1] The Board and the Individual Board Defendants may sometimes be referred to herein collectively as the "Board Defendants."

Division consider same as if set forth herein at length with respect to the portion of Plaintiff's appeal that challenges the February 22, 2024 Order denying her motion for reconsideration of the November 27, 2023 Order dismissing her bodily injury claims as to all defendants (Pa001415-Pa001416). [2]

As to Plaintiff's appeal of the Order dismissing her remaining LAD and CEPA claims on February 22, 2024 (Pa001413-Pa001414), and to the extent necessary with respect to the Order dismissing the Individual Board Defendants on November 27, 2023, the Board Defendants wish to add the following procedural history that is inextricably intertwined with the facts in this case, as set forth in its additional Counter Statement of Facts section below.

ADDITIONAL COUNTERSTATEMENT OF FACTS

On June 9, 2023, the Discovery end date for all of Plaintiff's claims was extended for a 7th time in response to Plaintiff's Motion to be November 25, 2023. (Pa000638-Pa00647;[3] see also BOEa185-BOEa186). After the close of

[2] Gina M. Zippilli-Matero from the firm of Capehart Scatchard, P.A. has entered an appearance and has filed a separate Brief on behalf of Ridgewood Respondent Board of Education as to Plaintiff's claims for bodily injury in Counts 1 and 5. To the extent it is necessary, the Individual Board Defendants also rely upon and incorporate those arguments made on behalf of the Board by co-counsel as it concerns any challenge that can be gleaned to be made to any of the November 27, 2023 dismissal orders by Plaintiff in her Appellate Brief.

[3] Duplicated at Pa000721-Pa000730 and at Pa001021-Pa001022.

discovery, and following extensive oral argument on several prior occasions, the Trial Court dismissed Plaintiff's bodily injury claims in Counts One and Five against all defendants on November 27, 2023, but left intact Plaintiff's employment claims under the LAD and CEPA asserted solely against the Board in Counts Two, Three and Four of the Complaint. (Pa001278-Pa001279;[4] and Pa1280-Pa1283; see also 3T at 44:8-15[5]).

Despite stating in the amended CIS filed on March 14, 2024, that Plaintiff is appealing the "11/27/23/ dismissal of personal injury counts with prejudice and 2/22/24 denial of reconsideration of 4/27/23 dismissal and dismissal with prejudice of remaining counts under CEPA and LAD," Plaintiff's Brief identifies only two Orders for which any argument has been made, namely PA001413 and Pa001415 consisting solely of the first pages of the two Orders entered on February 22, 2024 only (see Pl. Brief at pp. 25-30). These two Orders consist of the Trial Court Order (2 of 2) granting Defendants-Respondents Village of Ridgewood Board of Education, Daniel Fishbein, Angelo DeSimone, Anthony S. Orsini, Greg Wu, and Steven Tichenor's Motion to Dismiss, dated February 22, 2024 and Trial Court Order 1 of 2 denying Plaintiff-Appellant's

[4] Duplicated at Pa001333-Pa001334.

[5] All references to 1T, 2T, 3T and 4T are to the transcripts submitted by Co-Counsel for the Board to the Appellate Division and which are dated July 28, 2023, October 23, 2023, November 27, 2023 and February 22, 2024, respectively.

Motion for reconsideration of the court's November 27, 2023 Orders. (Pa001413-001414 and Pa001415-001416). [6]

The November 27, 2023 dismissal Orders labeled 1 out of 3 and 2 out of 3 that were the subject of Plaintiff's motion for reconsideration were the result of a September 20, 2023 motion filed by the Board on Counts Two to Four and the Individual Board Defendants on Counts One and Five of the Complaint (Pa000744-Pa000965). A separate September 21, 2023 motion was filed by the Board on Counts One and Five (Pa000966-to Pa001007) for Plaintiff's failure to comply with the Court's July 28, 2023 case management order pursuant to R. 4:23-2(b), and which was permitted to be filed by the Court on August 30, 2023 (see TransID # LCV 02324861632). These motions were originally made returnable on the dates of October 6, 2023 and October 20, 2023, respectively, but were not actually heard until November 27, 2023 (3T). The Court's Order granting Defendants' request to file said motions to dismiss was in response to Co-Counsel for the Board's correspondence to the Court dated August 17, 2023 and in response to Counsel for the Board on Counts Two to Four and the Individual Board Defendant's email dated August 16, 2023 (Pa000659 and Pa000959).

[6] Duplicated at Pa1280-Pa001281 and 1282-Pa001283.

Although Plaintiff filed a Motion for Reconsideration on December 12, 2023 seeking to vacate the aforementioned November 2023 dismissal Orders, her arguments were directed solely toward the Board and the "private party defendants." (Pa001285Pa-Pa001305). More specifically, as to the dismissal of the Board on Counts One and Five, Plaintiff argued that any prejudice could be erased by providing reorganized documents and allow Plaintiff to be deposed [for a fifth] time (Pa001290). As to the dismissal of the "private party defendants," she argued they never moved for dismissal or filed papers or made any arguments in favor of dismissal, and therefore she was denied "due process" with respect to dismissal of Counts One and Five against them. (Pa001289). The Individual Defendants however had, in fact, made arguments by filing papers in order to move for dismissal and Plaintiff was served with said motion papers and was thus, on notice of the Individual Board Defendants' Motion for dismissal on September 20, 2023. (Pa00744-Pa00757). In fact, Plaintiff filed papers opposing the Board's and the Individual Defendants' motions for dismissal of Counts One and Five of the Complaint on October 26, 2023 after seeking two extensions of the motion return date. (Pa001064-Pa001096). However, in her reconsideration motion, Plaintiff failed to make any argument so as to seek reconsideration of that portion of Order 2 of 3 dismissing the Individual Board Defendants, and thus never moved for reconsideration of the

dismissal of the Individual Board Defendants, all of whom are public employees and not private parties and which defendants had in fact filed motion papers in support of the dismissal of Plaintiff's Complaint for the failure to make discovery in violation of the Court's Orders. (Pa001289-Pa001290)

The November 27, 2023 Order labeled as 3 out of 3 had addressed the remaining claims for disability discrimination under the LAD and retaliation under CEPA by extending discovery on said claims through May 31, 2024 and by setting forth a schedule for the completion of discovery on those claims. (Pa001278-Pa001279; at Pa001333-Pa001334). In pertinent part, as agreed upon by Plaintiff's counsel to be sufficient during the Case Management portion of the oral argument held on November 27, 2024, Order 3 out of 3 provided Plaintiff with two (2) weeks to respond to the Board's request for identification of any previously produced documents that related to the NJLAD and CEPA claims by specific Bates/index number. (Id; see also 3T at 46:16-20).

Originally, Plaintiff had responded to the Board's written discovery requests relative to both her bodily injury and employment related CEPA and LAD claims with very minimal information and documents on or about December 14, 2021 and December 30, 2021. (Pa00763-Pa000768; Pa000770-Pa000780). Discovery ensued with Plaintiff continuing to selectively and tactically supplement discovery with hundreds of pages of medical literature,

photographs, news articles, and selective pages of medical records before each one of her depositions that were conducted on the separate dates of February 9, 2023, April 13, 2023, and May 8, 2023 and which was scheduled for a fourth day to occur on or about July 21, 2023 (see Pa000792-Pa000844; and Pa000849-Pa000851, Pa00863). Thereafter, as a result of a particularly egregious document dump of more than 10,000 unidentified pages on July 18, 2023 and another on July 26, 2023, the Court's Order dated July 28, 2023 had, in pertinent part, expressly prohibited Plaintiff from supplementing her document production after August 11, 2023, without a certification as to the reason it was not available to be produced any earlier. (Pa000655-Pa000656[7], Pa000856; Pa000863-Pa000866).

Accordingly, in compliance with the July 28, 2023 Order and the November 27, 2023 Order identified as 3 out of 3, the Board propounded its request for Plaintiff to simply identify by Bates/index number all previously produced documents that Plaintiff intended to rely upon to prove her employment-related claims only three days later on November 30, 2024. (Pa001337-Pa0001346). The Board did not serve new requests for discovery to be provided by Plaintiff. (Pa001343-Pa001346). Despite the Board's request for

[7] Duplicated at Pa000738-Pa00739, Pa000874-Pa000875; Pa000981-00982; and again at Pa001097-Pa001099;

more specific identification, Plaintiff blatantly failed to comply with the Court's third Order for discovery within the 2-week time period that Plaintiff's counsel had agreed was sufficient during the case management conference that was held following the dismissal of Counts One and Five on November 27, 2023 (Pa001349-Pa001350). Thus the Board moved for dismissal of Plaintiff's employment related claims on December 19, 2023 for the failure to abide by yet another Court Order, and which motion was made returnable on January 5, 2024. (Pa001306-Pa001347).

Plaintiff's Opposition to the aforementioned Motion was filed on or about on January 8, 2024, but her counsel failed to adequately explain Plaintiff's failure to provide responses to the Board's request for specific identification of the discovery previously produced by Plaintiff as it related to her remaining NJLAD and CEPA claims. (Pa001362-Pa001365).

Following the completion of briefing on the Board's Motion to Dismiss the remaining NJLAD and CEPA claims for the failure to provide discovery, the Board received Plaintiff's bleated responses to its more specific discovery requests along with an additional 4,271 pages of supplemental discovery on or about January 18, 2024. (Pa001366-Pa001377 and Pa0001378). Plaintiff had not filed a motion with the Court in order to supplement her document production as required by the July 27, 2023 Case Management Order (Pa000655-

Pa000656). Most egregiously, when Plaintiff's written responses were finally served late on January 18, 2024, she still failed to identify a single Bates-numbered document which supported the claim for relief under the LAD for disability discrimination, *e.g.* that she was denied a reasonable accommodation, or which supported the elements of her claim for retaliation under the LAD and CEPA, *e.g.* that she suffered an adverse employment action following a protected activity under either statute. (Pa001371-Pa001377). In fact, no previously-produced Bates numbered/indexed documents with the prefix MEH and HYERDOCS were identified by Plaintiff in response to Request Numbers 1, 2, 5, 6, 7, 10, 11, 15, 19 and 21, whatsoever (Pa001381).

For example, Request Number 5 asked Plaintiff to identify all documents that describe the protocol or procedures for filing a grievance with the Board for discrimination or retaliation (Pa001368). Plaintiff's response does not answer this question whatsoever. Instead, her response provides merely an excuse as to the reason she could not file a grievance with the Board (Pa 1382-Pa1383). As another example, Request Number 6 had sought for Plaintiff to identify all documents pertaining to any complaint she made regarding the alleged "unsafe" conditions in her classroom, yet she merely responded by referring generally to her deposition testimony. (Pa001357 and Pa001375). Similarly, Defendant's Request Number 7 asked Plaintiff to identify all complaints alleging

discrimination made by Plaintiff or on her behalf in support of her claim for LAD retaliation, (Third Count), yet Plaintiff responded instead with irrelevant details regarding a hearsay statement that was allegedly made to Greg Wu by Defendant Orsini in response to her making some complaint decades earlier in 2008 "about hazardous air" in her classroom. (see Pa001357; and Pa001375). A plain reading of Plaintiff's responses thus revealed that Plaintiff had utterly failed to identify any protected activity she engaged in to support her claim for retaliation under CEPA or the LAD.

Moreover, as stated above, the Court's July 28, 2023 case management order expressly prohibited Plaintiff from supplementing her document production after August 11, 2023 without a certification as to the reason it was not available to be produced any earlier. (Pa000656). In defiance of the July 2023 Order, Plaintiff produced another 4,271 plus pages of Bates-numbered documents on the Board on or about January 18, 2024 without an explanation, nor with a Rule 4:14-7 Certification, and which contained both new documents and old documents that had already been produced and reproduced earlier in support of Plaintiff's bodily injury claims on the dates of July 18, 2023, July 20, 2023, July 26, 2023, August 15, 2023, and October 26, 2023 (Pa000744-Pa000757; and Pa001380).

Additionally, the new HYERDOC Bates numbers ascribed to Plaintiff's

January 18, 2024 production were different than any of the MEH Bates numbers that had previously been ascribed to the 10,000 plus pages of discovery that Plaintiff had served on July 18, 2023 and July 20, 2023, the 7,981 pages that had been produced on July 26, 2023, the 6,589 pages along with several unidentified and never-before seen videos of Plaintiff's classroom and other random photos that had been taken by Plaintiff years earlier and produced on August 15, 2023, or the 4,125 supplemental HYERDOCS Bates stamped pages of documents she produced on October 26, 2023 with an Index (Pa001380-Pa001381). As such, Plaintiff's most recent document dump of another 4,271 pages had required the Board to once again compare an extraordinary amount of documents to determine which documents were previously produced in connection with Plaintiff's now-dismissed bodily injury claim and which were new documents that potentially related to her employment discrimination and retaliation claims versus her bodily injury claims. This was a completely onerous and impossible task. (Pa001306-Pa001315; Pa001380)

For example, in reviewing said production the Board ascertained that, in her response to Request Number 9, which sought for Plaintiff to identify the disability for which she had requested an accommodation and that was not provided by the Board, she failed to identify any such disability and her reference to the HYERDOCS bates numbers as contained on her Index did not

match her most recent January 18, 2024 production as being anywhere close to responsive to this request. (Pa001358; and Pa001375). Likewise, Request numbers 10 and 11 sought for Plaintiff to identify any documents referencing the unlawful conduct by the Board that she contends she reported or objected to and for which she believes she was retaliated against or to identify all communications showing the elimination of funding for an art class or denial of basic art supplies and a table, yet Plaintiff responded with new never-before raised allegations pertaining to her previous bodily injury lawsuit against the Board. (Pa001358; and Pa001375-1376). In addition, a review of the emails identified as HyerDoc000743-000745 in response to Request Number 12 revealed that they are dated in January 2008 and which predated any request for a room change that was made to Defendant Orsini via an email dated August 2008 that was identified as HyerDoc000694-000697. (Pa001376; and Pa001393).

Plaintiff also failed entirely to respond to Defendant's Request Number 16 for Plaintiff's application for unemployment benefits that was submitted following her voluntary resignation from employment on January 1, 2020 instead directing Defendant to (i) "HyerDoc003556" consisting of a document that appears to have been prepared by Plaintiff herself with respect to her reported salary for pension purposes and (ii) "Plaintiff's 'Exhibit E' in response

to Defendant's Third Notice to Produce" consisting of a lease agreement for Plaintiff's rental property in Florida and a text message of vacation of her rental property due to a finding of mold and not Plaintiff's "Pension File" as listed on the new Index (Pa001376; Pa001383 and Pa001394)

Moreover, as was Plaintiff's practice in the past, the new Index provided by Plaintiff contained missing or incorrect descriptions of the 4,271 new pages of documents and was wholly inadequate to permit Defendant to determine which of the thousands of pages of documents were previously produced and which were not, or to easily ascertain which documents were actually responsive to the corresponding request for identification (Pa001384 and Pa001388, and Pa001408). For example, Defendant's Request Number 3, sought identification of all prescriptions provided by any mental health care provider to Plaintiff for mental health treatment. (Pa0001357). Plaintiff's convoluted response referred vaguely to unidentified "2023 receipts" and then to "[p]reviously produced receipts" by Bates stamped number HyerDoc000360-000423 and HyerDoc001623-001655 and also to newly produced receipts from Apothicare and Walgreens by Bates stamped number HyerDoc004126-004179. (Pa001374). The accompanying new Index did not however describe any of these Bates numbered ranges correctly and thus, suffered from the same deficiencies as Plaintiff's prior Index which led to this Court dismissing the personal injury

claims in their entirety against all Defendants (Pa001384-1385; and Pa001388). In fact, Plaintiff's assigned Bates number range HyerDoc 000360-000422 on the new Index only identified State and Federal Tax Returns 2015-2022 and did not identify any records of mental health treatment (Pa001389).

Furthermore, Bate number HyerDoc00423 on the new Index which was identified to be the purported "receipt" for Apothicare 360 Pharmacy was not related to any medications known to be prescribed for any mental health reasons but was for medications that were prescribed by her primary care physician Alan Gruning for her alleged physical injuries. (Pa001385). Likewise, the newly-produced prescriptions identified in her response as Bates number HyerDoc001623-001655 were for medications prescribed by Plaintiff's allergist Dr. Lubitz or by her pulmonologist Dr. Kim for albuterol, and not by a mental health care provider, as requested. (Pa001385-Pa0001386). Similarly, the other copies of prescriptions purportedly added to Plaintiff's January 18, 2024 "document dump" and newly-identified as Bated number HyerDoc004126-004179 were also not from any mental health treatment provider authorized to write such prescriptions (Pa001386).

Plaintiff's new January 18, 2024 Index of documents was also deficient as Plaintiff had responded to Defendant's Request Number 9 for highly relevant information concerning her alleged disability for which she made a request for

an accommodation by identifying only two documents: (i) her letter to Anthony Orsini of June 25, 2008 allegedly consisting of 138 pages with attachments stamped with the Bates Number HyerDoc000612-000750 and (ii) her letter to Superintendent Fishbein stamped with the Bates number HyerDoc000618 (Pa001375) However, the January 18, 2024 Index describes Bates number HyerDoc000612-000750 to be merely a "[l]etter to Anthony Orsini of June 25, 2008." (Pa001390). Nowhere is there any mention of a letter to Superintendent Fishbein as being included within said Bates number range. (Id). Moreover, that particular Bates number range actually consists of multiple letters to various people including those not even written by Plaintiff and on multiple different dates starting from the year 2004 (Pa001390). Yet, those correspondences were entirely omitted from being identified in Plaintiff's January 18, 2024 Index of documents. (Pa001390)

On February 22, 2024, oral argument was heard as to the Board's motion to dismiss for the failure to obey a Court Order for discovery as well as Plaintiff's motion for reconsideration of the November 27, 2023 Orders dismissing her bodily injury claims (4T). During oral argument, the trial judge noted that Plaintiff did not specifically identify which requests the newly produced documents related to despite several motions and orders regarding same and that Defendant's request was not a request for new discovery but a

request to identify. (4T 33:24-34:7). The Trial Court also stated as follows:

> "And now well after the time originally asked for and after the time taken without consent or court order, the production is still not compliant and there's no—no opposition response to that. No representation that Ms. Kumar-Thompson is mischaracterizing it or the plaintiff has complied. So, in fact, still on this case that was filed on July 16th of 2020, three and a half years ago, plaintiff has not identified the discovery that supports her LAD and CEPA claims specifically for emotional distress and/or economic damages. This is---am I missing something? Is there something incorrect about that recitation?" (4T at 36:4-16).

Plaintiff's counsel did not dispute the Court's recitation of the facts whatsoever, other than to misleadingly argue that this was not a case of not responding but rather a bona fide dispute over the sufficiency of the responses that were provided in January. (4T 37:25-38:23). However, Plaintiff could point to no evidence to prove that any substantive responses identifying previously-produced documents had been received in response to Defendant's requests and efforts to narrow the issues to solely the LAD and CEPA claims and thus, this argument was properly rejected by the Trial Court. (4T 41:18-24).

In addressing Plaintiff's failure to clearly identify those documents to support her LAD and CEPA claims in her responses to Defendant's requests, the Court considered Plaintiff's entire history with complying with previous case management orders entered by the Court, failure to provide any responses within time frame agreed upon, failure to provide all of the information even by the extended time that plaintiff stated that she needed and that the Court did not

grant, and the earlier indication on November 27, 2023 that the Court "expected compliance with its orders and plaintiff's action" from that point forward. (4T 42:2-43:10). In addition, the Court considered that there was no justifiable excuse for Plaintiff not to have had some of these proofs and basis for her claims in hand when the complaint was brought [and that] over the course of three and half years of discovery, plaintiff's counsel ought to have had producible (sic) discovery organized, assembled and produced." (4T 43:11-17). Nor was it appropriate to continue to prolong this case further solely to impose costs and burdens on defendant from plaintiff's failure to comply with court orders and failure to pursue her case properly." (4T at 43:17-21). Accordingly, the Court found that no other solution short of dismissal, was possible at this juncture, thereby making dismissal the only appropriate sanction under the circumstances. (Pa001413-Pa001414).

LEGAL ARGUMENT

POINT ONE

PLAINTIFF HAS WAIVED THE RIGHT TO APPEAL THE NOVEMBER 27, 2023 DISMISSAL OF THE INDIVIDUAL BOARD DEFENDANTS DUE TO PLAINTIFF'S FAILURE TO CHALLENGE SAME IN HER APPELLATE BRIEF OR IN THE TRIAL COURT (Not Argued Below)

Plaintiff's Brief contains no argument relative to the Orders 1 of 3 or 2 of 3 entered on November 27, 2023 dismissing Plaintiff's bodily injury claims as

contained in Counts One and Five of the Complaint against all Defendants. Instead, Plaintiff's Brief solely identifies the first page of the February 22, 2024 Order denying her Motion for reconsideration seeking to vacate Orders 1 of 3 dismissing the Board and Order 2 of 3 dismissing the "private party" defendants, i.e. Sodexo and Aramark alone (Pa001413) and only the first page of the February 22, 2024 Order dismissing the Board from the employment-related claims under the LAD, and CEPA that had remained in the Complaint following the dismissal of all Defendants from Counts One and Five on November 27, 2023 (Pa001415; and see Pl. Brief at pp. 25, 26, and 30). Thus, although Plaintiff filed a notice of appeal and CIS with the intention of appealing the November 27, 2023 Orders of dismissal of the personal injury counts against all Defendants, she failed to make any argument specifically addressing the dismissal of the Individual Board Defendants on November 27, 2023 in her Appellate Brief. (see Pl. Brief, pp. 26-30). In fact, Plaintiff did not, as Court Rule 2:6-2(a)(1) requires, identify in any of her Point Headings where either Order 1 of 3 or Order 2 of 3 entered on November 27, 2023 was located in the Appendix or to indicate that her arguments on appeal were directed toward either November 2023 dismissal order.

It is well-settled that an issue not briefed on appeal is deemed waived. Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390 (App. Div. 2021);

See also *e.g.* In re. Bloomingdale Convalescent Center., 233 N.J. Super. 46, 49 n.1 (App. Div. 1989) (Appellate Division would not decide an issue raised for the first time during oral arguments and had not been briefed) and Kelly v. Hackensack Meadowlands Dev. Comm'n, 172 N.J. Super. 223, 228 n.1 (App. Div. 1980) (court did not decide an issue when defendant's brief obliquely questioned an issue, rather than directly challenging the issue). Thus, Plaintiff's arguments on appeal as to the November 27, 2024 dismissals have been waived and instead are limited solely to the February 22, 2024 Orders only. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); See also, *e.g.* Weiss v. Cedar Park Cemetery, 240 N.J. Super. 86, 102 (App. Div.1990) (finding dismissal was required because appellants did not "adequately brief the issues").

Moreover, as it pertains to the February 22, 2024 Order denying Plaintiff's Motion for Reconsideration, it is significant that her reconsideration Motion was directed toward the Board on Counts One and Five and the "private party defendants," alone. More specifically, as to her motion seeking reconsideration and vacation of the Board's dismissal from Counts One and Five, Plaintiff argued that any prejudice could be erased by providing reorganized documents and allow Plaintiff to be deposed [for a fifth] time. As to the "private party defendants" she argued that they never moved for dismissal or filed papers or argued for same, and therefore she was denied "due process" when the Court

dismissed Counts One and Five against them. The reference to "private party defendants" could only have been to Defendants Sodexo and Aramark since the Individual Board Defendants had in fact moved for dismissal, filed papers and argued for same. Plaintiff was served with said motion papers and on notice of the Individual Board Defendants' Motion for dismissal on September 20, 2023. Plaintiff even filed opposition to the Board Defendants' motions motion to dismiss on October 26, 2023. Yet, failed to make any argument in support of Plaintiff's reconsideration motion specifically against the Individual Defendants. Rather, Plaintiff limited her arguments to the dismissal of the Board and the "private party defendants."

Accordingly, it cannot be disputed that Plaintiff did not make any argument so as to seek reconsideration of that portion of Order 2 of 3 dismissing the Individual Board Defendants, and thus never moved for reconsideration of the dismissal of the Individual Board Defendants who are public employees and not private parties and who admittedly filed papers in support of dismissal of Plaintiff's Complaint for the failure to make discovery in violation of a Court Order pursuant to R. 4:23-2(b). Thus, insofar as Plaintiff's underlying motion for reconsideration did not seek to vacate the dismissal of the Individual Board Defendants from the Complaint, Plaintiff is now foreclosed from raising such an argument against these Individual Board defendants for the first time on

appeal, especially since she had the opportunity to do so in the Law Division, but did not. Nieder v. oyal Indem. Ins. Co., 62 N.J. 229, 234 (1973); See also *e.g.* North Haldeon Fire Co. No. 1 v. Borough of North Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012) and In re Bell Atlantic–New Jersey, Inc., 342 N.J. Super. 439, 442–43 (App. Div. 2001). As such, her appeal of the February 22, 2024 Order denying reconsideration as it pertains to the Individual Board Defendants should be dismissed. State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977) (explaining it is the appellant's responsibility to provide the facts, record, and legal argument that flows from the facts to allow an independent assessment of the merits of an appeal).

For all of these reasons, and for the reasons set forth by Counsel for the Board in its separately filed responding Brief, Plaintiff is not entitled to reversal of the Trial Court's decision on November 27, 2023 dismissing the individual Board Defendants from Plaintiff's claims for bodily injury and the only Counts (1 & 5) in the Complaint that had been asserted against them in their individual capacities

POINT TWO

PLAINTIFF'S CLAIMS FOR DISCRIMINATION AND RETALIATION AGAINST THE BOARD PURSUANT TO THE LAD AND CEPA WERE PROPERLY DISMISSED ON FEBRUARY 22, 2024 FOR THE FAILURE TO PRODUCE ANY DISCOVERY TO SUPPORT SAID CLAIMS OVER THE COURSE OF THREE AND ONE-HALF YEARS AND IN DELIBERATE VIOLATION OF THE COURT'S

ORDER 3 OUT OF 3 THAT WAS ENTERED ON NOVEMBER 27, 2024 (Argued Below)

As it pertains to Plaintiff's challenge to the February 22, 2024 dismissal Order dismissing the entire Amended Complaint with prejudice against all Defendants-Respondents, the Trial Court neither *sua sponte* disposed of Plaintiff's claims nor was there any error committed in granting the Board's motion to dismiss. Rather, in light of Plaintiff's history of flouting multiple court orders pertaining to the orderly procession of producing documentary discovery that Plaintiff began to "dump" on Defendants starting in July 2023, the dismissal of Plaintiff's claims against the individual defendants and remaining claims against the Board on February 22, 2024 was not only appropriate but warranted when Plaintiff again failed to respond timely to the Board's request to identify those documents that supported her claims for discrimination and retaliation under the LAD and/or CEPA. See Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 521 (1995). In fact, when Plaintiff's written responses to the Board's narrowly tailored requests were received, she failed to identify a single Bates numbered document to support those claims and instead Plaintiff dumped another 4,209 pages of documents on the Board on or about January 18, 2024 without explanation and which contained documents that were not responsive to any one of Defendants' requests for production. More egregiously, the new

HYERDOC Bates numbers ascribed to Plaintiff's January 2024 production, contained both new documents and reproduced documents that had already been produced earlier in support of Plaintiff's separate bodily injury claims, but did not match any of the Bates numbers ascribed to Plaintiff's previous productions as listed in her first Index, nor to some of the descriptions in the new Index provided by Plaintiff on January 18, 2024. This required the Board to once again compare an extraordinary amount of documents to determine which documents were previously produced in connection with Plaintiff's now-dismissed bodily injury claim and which were new documents in support of her separate employment discrimination and retaliation claims. Thus, Plaintiff's habit of dumping thousands of pages of documents on Defendants had not ceased despite repeated warnings by the Trial Court in July, October and November 2023 that such discovery misconduct is prejudicial to Defendants and would not be tolerated.

Additionally, it is significant that Plaintiff's responses to the Board's very specific and narrowly tailored request numbers 1, 2, 5, 6, 7, 10, 11, 15, 19 and 21 did not provide the essential information necessary to support Plaintiff's claims under CEPA and the LAD. In fact, no previously produced Bates numbered/indexed documents were identified by Plaintiff in response to Request Numbers 1, 2, 5, 6, 7, 10, 11, 15, 19 and 21, whatsoever. These requests were

highly relevant to Plaintiffs' ability to establish a claim for relief for disability discrimination and retaliation under the LAD and/or CEPA. For example, in response to Request Number 6, which sought for Plaintiff to identify all documents pertaining to any complaint she made regarding the alleged "unsafe" conditions in her classroom, she simply responded by referring to her deposition testimony. Similarly, in response to request number 7, which sought for Plaintiff to identify all complaints alleging disability discrimination in support of her claim for retaliation under the LAD (Third Count), Plaintiff responded instead with details regarding a hearsay statement that was allegedly made to Greg Wu to support her claim for retaliation for making a complaint in 2008 "about hazardous air" (PA001375; see also Complaint allegations). Thus, she failed to identify a single complaint for discrimination that had been made by her.

Moreover, as was the case in the past, the new index provided by Plaintiff contained missing or incorrect descriptions of the new document dump served on January 18, 2024 and suffered from the same deficiencies as Plaintiff's prior Index which led to this Court dismissing the personal injury claims in their entirety against all Defendants. Due to these deficiencies and errors, Plaintiff's references to any HyerDocs Bates numbers in Plaintiff's responses to the Board's more specific Requests could not be deemed to be responsive to said requests. For example, Request numbers 10 and 11 sought for Plaintiff to

identify any documents referencing the unlawful conduct by the Board that she contends she reported or objected to and for which she believes she was retaliated against by being denied funding for an art class and/or with basic art supplies and tables. Plaintiff's response to request number 11 was to reference emails identified as HyerDoc000743-000745, but which are all dated in January 2008, well beyond the one or two-year statute of limitations for her claim for retaliation under either the LAD or CEPA. In addition, none of these emails contained any evidence of unlawful conduct by the Board but simply consisted of her complaints regarding various conditions in her classroom.

Additionally, Request Number 3 requested Plaintiff to identify all prescriptions provided by any mental health care provider for mental health treatment in support of her claim for damages due to emotional distress. Plaintiff's convoluted response referred vaguely to unidentified "2023 receipts" and then to "[p]reviously produced receipts" by Bates number HyerDoc 000360-000423 and HyerDoc001623-001655; and also to newly produced receipts from Apothicare and Walgreens Bates stamped as HyerDoc004126-004179. Her accompanying new Index did not however describe any of these Bates numbered ranges correctly. In fact, the Index accompanying Plaintiff's responses to Request Number 3 identifies HyerDoc000360-000422 as State and Federal Tax Returns 2015-2022 only. Thus, Plaintiff's production was missing these

prescriptions in their entirety. Furthermore, HyerDoc 000423 did not identify a prescription but only a "receipt" for Apothicare 360 Pharmacy. This receipt was not related to any medications known to be prescribed for any mental health reasons but was for different medications that were prescribed by her primary care physician Alan Gruning to treat her pulmonary issues related to her bodily injury claims. Likewise, newly-produced Bates numbers HyerDoc001623-001655 were ascribed to medications prescribed by her allergist Dr. Lubitz or by her pulmonologist Dr. Kim for albuterol and not by a mental health care provider. Similarly, newly produced Bates number HyerDoc004126-004179 were for "prescriptions" that had not been written by any mental health care provider authorized to write such prescriptions, and thus her response was entirely non-responsive to the Board's more specific Request number

As another example of the misleading nature of Plaintiff's January 18, 2024 Index, Plaintiff responded to Defendant's Request Number 9 for highly relevant information concerning her alleged disability for which she made a request for an accommodation by merely identifying a) her letter to Anthony Orsini of June 25, 2008 allegedly consisting of 138 pages with attachments identified as HyerDoc000612-000750 and identifying a letter to Superintendent Fishbein as HyerDoc000618 only. However, the Index describes the entirety of HyerDoc000612-000750 to be solely a "[l]etter to Anthony Orsini of June 25,

2008." Nowhere is there any mention of a letter to Superintendent Fishbein. Moreover, that particular Bates range actually consists of multiple letters to various people--- including those not even written by Plaintiff and on multiple different dates starting from the year 2004.Yet, those letters are also omitted from being listed in the Index and from Plaintiff's response to Request Number 9.

It is well-settled that deficient answers belatedly provided by a delinquent party are useless and are treated as the equivalent of failing to respond to discovery requests of the moving party. See Sullivan v. Coverings and Installation Inc., 403 N.J. Super. 86, 94 (App. Div. 2008) (opining that, where discovery is still outstanding, because it is deficient, reinstatement of a complaint dismissed with prejudice for failure to provide discovery must be denied). It is also well-settled that a request for medical treatment arising from a work-related injury does not by itself qualify as a reasonable accommodation and is thus, insufficient to hold Defendant liable under the NJLAD. Carabello v. City of Jersey City Police Dep't, 237 N.J. 255, 269 (2019). Moreover, as it pertains to Plaintiff's claims for retaliation as a "whistle-blower," our Supreme Court has repeatedly upheld the dismissal of such a claim under CEPA where a plaintiff is unable to identify the law, rule, regulation or other authority that provides a standard against which the conduct of her employer may be

measured. Hitesman v. Bridgeway, Inc., 218 N.J. 8, 25 (2014); see also Chiofolo v. State, 238 N.J. 537, 545 (2019) (holding that where a defendant questions the source of law relied on by the plaintiff, that source should be provided by the plaintiff). Similarly, Plaintiff cannot support a claim for relief under the LAD for disability discrimination absent any facts to demonstrate that she was denied a reasonable accommodation. See Carabello, supra, 237 N.J. at 268. Therefore, absent such proofs, these claims would be subject to dismissal even if Plaintiff did not repeatedly continue to flout the Court's orders regarding the timing and manner of producing discovery to support her claims.

As Plaintiff did not supply such proofs, despite over three and half years to do so, her claims under the LAD and CEPA were appropriately dismissed for the failure to abide by a Court Order in light of the prejudice to the Board in engaging in trial preparation on said claims and to develop its defenses without a clear understanding of the underlying facts supporting her claims. Abtrax Pharmaceuticals, Inc., supra, 139 N.J. at 521 (holding that a litigant that obstructs full discovery and willfully violates a bedrock principle to make full disclosure of all relevant evidence in compliance with the discovery rules should not assume that the right to an adjudication on the merits of its claims will survive so blatant an infraction). In fact, no lesser sanction under the circumstances would suffice to erase the prejudice to the Board from the failure

to provide such highly relevant information and when the actions of Plaintiff repeatedly demonstrate a deliberate and contumacious disregard of the Court's authority. See, e.g. Marino v. Abex Corp., 471 N.J. Super. 263, 292 (App. Div. 2022) (holding ultimate sanction was warranted upon finding that defendant withheld relevant evidence after years of resisting plaintiff's discovery requests and despite negotiated agreement for production of such discovery with plaintiff) and Lask v. Florence, A-0706-17, 2021 WL 668027, at *8 (App. Div. Feb. 22, 2021) (recognizing that courts have endorsed the ultimate sanction of dismissal without prejudice under R. 4:23-2(b) where party deliberately pursues a course that hinders the ability to obtain necessary facts to understand the basis of a plaintiff's claim), citing Crews v. Garmoney, 141 N.J. Super. 93, 96-97 (App. Div. 1976); and Interchemical Corp. v. Uncas Printing & Finishing Co., 39 N.J. Super. 318, 321 (App. Div. 1956).

For all of the foregoing reasons and for the reasons set forth in Co-Counsel for the Board's separately-filed Responding Brief, Plaintiff's appeal of the dismissals of her respective claims against the Board should be denied and the Trial Court's Orders entered on February 22, 2024 be upheld.

CONCLUSION

It is respectfully requested that for all of the foregoing reasons and for the reasons set forth in Co-Counsel for the Board's separately-filed Responding Brief, Plaintiff's appeal of the dismissals of her respective claims against the Board as well as the Individual Board Defendants should be denied and the Trial Court's Orders entered on February 22, 2024 and on November 27, 2024 be upheld.

Respectfully Submitted,

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendants, Village of Ridgewood Board of Education as to Counts Two, Three, and Four and for Angelo DeSimone, Gregory Wu, Anthony Orsini, Dr. Daniel Fishbein, and Steven Tichenor as to Counts One and Five of the Amended Complaint.

By: *s/ Ruby Kumar-Thompson*
Ruby Kumar-Thompson, Esq.

Dated: December 5, 2024

Superior Court of New Jersey

APPELLATE DIVISION

MARGARETE HYER,

Plaintiff-Appellant,

v.

VILLAGE OF RIDGEWOOD BOARD OF EDUCATION, DANIEL FISHBIEN, ANGELO DESIMONE, ANTHONY S. ORSINI, GREG WU, STEVEN TICHENOR, SODEXO A/K/A SODEXO USA AND/OR SODEXO, INC., GCA SERVICES GROUP INC. A/K/A GCA EDUCATION SERVICES INC., ARAMARK A/K/A ARAMARK SCHOOLS FACILITIES, LLC, ARAMARK SCHOOLS, INC., ARAMARK EDUCATIONAL GROUP, LLC, ARAMARK EDUCATION SERVICES, INC., ARAMARK EDUCATIONAL SERVICES, LLC AND/OR ARAMARK EDUCATION GROUP, INC. and JOHN DOES 1-10,

Defendants-Respondents.

DOCKET NO. A-002074-23 T4

CIVIL ACTION:

On Appeal From Order of Law Division Granting Motion to Dismiss and Denying Motion for Reconsideration/to Vacate Superior Court of New Jersey, Law Division, Bergen County Docket No. BER-L-4141-20

SAT BELOW:

Hon. Mary J. Thurber

DATE SUBMITTED:

December 11, 2024

BRIEF FOR DEFENDANTS-RESPONDENTS

On the Brief:

Patrick W. Brophy (040691990)

MCMAHON, MARTINE & GALLAGHER, LLP

Attorneys for Defendants-Respondents Aramark Management Services Limited Partnership, i/s/h/a Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Educational Services, Inc., Aramark Educational Services, LLC and/or Aramark Educational Group, Inc.

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I. PRELIMINARY STATEMENT

Plaintiff Margaret Hyer brought this lawsuit against the various defendants claiming personal injuries from exposure to what she believed was mold during her employment as an art teacher at Benjamin Franklin Middle School in Ridgewood, NJ from September 1998 until her retirement in 2020. Among the many defendants named in Plaintiff's First Amended Complaint (Pa000410-Pa000428) were "Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Educational Services, Inc., Aramark Educational Services, LLC and/or Aramark Educational Group, Inc." (Pa000410-Pa000411) The actual Aramark entity contracted by the defendant Village of Ridgewood Board of Education was Aramark Management Services Limited Partnership. Accordingly, our office served an Answer to the Plaintiff's First Amended Complaint on behalf of all of the misnamed Aramark defendants as "Defendant Aramark Management Services Limited Partnership, i/s/h/a Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Educational Services, Inc., Aramark Educational Services, LLC and/or Aramark Educational Group, Inc. (hereinafter "Aramark")." (Da1).

Plaintiff's appeal herein arises from: (a) the trial court's three orders of November 27, 2023, the second of which (Order 2 of 3) ordered, among other

things, that "All defendants other than the Ridgewood Board of Education are dismissed from the matter." (Pa001282-1283 and 3T); and (b) the trial court's two orders of February 22, 2024, the first of which (Order 1 of 2) ordered that "Plaintiff's motion [for reconsideration of the court's November 27, 2023 Orders] is DENIED." (Pa001415-1416 and 4T).

The November 27, 2023 dismissal of the action against Aramark and all other Defendants except Defendant Village of Ridgewood Board of Education came 1,225 days after Plaintiff filed her Amended Complaint on July 23, 2020. Various Defendants filed multiple discovery motions throughout the litigation, and discovery had been extended no less than seven times. Prior to the dismissal in November 2023, the trial judge warned Plaintiff that if she did not bring herself in compliance with the trial court's July 28, 2023 and October 23, 2023 discovery scheduling orders, her Complaint would be dismissed with prejudice. ("THE COURT: I'm going to give you dates and deadlines, and if they're not met, the plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this." 2T16:12-15). Plaintiff never complied and on November 27, 2023 the trial court dismissed Plaintiff's Complaint against all defendants except Defendant Village of Ridgewood Board of Education, as to which the trial court allowed only a limited set of Plaintiff's statutory, non-negligence causes of action to continue.

Following extensive argument, the trial judge found Plaintiff's course of conduct to be deliberate and intentionally burdensome on Defendants. The trial judge also determined that Plaintiff had not been diligent in pursuing discovery, despite having over three years to do so, and had not satisfactorily explained why discovery had not been completed. Defendants, on the other hand, had not engaged in any inappropriate conduct and had been persistent in their efforts to obtain discovery that was essential to the case. The trial court also found that, having dismissed the personal injury claims (Counts One and Five), Aramark (and GCA Services and Sodexo) would be out of the case as well. (3T50:16-25 and 3T51:1-7 and Pa001282-1283).

The record before this Appellate Court is replete with reasons why the trial judge not only determined that dismissal was the appropriate sanction but also why the court felt that no lesser sanction was sufficient. The trial court did not abuse its discretion and Plaintiff's appeal should be denied as to Defendant Aramark.

II. PROCEDURAL HISTORY[1]

1. Plaintiff filed a First Amended Complaint ("Complaint") on July 23, 2020. (Pa000410-Pa000428).

2. The original discovery end date was March 4, 2022 (BOEa001).

3. Discovery had been extended no less than 7 times (BOEa001).

4. Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) filed no less than 5 discovery motions:

a. On December 20, 2021, Defendant Village of Ridgewood Board of Education moved to dismiss Plaintiff's complaint for failing to answer discovery (BOEa006-BOEa014).

b. On April 22, 2022, Defendant Village of Ridgewood Board of Education again moved to dismiss Plaintiff's complaint for failing to answer discovery (BOEa033-BOEa055).

c. On December 2, 2022, Defendant Village of Ridgewood Board of Education moved to compel Plaintiff's in-person deposition (Pa000272-Pa000279).

[1] Appellant did not submit the July 28, 2023 or the October 23, 2023 transcripts to the Court despite them being germane to this Appeal. Defendant Village of Ridgewood Board of Education has submitted those two transcripts to the Appellate Division. Defendant Aramark references the (4) transcripts in chronological order pursuant to R. 2:6-8 as follows: the July 28, 2023 transcript is 1T; the October 23, 2023 transcript is 2T; the November 27, 2023 transcript is 3T; and the February 22, 2024 transcript is 4T.

d. On December 7, 2022, Defendant Village of Ridgewood Board of Education moved to compel Plaintiff to provide HIPAA authorizations (Pa000280-Pa000293).

e. On January 17, 2023, Defendant Village of Ridgewood Board of Education moved for sanctions after Plaintiff appeared for, but refused to move forward with, Defendant's medical examination (Pa000327-Pa000345).

5. On September 21, 2021, Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) requested that Plaintiff produce all documents that supported her damage claims (BOEa002-BOEa005).

6. On January 11, 2023, Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) served its Third Request for Documents on Plaintiff again requesting she produce, inter alia, medical literature, records, treatises and other documents that Plaintiff's experts relied upon in rendering their reports (BOEa060-BOEa064).

7. On June 9, 2023, the trial court granted Plaintiff's motion seeking to extend discovery until November 25, 2023 (BOEa185-BOEa186).

8. By July 2023, Plaintiff had perfected a discovery tactic of "document dumping," whereby Plaintiff would produce and reproduce the same

document production consisting of thousands upon thousands of pages of documents on Defendant multiple times (Pa000648; Pa000655-Pa000657; and Pa000659-Pa000660).

9. Plaintiff's "document-dumping" practice became so overwhelming and costly that by July 20, 2023, Defendant Village of Ridgewood Board of Education wrote to the trial court for help:

> On June 9, 2023, Your Honor entered an Order extending discovery and further ordered a request for a case management conference be made prior to any further discovery extensions would be entertained.
>
> Over the last two days, Plaintiff has produced over 10,000 pages of documents. In light of this, the Board requests a case management conference with Your Honor to discuss the current discovery deadlines and to discuss future discovery production by Plaintiff. (Pa000648).

10. A case management conference was held on July 28, 2023 (Pa000655).

11. On July 26, Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) provided a "sample" of the type and kind of documents that Plaintiff was producing in discovery. The sample included pictures of, *inter alia*, Plaintiff's arm pit, and paint cans (Pa000650).

12. On July 28, 2023 after a lengthy discussion of Plaintiff's discovery practices, the trial court entered the following order:

> No later than August 11, 2023, Plaintiff shall produce to defendants:

> Contact information including names and addresses plus fully executed HIPAA releases (if not previously provided) for every care provider who provided services to Plaintiff during the time period relevant to this lawsuit, including all providers included in Plaintiff's recent document productions;
>
> An Index of all Bate-stamped documents produced by Plaintiff and an itemized identification of the discovery requests to which the documents are responsive; and
>
> Bate-stamped copies of any other documents responsive to discovery requests or on which Plaintiff intends to rely at trial, including any documents previously produced but not bate-stamped, also indexed and linked to discovery requests as in paragraph 1(b) above.
>
> Plaintiff may not supplement her document production after August 11, 2023, nor rely at trial on documents that are not produced in accordance with this Order. To seek relief from this paragraph, Plaintiff must file a motion for relief and demonstrate the documents or information were not reasonably available to or discoverable by Plaintiff prior to August 11, 2023. Any such application must be made promptly following Plaintiff's receipt or discovery of any such documents or information (Pa000655-Pa000657).

13. On July 31, 2023, Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) sent a letter to Plaintiff again identifying outstanding discovery that included, *inter alia*, tax returns, the names and addresses of Plaintiff's siblings; medical authorizations not yet received; and other outstanding discovery (BOEa187).

14. August 11, 2023 was the deadline set forth in the July 28, 2023 order for Plaintiff to provide outstanding discovery (Pa000656).

15. On August 15, 2023, four days after the court-ordered deadline, Plaintiff reproduced the same 10,000-page document production that she produced prior to the July 28 conference. Defendants also received (1) non-compliant HIPAA authorizations in favor of providers with whom Plaintiff never treated; (2) documents reflecting, for the first time, that Plaintiff treated in states other than New Jersey; and (3) documents indicating that Plaintiff, three years into the litigation, was now also claiming orthopedic injuries (Pa000650-000660).

16. On August 16, 2023, Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) sent the following emails to Plaintiff's counsel:

> The HIPAAS you provided are not compliant and thus the reason we sent you blank forms, to avoid this very issue. I note that you included prior doctors and thus are, once again, mass producing documents in duplicates. I am now receiving notice of providers in Ohio and other states never identified in deposition, answers to discovery or otherwise. The HIPAAS are not tailored in time, among other things.
>
> We deem your response is this regard not compliant with the court's order and will be contacting the court once again.

(BOEa192-193).

> None of the information requested during deposition has been provided, including names and addresses of employees and siblings;
>
> The newly produced pictures have no notation as to what they are showing (there are a few pics of Plaintiff's armpit); There is a picture of paint;
>
> The column "lists" contains no definition as to what they are supposed to mean. This issue was specifically addressed by the Court during our last call;
>
> The "receipts and bills" have no information as to what they are supposedly showing;
>
> There is no explanation for why your client's dental receipts are being provided or why her dental visits are listed and why we are receiving EOB's for, inter alia, dental cleaning.
>
> This is not an exhaustive list

(BOEa191)

17. On September 20, 2023, Defendant Village of Ridgewood Board of Education and the Individual Defendants (by Cleary Giacobbe Alfieri Jacobs LLC) moved to dismiss Plaintiff's complaint pursuant to R. 4:23-2(b)(3). (Pa000744-Pa000965).

18. On September 21, 2023, Defendant Village of Ridgewood Board of Education (by Capehart & Scatchard, P.C.) moved to dismiss Plaintiff's complaint pursuant to R. 4:23-2(b)(3) and for an award of counsel fees pursuant to R. 4:23-2(B)(4). (Pa000966-Pa001007).

18. Those motions to dismiss were not heard until November 27th. The trial judge, on at least two more occasions, extended previously amended discovery deadlines to give Plaintiff additional time to bring herself in compliance with the July 28 and October 23 orders (3T7:14-25).

19. On October 4, 2023, Defendant Village of Ridgewood Board of Education and the Individual Defendants (by Cleary Giacobbe Alfieri Jacobs LLC) moved to bar plaintiff's expert report. That motion was returnable October 20, 2023 (Pa001010-Pa001042).

20. On Monday, October 23, 2023, rather than immediately barring Plaintiff's expert, the trial court entered another discovery order that again extended the deadlines for Plaintiff to provide outstanding discovery and to cure her deficiencies:

> Plaintiff shall return signed HIPAA forms no later than 4:00 p.m. on Wednesday, October 25, 2023 for [the 18] providers listed.
>
> If Plaintiff fails to comply, then for any provider for whom Plaintiff does not provide the HIPAA release as set forth in paragraph 3, Plaintiff shall be barred from relying on or introducing any evidence concerning treatment by any of these providers, including but not limited to any reference to any records or treatment by any of these providers by any witness, including experts and other providers.
>
> ***

> No later than 4:00 p.m. on Friday, October 27, 2023, Plaintiff shall provide to Defendants Bate-stamped copies of all documents Defendants requested concerning Dr. Scott W. McMahon, including but not limited to:
>
> Dr. McMahon's entire medical treatment file relative to this matter including but not limited to his handwritten interview and treatment notes;
>
> Copies of Plaintiff's medical records from Center for Functional Medicine, Cyrex Laboratories, and Genova Diagnostics;
>
> Copies of all medical literature relied upon to arrive at his conclusion in his report; and
>
> Any exhibits or models Dr. McMahon intends to use at trial.
>
> If Plaintiff fails to comply with … this Order, Dr. McMahon's expert report shall be barred, and Plaintiff shall be barred from relying on his expert opinion at trial
>
> (Pa001056-Pa001059).

21. The court emphasized during the hearing on October 23, 2023 that a failure by Plaintiff to meet these latest deadlines would result in the dismissal of Plaintiff's case with prejudice:

> THE COURT: I'm going to give you dates and deadlines, and if they're not met, the plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this. (2T16:12-15).

22. October 27, 2023 was the new deadline for Plaintiff to cure all deficiencies and to bring herself in compliance with the July and October orders (Pa001058).

23. Plaintiff again did not comply.

24. On November 27, 2023, after extensive argument and a review of the procedural history of this case, the trial court granted Defendant Village of Ridgewood Board of Education's (by Capehart & Scatchard, P.C.) motion to dismiss the bodily injury claims asserted in the first and fifth counts as to the Board of Education. The trial court labeled this order 1 out of 3 and is indexed at Pa001280-Pa001281. The trial court also dismissed the individually named Board employees, specifically Daniel Fishien, Angelo Desimone, Anthony S. Orsini, Greg Wu and Steven Tichenor, and the Defendants Sodexo, GCA Services and Aramark from the lawsuit as well. That order is labeled 2 out of 3 and is indexed at Pa001282-001283. It provided among other things that "All defendants other than the Ridgewood Board of Education are dismissed from the matter." As stated on the record, it was clear that Plaintiff's failure to provide the necessary discovery which was Court Ordered and ultimately barred made it impossible for Plaintiff to support a negligence claim against any defendant, and the court only permitted the NJLAD and CEPA

claims against the Village of Ridgewood Board of Education to survive. (3T44:8-15). The case was clearly dismissed as against all defendants except for Defendant Village of Ridgewood Board of Education, and then leaving only the NJLAD and CEPA claims. (3T50:16-25 and 3T51:1-7 and Pa001282-1283). These orders resulted from Defendants' motion to dismiss as referenced in ¶¶ 17 and 18 above, which Aramark joined in during the November 27, 2023 oral argument (3T50:16-25 and 3T51:1-9).

25. On February 22, 2024, Plaintiff moved for reconsideration of the November 27th order (Pa001285).

26. During oral argument on reconsideration, the trial judge noted that Plaintiff "did not recite any applicable standard" (4T17:22-24) and there was "a failure to acknowledge in the papers and in the argument the extent, duration, and magnitude of the discovery failings that led to the Court's decision." (4T19:18-21).

III. COUNTERSTATEMENT OF THE FACTS

We have had the benefit of reading the Counterstatement of Facts contained in the Respondent's Brief of Defendant Village of Ridgewood Board of Education by Gina M. Zippilli, Esq. of Capehart & Scatchard, P.C. Rather than inundate the Court with an essentially redundant recitation of the same relevant facts, we concur in and respectfully adopt and incorporate by reference the Counterstatement of Facts in the Respondent's Brief of Defendant Village of Ridgewood Board of Education by Gina M. Zippilli, Esq. as if fully set forth herein.

IV. LEGAL ARGUMENT

POINT I: THE RECORD CONTAINS ADEQUATE, SUBSTANTIAL AND CREDIBLE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT PLAINTIFF DELIBERATELY EMPLOYED INAPPROPRIATE DISCOVERY TACTICS AND WILLFULLY DISREGARDED THE JULY AND OCTOBER 2023 CASE MANAGEMENT ORDERS

Plaintiff variously, continuously, persistently, and interminably thwarted discovery including by, among other things, selectively producing documents for tactical purposes while withholding others (3T18:19-23 and 3T42); by engaging in a practice of "document-dumping," whereby Plaintiff would reproduce thousands upon thousands of pages of documents multiple times while assigning different Bates-numbers to the same document (3T13:20-25;

3T14:1-3; 3T14:8-10 3T23:22-25; 3T24:1-25; and 3T25:8-10); by refusing to provide the literature, treatises, books, articles and other documents referenced in her expert's 119-page report (3T42:1-7); and by failing to comply with court discovery scheduling orders, not only but most notably that of October 23, 2023 as to which the court stated during the hearing on October 23, 2023 that "I'm going to give you dates and deadlines, and if they're not met, the plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this." (2T16:12-15). The court below considered these facts as well as the number of allowances afforded Plaintiff to cure the deficiencies (3T15:13-15, 3T42:18-25); the fact that Plaintiff, rather than her attorney, sent all documents directly to Dr. McMahon, Plaintiff's expert, but refused to provide them to Defendant or Plaintiff's counsel; the fact that Plaintiff's attorney, Scott Piekarsky, had no knowledge as to what documents Plaintiff had actually sent to the expert and therefore could not confirm what documents were provided to Defendant (3T41:18-25 and 3T42:1-25); the fact that the case was over three years old; and the fact that Defendants were not delinquent in discovery.

Following extensive argument, the trial judge found Plaintiff's course of conduct to be deliberate and intentionally burdensome on Defendants. The trial judge also determined that Plaintiff had not been diligent in pursuing discovery, despite having over three years to do so, and had not satisfactorily explained

why discovery had not been completed. Defendants, on the other hand, had not engaged in any inappropriate conduct and had been persistent in its efforts to obtain discovery that was essential to the case. The trial court also found that, having dismissed the personal injury claims (Counts One and Five), Aramark (and GCA Services and Sodexo) would be out of the case as well. (3T50:16-25 and 3T51:1-7 and Pa001282-1283).

The record before this Appellate Court is replete with reasons why the trial judge not only determined that dismissal was the appropriate sanction but also why the court felt that no lesser sanction was sufficient. The trial court did not abuse its discretion and Plaintiff's appeal should be denied as to Defendant Aramark.

The court did not err in granting the motions to dismiss the amended complaint, and in dismissing the amended complaint against Aramark and all defendants other than the Village of Ridgewood Board of Education (as to whom only the CEPA and NJLAD claims were allowed to continue, as they were less affected by Plaintiff's discovery failures). Rule 4:23-2(b)(3) sets forth in relevant part that "if a party … fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: an order striking out pleadings or parts thereof, or staying further proceedings until the order is

obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party." Moreover, "a trial court has inherent discretionary power to impose sanctions for failure to make discovery, subject only to the requirement that they be just and reasonable in the circumstances." Calabrese v. Trenton State College, 162 N.J. Super 145, 151-52, 392 A.2d 600 (App. Div. 1978), aff'd, 82 N.J. 321, 413 A.2d 315 (1980). Given the circumstances of Plaintiff-Appellant's multitude of varied, repeated, persistent and unending failures to comply with discovery demands, rules and orders over three years, it is clear that the court did not err, and the court's actions were just and reasonable.

When the court below heard oral argument on November 27, 2023, Plaintiff remained in violation of the court's July 28, 2023 case management order (PA000738) and October 23, 2023 case management order (PA001056). After numerous opportunities provided by this Court for Plaintiff to cure her discovery failures, to no avail, it was clear that no lesser sanction remained, thereby making dismissal an appropriate remedy.

The court's decision was consistent with precedent set forth by New Jersey courts to determine what would warrant disposal of a matter as an appropriate sanction for failure to comply with discovery demands. While it is true that "suppressing pleadings for failure to comply with discovery orders is the 'last

and least favorable option,'" Il Grande v. DiBenedetto, 366 N.J. Super 597, 624, 841 A.2d 974 (App. Div. 2004), it is also true that "a party invites this extreme sanction by deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 515 (1995). "[A] relatively simple negligence case can turn into a litigation nightmare that taxes judicial resources beyond what is necessary and required for a just determination of the merits of the complaint," with delays resulting in "inherent prejudice" to opposing parties, thereby necessitating dismissal with prejudice." Katramados v. First Transit, Inc., No. A-1947-17T1, 2019 N.J. Super. Unpub. LEXIS 181, at *11-12 (App. Div. Jan. 24, 2019). Finally, three years of delays and failure to comply with discovery has been deemed a sufficient amount of time for a court to determine that such failure to comply warranted dismissal with prejudice. Glass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 577 (App. Div. 1998)

Moreover, the trial court has "inherent discretionary power to impose sanctions for failure to make discovery," and thus this decision of the trial court to exercise this discretion and dismiss this matter resulting from a Plaintiff's repeated failure to comply with motions and orders should not be disturbed. Rosenblit v. Zimmerman, 166 N.J. 391, 401, 766 A.2d 749 (2001) (quoting Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 260 (Super. Ct. 1993).

The Court correctly dismissed this matter with prejudice, as the circumstances and prior case law demonstrated that such a sanction was warranted by the Appellant's actions. Moreover, this is a discretionary decision, meaning that the Court was justified in making this ruling, and it should not be overturned absent an abuse of discretion, see Abtrax Pharms, supra, at 517, which is not supported by the facts in the present case.

"Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Id., quoting Rova Farms Resort, Inc. v. Investors Insurance Co. of America, 65 N.J. 474, 484, 323 A.2d 495 (1974).

> "'[O]ur appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" *Ibid*. (quoting *Fagliarone v. Township of No. Bergen*, 78 N.J. Super. 154, 155, 188 A.2d 43 (App.Div.), certif. denied, 40 N.J. 221, 191 A.2d 61 (1963)).

Id.

The record of discovery failures by Plaintiff in this case, recited above and notable for their exceptional variety, persistence and never-ending character, warranted dismissal. Plaintiff was explicitly warned at the October 23, 2023 hearing that further failure to meet the court's order would result in dismissal

with prejudice. The court reiterated that the October order was Plaintiff's "last chance," and "permanent consequences would be forthcoming" if Plaintiff did not comply with the new October 27 deadline (2T16:12-16 and 2T31:1-6). Plaintiff did not comply, and the Complaint was dismissed on November 27 (Pa001280-Pa001281). At long last, it was not a surprise.

Plaintiff's claims that she was denied due process as a result of the Court dismissing her claims are unfounded, as she was granted notice and opportunity to be heard. Plaintiff was aware of Defendants-Respondents' arguments for dismissal of her claims as a result of her repeated failure to comply with discovery orders, which were made not only in the written motion submissions of Defendant Village of Ridgewood Board of Education and the Individual Defendants (Pa000744-Pa000965; Pa000966-Pa001007), but also in the court's own warning at the October 23, 2023 hearing, following the lengthy discussion of Plaintiff's discovery delinquencies at that hearing, that "I'm going to give you dates and deadlines, and if they're not met, the plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this[,]" (2T16:12-15) and finally at the oral argument that occurred before the Court on November 27, 2023 in which Aramark joined the request for dismissal:

> Okay. So what is Aramark's role?

> MR. PAESSLER: Judge, I was going to get to it. If the personal injury claims are -- are out, I would think that --
>
> THE COURT: I --
>
> MR. PAESSLER: -- Sodexo and Aramark would both be out of the case.
>
> THE COURT: Well, that's what I ask (sic) -- are you defendants on only those?
>
> MR. PAESSLER: That's it.
>
> THE COURT: Does everyone agree that – that if I'm dismissing Counts One and Five, then those -- those two defendants are dismissed in their entirety? Then we just have the -- the Board of Ed as a defendant on the CEPA and LAD claims. Are the individual defendants named in any the -- the CEPA or LAD?
>
> MS. KUMAR-THOMPSON: No.
>
> THE COURT: Okay. So that's what remains then CEPA, LAD.
>
> MS. KUMAR-THOMPSON: Right. The Board of Ed would be the employer.
>
> THE COURT: Okay.

(3T50:16-25 and 3T51:1-12).

On this point the transcript of oral argument reflects that Plaintiff's counsel stated no disagreement and made no objection whatsoever. (3T51-52).

Plaintiff cites to Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 80 (App. Div. 2001) to support her due process argument for reversal as to

Aramark. The facts in Klier, including the procedural shortcut uniquely invented by that trial judge to take aim at the substantive merits of that personal injury case and to dispose of it on the eve of trial, are not remotely comparable to the procedural facts and procedural history of this case. These were the peculiar operative facts in Klier:

> The case was scheduled for trial on September 29, 1998. On that date, immediately prior to trial, the judge to whom the case had been assigned stated that he had "serious concerns about the cause of action." Noting that the case would take approximately two weeks to try, the judge said, "[i]t seems to me that it would be good administration to determine whether there is a cause of action. At least in my view." The judge stated that he recognized that he could require the plaintiff to present his case, and, if there was a motion at the conclusion of plaintiff's case, he would "accept the truth of oral statements made on behalf of the plaintiff and . . . draw all inferences which may reasonably be drawn against the motion to dismiss." He proposed to "shortcut that procedure and to have [plaintiff's attorney] put on the record the best case that he hopes to produce here. And I will apply the rule that I--that is applied at the conclusion of the plaintiff's case which I have already enunciated. And I will hear argument and make a determination as to whether or not, in my view, there is something which should go to the jury."
>
> The judge said that he had used that procedure before and he felt, "[i]t is good administration from the judicial point of view. I also think it is good from the parties' point of view," since the trial would be long and expensive.

Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 81-82 (App. Div. 2001). After hearing and argument, that "judge refused to hold defendant, the general contractor, liable for the "egregiously stupid" act of Imbimbo, who was an employee of Mazzocchi, the subcontractor, who caused the canopy to collapse by prying at its soffit[,]" Klier, 337 N.J. Super. at 82, and dismissed the plaintiff's complaint.

Klier was nothing less than the deprivation of a plaintiff's right to have his case on the eve of trial decided in the first instance by a jury. Our case was nowhere near trial, thanks to Plaintiff's own exclusive, never-ending, extraordinary and multi-faceted failures to comply with the discovery demands, rules and case management orders. And the trial judge in our case did not attack the substantive merits of Plaintiff's case. Rather, the trial judge exercised her "inherent authority to impose appropriate sanctions for noncompliance" with rules and orders. Rabboh v. Lamattina, 312 N.J. Super. 487, 492 (App. Div. 1998).

In this case, Plaintiff's claims were dismissed following written motions on notice by Defendant Village of Ridgewood Board of Education and the Individual Defendants, whose arguments therein applied with equal force for dismissal of the amended complaint as against Aramark and the other non-NJLAD and CEPA claim defendants. Moreover, the court itself had put Plaintiff

on notice at the October 23, 2023 hearing that "I'm going to give you dates and deadlines, and if they're not met, the plaintiff's case is going to be dismissed with prejudice. We're not going to keep doing this[,]" (2T16:12-15). No further notice or argument was required that Plaintiff's case was on the precipice of being dismissed with prejudice as against all defendants, including Aramark. In addition, the court held oral arguments to address the motions to dismiss Plaintiff's amended complaint. The very purpose of these oral arguments was to discuss dismissal of the claims. When the subject of dismissing Aramark and the other non-NJLAD and CEPA claim defendants was raised, (3T50:16-25 and 3T51:1-12), Plaintiff's counsel stated no disagreement and made no objection whatsoever. (3T51-52).The oral argument belies any notion of denial of due process as against the Plaintiff. Finally, to require more steps on Aramark's part under these circumstances would only add expense to the inevitable – the same result would obtain if Aramark were obliged to move in writing rather than, as it did, orally join in the motions that were already before the court below.

In addition to the arguments set forth above, Aramark also joins in the additional arguments of all other defendants for the affirmance of the orders of the court below.

POINT II: THE COURT DID NOT ERR IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR RECONSIDERATION

The court decided correctly when it denied Plaintiff-Appellant's motion for reconsideration.

> *R.* 4:49-2 was thoroughly discussed in *D'Atria v. D'Atria*, 242 N.J.Super. 392, 576 A.2d 957 (Ch.Div.1990), where the court noted that "[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." *Id.* at 401, 576 A.2d 957 (Citing *Johnson v. Cyklop Strapping Corp.*, 220 N.J.Super. 250, 257, 263, 531 A.2d 1078 (App.Div.1987),*certif. denied,* 110 N.J. 196, 540 A.2d 1078 (1988); *Michel v. Michel*, 210 N.J.Super. 218, 509 A.2d 301 (Ch.Div.1985)).
> The Chancery Division judge in *D'Atria* specifically noted:
>
> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .
> Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

[*Id.* at 401-02, 576 A.2d 957.]

Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

The court's decision was not based upon a palpably incorrect or irrational basis, nor is it obvious that the court failed to appreciate the significance of probative, competent evidence; and therefore the Plaintiff-Appellant's contentions that they should have been given an opportunity to be re-heard are unfounded.

"[A] trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382, 113 A.3d 1217 (App. Div. 2015). For all of the many specific reasons recited herein supra, the court's denial of reconsideration of the November 27, 2023 order dismissing Aramark from the lawsuit was plainly not an abuse of discretion.

During oral argument, the judge not only indicated that Plaintiff "did not recite any applicable standard" (4T17:22-24) but the trial judge also advised Plaintiff that there was "a failure to acknowledge in the papers and in the argument the extent, duration, and magnitude of the discovery failings that led to the Court's decision." (4T19:18-21).

Plaintiff-Appellant does not meet the high standard that has been established by R.4:49-2 and relevant case law. Plaintiff now essentially seeks to re-argue the same points that were already made and heard on the initial

Motions, which is clearly not allowed under relevant caselaw that sets forth "reconsideration should be utilized only for those cases . . . that fall within that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Capital Fin. Co. of Delaware Val., Inc. v Asterbadi, 398 NJ Super 299, 942 A2d 21 Super Ct App Div 2008). Moreover, Plaintiff also sought to make the argument that the motions to dismiss were improper simply because "some medical records were not provided," downplaying the truth of the matter which is that Plaintiff has repeatedly been deficient in discovery and was aware of this as it was discussed in the November 27, 2023 oral arguments. Plaintiff then seeks to utilize an email from November 29, 2023, in which she purported to provide outstanding medical records, and she alleges that this is evidence that she had remedied her errors. However, this email did little in the way of remedying her deficiencies, and even if it had, prior caselaw would have prohibited its introduction as motions for reconsideration are "not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Capital Fin. Co., *supra, citing* Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60 (App. Div. 1996).

It is clear that the court did not err in its denial of the Plaintiff's Motion for Reconsideration.

Finally, in addition to the arguments set forth above, Aramark also joins in the additional arguments of all other defendants for the affirmance of the orders of the court below.

V. CONCLUSION

For all of the foregoing reasons, Aramark respectfully submits that the orders of the court below should be affirmed.

Respectfully submitted,

/S/ Patrick W. Brophy
Patrick W. Brophy
Attorney for Defendant/Respondent,
Aramark Management Services Limited Partnership, i/s/h/a Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Educational Services, Inc., Aramark Educational Services, LLC and/or Aramark Educational Group, Inc.,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NUMBER: A-002074-23 T4

MARGARETE HYER,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM
	:	ORDER OF LAW
- against -	:	DIVISION GRANTING
	:	MOTION TO DISMISS
VILLAGE OF RIDGEWOOD BOARD OF EDUCATION, DANIEL FISHBIEN, ANGELO DESIMONE, ANTHONY S. ORSINI, GREG WU, STEVEN TICHENOR, SODEXO A/K/A SODEXO USA AND/OR SODEXO, INC., GCA SERVICES GROUP INC. A/K/A GCA EDUCATION SERVICES INC., ARAMARK A/K/A ARAMARK SCHOOLS FACILITIES, LLC, ARAMARK SCHOOLS, INC., ARAMARK EDUCATIONAL GROUP, LLC, ARAMARK EDUCATIONAL SERVICES, INC., ARAMARK EDUCATIONAL SERVICES, LLC AND/OR ARAMARK EDUCATIONAL GROUP, INC. AND JOHN DOES 1-10,	:	AND DENYING MOTION FOR RECONSIDERATION/ TO VACATE
	:	SAT BELOW:
	:	HON. MARY F. THURBER, J.S.C.
	:	SUPERIOR COURT OF NEW JERSEY
	:	BERGEN COUNTY
	:	LAW DIVISION
	:	DOCKET NO.
	:	BER-L-4141-20
Defendants-Respondents.	:	

APPELLANT'S REPLY BRIEF IN FURTHER SUPPORT OF APPELLANT'S NOTICE OF APPEAL

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PRELIMINARY STATEMENT

Plaintiff-Appellant Margarete Hyer ("Hyer") submits this brief in further support of her notice of appeal and in response to the brief submitted by defendants-respondents Aramark Management Services Limited Partnership, i/s/h/a Aramark a/k/a Aramark Schools Facilities, LLC, Aramark Schools, Inc., Aramark Educational Group, LLC, Aramark Education Services, Inc., Aramark Educational Services, LLC and/or Aramark Educational Group, Inc. (collectively, "Aramark").

Aramark's brief breathlessly bloviates about how Hyer's Amended Complaint warranted dismissed—with prejudice and *sua sponte*. But it does so without laying a foundation of case law. It does so without explaining why the "ultimate sanction" of dismissal for discovery-related infractions is justified when Hyer never had the chance to take a deposition of any of the defendants-respondents. And it does so without establishing that Hyer's conduct during the discovery phase of the Law Division matter rises to the level of jumping to a dismissal with prejudice and *sua sponte*.

Instead, Aramark's brief traffics in mischaracterizations and generalizations in an attempt to diminish Hyer's position which

remains that she was a schoolteacher who, as a result of the conditions she worked in, suffered from significant illnesses which caused her substantial damages.

The Court's *sua sponte* dismissal of her case, with prejudice, deprives her of her day in Court. The defendants-respondents' briefs proclaim that this is an equitable result but only because it is the result they sought—not because it is warranted and not because there is a legal basis for it.

With a dearth of case law supporting this result, reversing and remanding this matter to the Law Division is warranted.

LEGAL ARGUMENT

POINT I: ARAMARK HAS NOT IDENTIFIED A BASIS FOR AFFIRMING THE DISMISSAL OF HYER'S COMPLAINT WITH PREJUDICE

The Law Division Judge's dismissal of Hyer's Amended Complaint, with prejudice, remains unjustified and inequitable.

The briefs filed by the other defendants-respondents principally relied on two cases, one of which was unpublished, and both of which are inapposite and further illustrate how courts typically may move to dismiss with prejudice. See Katramados v. First Transit, Inc., 2019 WL 302607, at *4 (App. Div. 2019) (the Appellate Division observed

that dismissal without prejudice, with sixty days to then move to reinstate, followed by a motion to dismiss with prejudice is typically the procedure); Glass v. Suburban Restoration Co., Inc., 317 N.J.Super. 574, 578-80 (App. Div. 1998) (Prior to dismissing the action with prejudice, the Law Division judge granted a motion for summary judgment dismissing the claim without prejudice for forty-five days during which the party could produce an expert report, and when the aggrieved party moved to extend the time to contest summary judgment and moved to vacate an order barring expert testimony, the Law Division judge "effectively again extended the time for [the party] to produce an expert report despite [its] repeated failures in producing an expert report").

Aramark's brief is long on arguments and short on citations. As much as Aramark breathlessly recites the procedural history of the case—with the inevitable conclusion that the Law Division's dismissal of the case was justified—Aramark does not fortify their position with legal authority demonstrating that the dismissal with prejudice was warranted here.

The fact remains that even after Hyer appeared for depositions and produced thousands of pages in discovery, the Law Division

Judge did not permit Hyer to take any depositions of the defendants-respondents. The Judge then dismissed the action—with prejudice—granting relief that none of the movants requested by dismissing every claim in Hyer's Amended Complaint. The Judge did not, as would be customary, dismiss the Amended Complaint without prejudice, leaving Hyer with an opportunity to move to reinstate the Amended Complaint.

Dismissal with prejudice was not warranted in these circumstances, and absent from Aramark's—or any of the other defendants-respondents—is an attempt at explaining why *sua sponte* relief of this magnitude is warranted.

Instead, Aramark and the other defendants-respondents look to one case that illustrates when "the ultimate sanction of dismissal" actually is warranted. Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499 (1995).

In Abtrax, the Supreme Court found that dismissal was warranted as the party's conduct had "significantly prejudiced" the other party's trial preparation, "noting that the delayed production of undisclosed documents would require [the party] to conduct additional discovery, obtain revised expert reports, retain a new

expert on damages, and engage in additional trial preparation." Id. at 520-21.

Here, Hyer did not even have an opportunity to progress into the discovery phase long enough to take depositions of any of the defendants-respondents—let alone prepare for trial. The vastness of the prejudice that Aramark asserts it suffered is that Hyer "selectively produc[ed] documents for tactical purposes while withholding others . . . ; . . . engag[ed] in a practice of 'document-dumping,' whereby [Hyer] . . . reproduce[d] thousands upon thousands of pages of documents multiple times . . . ; . . . refus[ed] to provide the literature, treatises, books, articles and other documents referenced in her expert's 119-page report . . . ; and . . . fail[ed] to comply with court discovery scheduling orders . . . ."

Even taking each of those mischaracterized assertions as true, these are not actions that warrant dismissing the Law Division matter—with prejudice. By comparison, in Katramados, the Appellate Division found that a dismissal without prejudice and subject to reinstatement was warranted before dismissing with prejudice. See Katramados, 2019 WL 302607, at *4. To make a second comparison, in Glass, the Appellate Division reviewed an

appeal involving a party's refusal to produce an expert report even after "there were apparently as many as fifteen trial dates." Glass, 317 N.J.Super. at 580.

Here, even though defendants-respondents acknowledge that dismissal is the "ultimate sanction" which courts are to use "only sparingly," they do not acknowledge the procedural and factual differences between those cases where courts dismiss matters with prejudice and here. Hyer had her case—a case seeking redress for extensive injuries she suffered while working as a schoolteacher—dismissed *sua sponte* and with prejudice without even having a chance to take a deposition of a defendant-respondent. The mischaracterizations of her conduct during the Law Division matter are neither borne out by this record nor justify depriving her of her day in Court to seek recourse for her injuries.

CONCLUSION

For the foregoing reasons, Hyer respectfully requests that the Court grant her appeal and reverse and remand the matter to the trial court.

Respectfully Submitted,

/s/ Scott Piekarsky, Esq.

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Dated: December 27, 2024

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