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SHEILA ELIJAH, ADMINSTRATRIX AD PROSEQUENDUM AND GENERAL ADMINISTRATRIX OF THE ESTATE OF ROBERT ELIJAH, DECEASED, Plaintiff-Appellant, v. PORT AUTHORITY TRANS-HUDSON CORPORATION, Defendant-Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-002335-23** CIVIL ACTION On Appeal from an Order of the Law Division, Hudson County, granting summary judgment dated February 20, 2024 Docket No. HUD-L-2137-20 Sat Below: Hon. Anthony V. D'Elia, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF THE APPEAL

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TABLE OF CONTENTS – BRIEF

	Page
TABLE OF CONTENTS - BRIEF	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS	ii
TABLE OF TRANSCRIPT DESIGNATIONS	ii
TABLE OF CONTENTS - APPENDIX	iii
TABLE OF AUTHORITIES	viii
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	4
LEGAL ARGUMENT	8
POINT I: **THE TRIAL COURT ERRED BY RESOLVING DISPUTED MATERIAL FACTS ON SUMMARY JUDGMENT AND FAILING TO REVIEW THE MOTION PURSUANT TO THE PROPER STANDARD. (Pa1; 13T15:5)**	8
A. Standard of Review.	8
B. Evidence of the Standard of Care.	11
C. Evidence of Causation.	16
D. Evidence of Medical Causation.	18
CONCLUSION	25

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	Page
Order granting summary judgment, filed February 20, 2024	1a
Reasons on the record, dated February 16, 2024	13T15:5

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Decision dated April 4, 2022

2T – Transcript of Hearing dated May 13, 2022

3T – Transcript of Trial dated October 4, 2023

4T – Transcript of Trial dated October 5, 2023 (vol. 1)

5T – Transcript of Trial dated October 5, 2023 (vol. 2)

6T – Transcript of Trial dated October 10, 2023 (vol. 1)

7T – Transcript of Trial dated October 10, 2023 (vol. 2)

8T – Transcript of Trial dated October 11, 2023

9T – Transcript of Trial dated October 12, 2023 (vol. 1)

10T – Transcript of Trial dated October 12, 2023 (vol. 2)

11T – Transcript of Trial dated October 16, 2023

12T – Transcript of Trial dated October 17, 2023

13T – Transcript of Hearing dated February 16, 2024

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 1 – Pa1 to Pa157)

	Page
Order granting summary judgment, filed September 25, 2023	1a
Complaint, filed June 11, 2020	2a
Exhibit 1 to Complaint, Letters of Administration ad Prosequendum, dated June 8, 2020	13a
Answer of Porth Authority Trans-Hudson Corporation, filed July 30, 2020	14a
Order denying Summary Judgment, filed April 4, 2022	24a
Order denying reconsideration of Order denying Summary Judgment, filed May 13, 2022	25a
Notice of Motion for Summary Judgment, filed November 17, 2023	26a
Statement of Undisputed Material Facts, filed November 17, 2023	28a
Certification of Thomas R. Brophy, filed November 17, 2023	38a
Exhibit A to Certification, Complaint, filed November 17, 2023 (omitted here – see Pa2)	--
Exhibit B to Certification, Excerpts from Transcript of Trial dated October 5, 2023 (vol. 1), filed November 17, 2023 (omitted here – see 4T)	--
Exhibit C to Certification, PATH's Interrogatories, filed November 17, 2023	41a
Exhibit C to Certification, PATH's Request for Production, filed November 17, 2023	54a

	Page
Exhibit D to Certification, Letter dated April 14, 2021, filed November 17, 2023	59a
Exhibit D to Certification, Plaintiff's Responses to Interrogatories, filed November 17, 2023	60a
Exhibit D to Certification, Plaintiff's Responses to Request for Production, filed November 17, 2023	68a
Exhibit E to Certification, Excerpts from Transcript of Trial dated October 4, 2023, filed November 17, 2023 (omitted here – see 3T)	--
Exhibit F to Certification, Excerpts from Transcript of Trial dated October 4, 2023, filed November 17, 2023 (omitted here – see 2T)	--
Exhibit G to Certification, Excerpts from Transcript of Trial dated October 10, 2023 (vol. 1), filed November 17, 2023 (omitted here – see 6T)	--
Exhibit H to Certification, Excerpts from Transcript of Trial dated October 11, 2023, filed November 17, 2023 (omitted here – see 8T)	--
Exhibit I to Certification, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 1), filed November 17, 2023 (omitted here – see 9T)	--
Exhibit J to Certification, Excerpts from Transcript of Trial dated October 16, 2023, filed November 17, 2023 (omitted here – see 11T)	--
Exhibit K to Certification, Cordero v. N.J. Transit Rail Ops., Inc., No. A-3646-21 (N.J. App. Div. Sep. 5, 2023)	71a
Exhibit L to Certification, Kowalewski v. Port Auth. Trans-Hudson Corp., A-5051-11 (N.J. App. Div. June 7, 2013)	76a
Exhibit M to Certification, Bass-Bey v. N.J. Transit Rail Ops., Inc., A-4706-04 (N.J. App. Div. July 28, 2006)	85a

Page

Exhibit N to Certification, Dhillon v. Princess Cruise Lines, Ltd., No. 2:20-cv-11661 (C.D. Cal. Feb. 18, 2022), aff'd, No. 22-55215 (9th Cir. Sep. 5, 2023) 90a

Exhibit O to Certification, Whaley v. Norfolk S. Ry. Co., No. 4:14-cv-0108 (N.D. Ga. June 2, 2015) 95a

Exhibit P to Certification, J.M. v. T.F., No. A-2621-16 (N.J. App. Div. Jan. 17, 2019) 103a

Plaintiff's Answer to Statement of Undisputed Facts, filed January 11, 2024 111a

Certification of Don P. Palermo, Jr., filed January 11, 2024 137a

Exhibit A to Certification, Complaint dated June 11, 2020, filed January 11, 2024 (omitted here – see Pa2) --

Exhibit B to Certification, Excerpts from Transcript of Trial dated October 5, 2023 (vol. 1), filed January 11, 2024 (omitted here – see 4T) --

Exhibit C to Certification, Excerpts from Transcript of Trial dated October 4, 2023, filed January 11, 2024 (omitted here – see 3T) --

Exhibit D to Certification, Affidavit of Service dated October 12, 2023, filed January 11, 2024 141a

Exhibit D to Certification, Affidavit of Due Diligence dated October 12, 2023, filed January 11, 2024 142a

Exhibit E to Certification, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 1), filed January 11, 2024 (omitted here – see 9T) --

Exhibit F to Certification, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 2), filed January 11, 2024 (omitted here – see 10T) --

Page

Exhibit G to Certification, Excerpts from Transcript of Trial dated October 5, 2023 (vol. 2), filed January 11, 2024 (omitted here – see 5T) --

Exhibit H to Certification, Excerpts from Transcript of Trial dated October 16, 2023, filed January 11, 2024 (omitted here – see 11T) --

Exhibit I to Certification, Excerpt from CDC Guidelines and Recommendations: A CDC Primer, filed January 11, 2024 144a

Exhibit J to Certification, Excerpt from Occupational Health and Safety Administration, section 4, filed January 11, 2024 148a

Exhibit K to Certification, April 4, 2022, Transcript of Decision dated April 4, 2022, filed January 11, 2024 (omitted here – see 1T) --

Exhibit L to Certification, Transcript of Hearing dated May 13, 2022, filed January 11, 2024 (omitted here – see 2T) --

Exhibit M to Certification, Excerpts from Transcript of Trial dated October 17, 2023, filed January 11, 2024 (omitted here – see 12T) --

Exhibit N to Certification, Excerpts from Transcript of Trial dated October 10, 2023 (vol. 2), filed January 11, 2024 (omitted here see 7T) --

Exhibit A to Sur-Reply, Excerpts from Transcript of Trial dated October 10, 2023 (vol. 1), filed January 17, 2024 (omitted here – see 6T) --

Exhibit B to Sur-Reply, Email dated March 9, 2020, filed January 17, 2024 150a

Exhibit C to Sur-Reply, Excerpts from Transcript of Trial dated October 11, 2023, filed January 17, 2024 (omitted here – see 8T) --

Exhibit D to Sur-Reply, Excerpts from Transcript of Trial dated October 16, 2023, filed January 17, 2024 (omitted here – see 11T) --

	Page
Exhibit E to Sur-Reply, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 1), filed January 17, 2024 (omitted here – see 9T)	--
Exhibit F to Sur-Reply, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 2), filed January 17, 2024 (omitted here – see 10T)	--
Exhibit G to Sur-Reply, Excerpt from Transcript of Trial dated October 17, 2023, filed January 17, 2024 (omitted here – see 12T)	--
Notice of Appeal, filed April 5, 2024	151a
Statement of Summary Judgment Motion Record	154a

TABLE OF AUTHORITIES

Cases	**Pages**
Ackley v. Chicago & N. Western Transp. Co., 820 F.2d 263 (8th Cir. 1986)	14
Alamendarez v. Atchison, T. & S.F. Ry. Co., 426 F.2d 1095 (5th Cir. 1970)	25
Allenbaugh v. BNSF Rwy. Co., 832 F. Supp. 2d 1260 (E.D. Wash. 2011)	15
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)	9
Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803 (6th Cir. 1996)	16,17
Bailey v. Central Vermont R.R., 319 U.S. 350 (1943)	16
Black v. Pub. Serv. Elec. & Gas Co., 56 N.J. 63 (1970)	12
Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995)	9
Buckelew v. Grossbard, 87 N.J. 512 (1981)	20
Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016)	24
Creanga v. Jardal, 185 N.J. 345 (2005), certif. denied, 114 N.J. 525 (1989)	19
CSX Transp., Inc. v. McBride, 564 U.S. 685 (2011)	25
Davis v. Brickman Landscaping, Ltd., 219 N.J. 395 (2014)	12
Dolson v. Anastasia, 55 N.J. 2 (1969)	10
Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963)	14
Geherty v. Moore, 238 N.J. Super. 463 (App. Div. 1990), appeal dismissed, 127 N.J. 287 (1991)	24

Cases	**Pages**
Grossman v. Club Med Sales, 273 N.J. Super. 42 (App. Div. 1994)	13,23,24
Harbin v. Burlington N. R.R. Co., 921 F.2d 129 (7th Cir. 1990)	25
Hines v. Consolidated Rail Corp., 926 F.2d 262 (3d Cir. 1991)	10
Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968 (8th Cir.1995)	16
Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954)	9
Klimko v. Rose, 84 N.J. 496 (1980)	15,24
Pehowic v. Erie Lackawanna R.R. Co., 430 F.2d 697 (3d Cir. 1970)	10,16,18
Polzo v. County of Essex, 196 N.J. 569 (2008)	19
Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162 (App. Div.), certif. denied, 154 N.J. 608 (1998)	8
Rodriguez v. Delray Connecting R.R., 473 F.2d 819 (6th Cir.1973)	16
Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500 (1957)	16,18
Rosenberg v. Tavorath, 352 N.J. Super. 385 (App. Div. 2002)	19,20
Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)	20
Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200 (App. Div. 1987)	9,24
Shenker v. Baltimore & O.R. Co., 374 U.S. 1 (1963)	16
Sindoni v. Consolidated Rail Corp., 4 F. Supp. 2d 358 (M.D. Pa. 1996)	10
State v. Freeman, 223 N.J. Super. 92 (App. Div. 1988)	19,20

Cases	**Pages**
State v. Kelly, 97 N.J. 178 (1984)	19
State v. Townsend, 186 N.J. 473 (2006)	19
Stevens v. N.J. Transit Rail Ops., 356 N.J. Super. 311 (App. Div. 2003)	18
Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189 (2016)	8,11
United Advertising Corp. v. Metuchen, 35 N.J. 193 (1961)	9
Urie v. Thompson, 337 U.S. 163 (1949)	17
Walsh v. Consolidated Rail Corp., 937 F. Supp. 380 (E.D. Pa. 1996)	10
Wellenheider v. Rader, 49 N.J. 1 (1967)	12
Whaley v. Norfolk Southern Rwy. Co., No. 4:14-cv-0108 (N.D. Ga. June 2, 2015) (Pa101)	15
Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 841 F.2d 1347 (7th Cir.), cert. dismissed, 487 U.S. 1244 (1988)	25

Constitutions	**Pages**
N.J. Const. of 1776 art. XXII	12
N.J. Const. of 1844 art. I, ¶7	12
N.J. Const. art. I, ¶9	9,12

Statutes	**Pages**
29 U.S.C. §653(b)(1)	13,14
45 U.S.C. §51-60	2

Regulations **Pages**

Rules of Court **Pages**

Evid. R. 703 19,20

R. 4:46-5 9,23

Other Authorities **Pages**

PRELIMINARY STATEMENT

This matter arises from the death of Robert Elijah due to exposure to COVID-19 at work. Defendant, Port Authority Trans-Hudson Corporation (PATH), was his employer. Plaintiff, Sheila Elijah, Mr. Elijah's surviving spouse, sued pursuant to the Federal Employer's Liability Act (FELA). After thorough discovery, motions for summary judgment and reconsideration that were denied, and a trial declared a mistrial when plaintiff's counsel's father died suddenly, PATH moved again for summary judgment. The trial judge, relying on his Honor's rulings during the mistrial, granted judgment for PATH and dismissed the action with prejudice.

The decision on summary judgment was incorrect for several reasons. First, in considering the motion, the trial court assumed material facts based on the mistrial rather than determining the motion in accordance with Rule 4:46-2. Second, the court imposed a requirement to establish a standard of care by expert testimony that is not required under the FELA. Third, the court determined, as a matter of fact and law, that PATH "complied" with Center for Disease Control (CDC) guidelines and, therefore, did not breach the duty owed to Mr. Elijah.

Whether PATH breached its duty to decedent was a disputed material factual issue for a jury to decide. Neither CDC nor Occupational Safety and Health Administration (OSHA) guidelines immunize PATH, which is governed by the

Federal Railway Act (FRA). The CDC guidelines are not dipositive of whether PATH owed a duty to its employee or whether it breached its duty to Mr. Elijah. The guidelines are simply evidence relevant to the jury's determination of PATH's non-delegable duty to provide a reasonably safe place to work and whether PATH breached that duty.

As found on the initial motion for summary judgment and the motion to reconsider, there were numerous material facts in dispute bearing on PATH's duty, negligence and causation that precluded summary judgment. The mistrial did not change that. It was error to dismiss the case on summary judgment. The decision denied plaintiff her constitutional right to a jury trial and should be reversed.

PROCEDURAL HISTORY

Plaintiff, Sheila Elijah, Mr. Elijah's surviving spouse and administratrix of his Estate, filed suit against PATH alleging violation of the Federal Employers' Liability Act, 45 U.S.C. §51-60. Pa2. Plaintiff alleged that on March 15, 2020, Mr. Elijah was exposed to the COVID-19 virus at work by another employee who later tested positive for COVID-19. Pa4. Plaintiff also alleged that Mr. Elijah was not wearing a mask because PATH had instructed its workers at safety meetings **not** to wear masks at work and had withdrawn the supply of masks made available to workers ten days before the exposure. Pa4. Beginning immediately after the exposure on March 15, 2020, Mr. Elijah quarantined at home. While quarantining,

Mr. Elijah began to exhibit symptoms of the virus. Pa4. He was hospitalized on April 3, 2020, and passed away twenty days later of cardiopulmonary arrest due to COVID-19. Pa5.

Plaintiff alleged that PATH breached its duty to use reasonable care and to provide a reasonably safe place to work. Pa5. Among the specific allegations of unsafe practices, PATH deterred its employees from wearing Personal Protective Equipment (PPE) such as masks and gloves and had ordered its foremen to have their respective employees return masks days before Mr. Elijah's exposure. Pa6.

PATH filed its Answer on July 30, 2020. Pa14. Discovery proceeded and continued through January 23, 2022. Pa26. After the close of discovery, PATH moved for summary judgment, which was denied by the Honorable Jeffrey R. Jablonski, A.J.S.C., by Order dated April 4, 2022. Pa24; 1T (reasons set forth on the record). The court found that there were numerous material factual disputes that precluded judgment as a matter of law. 1T5:19-7:25. PATH moved to reconsider, which was denied by Order dated May 13, 2022. Pa25; 2T10:15 (reasons set forth on the record).

The case proceeded to trial on October 2, 2023. During the third week of trial, plaintiff's counsel's father passed away. The trial judge declared a mistrial and scheduled a new trial date of February 5, 2024. 12T130:21-23; Pa26. After the mistrial and with a new trial date scheduled, on November 17, 2023, defendant

moved for summary judgment. Pa26. Defendant relied extensively on the testimony presented and prohibited during the trial that had been abandoned. After holding oral argument on February 16, 2024, 13T, on February 20, 2024, the trial court entered an Order granting summary judgment for defendant and dismissed the complaint with prejudice. Pa1.

STATEMENT OF FACTS

Robert Elijah worked for PATH beginning in 2001. Pa3. In March 2020, he was employed by PATH as a Power Rail Mechanic. Pa3. On March 15, 2020, Mr. Elijah was exposed to COVID-19 at work and went home to quarantine. Pa4. Prior to March 2020, face masks, and specifically N-95 masks, were standard Personal Protection Equipment (PPE) freely available to PATH workers. Prior to the exposure, PATH had directed workers at its safety meetings **not** to wear masks at work unless they were performing their specific job functions. Pa4. One reason given for taking away the masks was PATH "didn't want passengers seeing workers in masks and the passengers getting scared of riding the trains." 6T148:18-20. See also 8T149:13-17; 8T150:24-151:3. Prior to the exposure, on March 5, 2020, PATH had directed its supervisors to take supplies of face masks back from its employees. Even though Mr. Elijah had purchased face masks personally for his household and himself, at the time of the exposure, Mr. Elijah

was not wearing a face mask because he was at work, on PATH premises and was not in the act of performing his specific job function. Pa4.

While quarantining, Mr. Elijah developed symptoms of the virus, including fever, weakness, loss of the sense of smell and taste, respiratory issues and diarrhea. Pa4. When the symptoms worsened, he was admitted to the ICU at Bayshore Medical Center, where he died April 23, 2020, of cardiopulmonary arrest due to COVID-19. Pa4-5; 9T167:3-14.

Prior to being exposed to COVID-19 at work, Mr. Elijah had taken steps to avoid the virus. He had purchased N-95 masks and gloves for his immediate family. Pa5; 10T211:6-25. From the beginning of March 2020, Mr. Elijah insisted that the members of his household – himself, his wife, his daughter and his grandson – all had to wear N-95 masks when they left the house. 10T211:15-212:2. He was conscientious about wearing a mask, social distancing and limiting his contacts. Pa5; 10T212:8-12. From the beginning of March 2020, when Mr. Elijah obtained the masks for his family, through March 15, 2020, if he was going out, he would wear his mask consistently. 10T262:25-264:12. None of the members of decedent's household or close friends – other than Mr. Elijah – ever had and/or have the COVID-19 virus. Pa5; 10T214:18-215:4.

On March 15, 2020, Mr. Elijah was present in the PATH locker room with his co-worker, Juan Martinez. 4T77:9-12. The two co-workers had previously had

a disagreement and discussed and resolved their differences. 4T82:9-83:16. They then hugged. 4T83:17-84:6. Although not known by Mr. Elijah, at the time of the hug, Mr. Martinez was not feeling well. 4T70:14-71:4. In fact, he was experiencing symptoms of the COVID-19 virus. When he left PATH, he went home and felt worse the next day. 4T71:21-72:5. He called out sick from work. 4T72:6-8. He continued to exhibit symptoms of the COVID-19 virus. On March 16, 2020, Mr. Martinez went to the hospital and was tested for the presence of the COVID-19 virus. 4T72:9-19; Pa28. He was told to quarantine for 14 days. 4T74:19-23. Mr. Martinez never received the test results. 4T73:15-17; Pa28. He recovered and returned to work. At no other time did he experience symptoms of the COVID-19 virus. 4T100:3-15. Nonetheless, in August 2020, Mr. Martinez tested positive for COVID-19 antibodies, indicating that he had the COVID-19 virus previously. Pa29; 4T102:10-103:9.

On March 15, 2020, Mr. Elijah returned home from work, told his wife that he had been around someone at work who had symptoms, and immediately went to his room to quarantine. 10T211:2-5; 10T215:18-23. His spouse stayed down in the living room while he quarantined. 10T216:10-14. From the minute he went to his room to quarantine, Mr. Elijah was alone. 10T216:4-9. He had his own room and bathroom. 10T216:15-23. He stayed in his room with the door shut. 10T216:23. When Mr. Elijah had to eat, his wife or daughter would bring food and

leave it outside his door. 10T216:24-217:5. His spouse talked to him on the phone or through the door. Plaintiff and her daughter even wore their masks in the house when they brought up food. 10T217:5-21. "He made us stay away." 10T217:8. Mr. Elijah was conscientious about quarantining. 10T217:22-24.

Dr. Edward Peters is an epidemiologist. Pa127. He was asked by plaintiff's counsel to look at the facts of the case and determine in his expert opinion the likelihood that the prohibition on wearing masks in the PATH environment contributed to Mr. Elijah's exposure to the COVID-19 virus and subsequent death. 9T36:6-10. He testified to a reasonable degree of certainty that Mr. Elijah contracted the COVID-19 virus from his hug with Mr. Martinez. "I think it was highly probable that he acquired it through his close contact hugging of Mr. Martinez, who we suspect at that time was infected with COVID. And then, shortly thereafter, Mr. Elijah developed signs and symptoms of COVID, was hospitalized with COVID and respiratory distress, and – and then died." 9T112:7-12. That was the only exposure of decedent to a person known to have had the COVID-19 virus. Mr. Martinez was exhibiting symptoms of the virus at the time of the hug and neither person was wearing a mask. 4T84:11-14. Asked how he could have a high degree of certainty that the hug was the exposure that gave Mr. Elijah the COVID-19 virus, Dr. Peters explained "in all the information provided to me, that was the one contact." 9T150:24-25. "[Mr. Martinez] was ill and they

were in very close contact. They worked together, they hugged. So highly probable that Mr. Martinez was – you know, the source of the infection." 9T157:14-17.

Dr. Peters also reviewed and testified regarding Mr. Elijah's hospital records. The admission reflects that the doctors diagnosed COVID-19 virus on April 3, 2020, the date of admission. 9T166:20-167:1. At the time that Mr. Elijah passed away, he was diagnosed as having acute respiratory distress syndrome due to the COVID-19 virus. 9T167:3-14.

LEGAL ARGUMENT

POINT I
THE TRIAL COURT ERRED BY RESOLVING DISPUTED MATERIAL FACTS ON SUMMARY JUDGMENT AND FAILING TO REVIEW THE MOTION PURSUANT TO THE PROPER STANDARD. (Pa1; 13T15:5)

A. Standard of Review.

In reviewing an order granting summary judgment, an appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court"). The trial court must not decide issues of fact; it

must decide only whether any such issues exist. Brill v. Guardian Life. Ins. Co., 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5.

Summary judgment should not be granted where the decision of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961). Under the New Jersey Constitution, whether the facts impose liability is for a jury, not the court. N.J. Const. art. I, ¶9. Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, supra, 215 N.J. Super. at 212.

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill, supra, 142 N.J. at 538.

Moreover, courts are "not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

The granting of summary judgment under the FELA demands an even more stringent approach. Sindoni v. Consolidated Rail Corp., 4 F. Supp. 2d 358, 361 (M.D. Pa. 1996). In enacting the FELA, the United States Congress intended to increase the probability that injured workers could present their cases to juries. Walsh v. Consolidated Rail Corp., 937 F. Supp. 380, 382 (E.D. Pa. 1996). The FELA is given a liberal construction that emphasizes the role of a jury. Pehowic v. Erie Lackawanna R.R. Co., 430 F.2d 697, 699 (3d Cir. 1970). Thus "a trial court is justified in withdrawing such issues from the jury's consideration only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee." Id. at 699-700. Under the FELA, an employer is deemed liable to its injured or killed employee on any showing of negligence, no matter how slight. Walsh, supra, 937 F. Supp. at 382. A FELA plaintiff need present only a minimum amount of evidence in order to defeat a summary judgment motion. Hines v. Consolidated Rail Corp., 926 F.2d 262, 268 (3d Cir. 1991).

In dismissing the case on summary judgment, the trial court made numerous determinations of fact that were disputed on the record presented. This Court is

not bound by that reasoning but rather is compelled to examine the record de novo for admissible evidence and reasonable inferences that would support the position of the non-movant. Templo Fuente, supra, 224 N.J. at 199.

B. Evidence of the Standard of Care.

PATH argued that plaintiff required and lacked expert testimony to establish the employer's standard of care. It asserted that it complied with CDC guidelines and, therefore, could not be found liable.

The court below agreed, misstating the substance of the CDC guidelines and giving them improper dispositive effect. The CDC guidelines did not require or recommend that all people wear masks as of mid-March 2020. They also did not prohibit PPE or recommend that PPE not be used. At best, the general guidelines were neutral. Different circumstances may lead to different conclusions by a factfinder about what would be reasonable, responsible behavior. That the CDC guidelines did not require PPE or masking at the time does not equate with there being no duty to act reasonably under the circumstances. The trial court treated the CDC guidelines as the standard of care and ruled that absent laws, regulations, government directives or expert testimony based on government enactments, compliance with the CDC guidelines at the time was a basis to deny the jury its duty to determine PATH's negligence, i.e., whether PATH had fulfilled its duty to provide a safe workplace.

Compliance with the CDC guidelines, however, is not the standard of care. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 411 (2014). "The customs of an industry are not conclusive on the issue of the proper standard of care; they are at most evidential of this standard." Wellenheider v. Rader, 49 N.J. 1, 7 (1967). Similarly, a regulatory code or standard "is evidence of due care but is not conclusive on the subject." Black v. Pub. Serv. Elec. & Gas Co., 56 N.J. 63, 77 (1970). The substance of the guidelines and whether PATH followed the guidelines in its efforts to provide a safe workplace are relevant to the jury's factual determination of whether PATH acted reasonably under the totality of the circumstances. The decision of that factual issue remains up to the jury under the New Jersey Constitution and the FELA.

In 1776, New Jersey adopted its first Constitution. Included among the rights and privileges established was the following: "the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." N.J. Const. of 1776 art. XXII. In 1844, the State of New Jersey adopted a new constitution that affirmed that the "right of trial by jury shall remain inviolate." N.J. Const. of 1844 art. I, ¶7. In 1947, the State of New Jersey again adopted a new constitution and again affirmed that "[t]he right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons." N.J. Const. art. I, ¶9.

Under the New Jersey Constitution, whether the facts impose liability is for a jury, not the court. As found by Judge Jablonski in denying PATH's first motion for summary judgment, the determinations of COVID-19 exposure, cause of death, failure to provide a safe workplace, withdrawal of PPE at such a critical time and without regard to job requirements and personal health considerations, and the propriety of directions not to wear masks are factual determinations inappropriate for resolution by the court on summary judgment. 1T5:19-7:25. So, too, is the resolution of evidentiary issues against the non-movant based on the assumption of what evidence would be produced at the retrial. See Grossman v. Club Med Sales, 273 N.J. Super. 42, 52 (App. Div. 1994). Those are disputed issues of material facts on a full review of the record. Summary judgment was improvidently granted and should be reversed.

Defendant's expert acknowledged that the CDC guidelines presented guidelines for the general population. 11T27:13-22. Different workplaces present different circumstances and considerations. Ibid. Typically, OSHA takes the lead for guidance on workplace safety. Even compliance with OSHA guidelines, however, would be only evidence relevant to the determination of reasonable conduct. It would not be dispositive of the issue. Because PATH falls under the oversight of the Federal Railroad Administration (FRA), OSHA guidelines have limited application. 29 U.S.C. §653(b)(1).

Under the FELA, the standard of care is ordinary care under the totality of the circumstances. Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 118 (1963) ("A railroad carrier's duty is measured by what a reasonably prudent person would or should anticipate under like circumstances."); Ackley v. Chicago & N. Western Transp. Co., 820 F.2d 263, 267 (8th Cir. 1986) (a railroad's "conduct is measured by the degree of care that persons of ordinary reasonable prudence would use under similar circumstances and by what these same persons would anticipate as resulting from a particular condition."). The standard of care is not some esoteric standard determined by CDC, OSHA, WHO, DOH or any other agency. In fact, CDC guidelines state that they do not mandate specific conduct. Pa146 (CDC "Guidelines, unlike some types of policies, are *not* mandatory."). OSHA also does not apply to PATH according to federal law. 29 U.S.C. §653(b)(1) ("Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."); Pa148. PATH, like all interstate railroads, is governed by the FRA, the Federal Rail Safety Act and the FELA.

In testimony, a PATH employee claimed that PATH just followed the lead of the Metropolitan Transit Authority (MTA). That does not immunize PATH under the FELA. "While it may be that industry practice is a relevant consideration in

the determination of whether [Defendant's] work environment was reasonably safe, it is not dispositive." Allenbaugh v. BNSF Rwy. Co., 832 F. Supp. 2d 1260, 1265 (E.D. Wash. 2011). "Put another way, just because [Defendant] was essentially doing what every other Class I railroad was doing in terms of ergonomics in the workplace does not necessarily mean [Defendant] was providing a reasonably safe workplace." Id.; see Whaley v. Norfolk Southern Rwy. Co., No. 4:14-cv-0108 at 9 (N.D. Ga. June 2, 2015) (Pa101). "[W]hen a risk is obvious and a precautionary measure available, an industry or professional standard or custom that does not call for such precaution is not conclusive if, regardless of the standard or custom, the exercise of reasonable care would call for a higher standard, i.e., for precautionary measures." Klimko v. Rose, 84 N.J. 496, 506 (1980).

The determination that CDC guidelines are the applicable standard of care and that compliance with those guidelines establishes as a matter of law that PATH did not breach a duty owed to decedent under the FELA is contrary to law. At most, CDC guidelines inform the decision; they are not dispositive. Under the FELA and the New Jersey Constitution, the jury is charged with deciding what constitutes ordinary care under the circumstances and whether there has been a failure to act with ordinary care. Imposing a different standard of care and taking that decision from the jury would be contrary to law. The grant of summary judgment, therefore, must be reversed.

C. Evidence of Causation.

A railroad has a non-delegable duty to provide its employees with a reasonably safe place to work. Shenker v. Baltimore & O.R. Co., 374 U.S. 1 (1963). The FELA establishes a duty on the part of a common carrier to use reasonable care in providing employees a safe work environment. Bailey v. Central Vermont R.R., 319 U.S. 350, 352 (1943). Ensuring that employees have proper equipment with which to perform their work assignments falls within that non-delegable duty. Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 978 (8th Cir.1995); Rodriguez v. Delray Connecting R.R., 473 F.2d 819, 821 (6th Cir.1973). The availability of safer alternative equipment is evidential on that issue. Rodriguez, supra, 473 F.2d at 821.

Under the FELA, an employer is liable if the injury was caused in whole or in part by its negligence.

> "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. *It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes*, including the employee's contributory negligence.' Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) (emphasis added)."

Pehowic, supra, 430 F.2d at 699. See Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803, 810 (6th Cir. 1996) ("railroads have a duty to furnish employees with a 'reasonably safe place in which to work and such protection [against the hazard

causing the injury] as would be expected of a person in the exercise of ordinary care under those circumstances.'") (quoting Urie v. Thompson, 337 U.S. 163, 179 n. 16 (1949)).

Expert testimony is not required for a jury to conclude that withdrawing PPE indiscriminately constitutes a failure to provide decedent with a reasonably safe place to work. Expert testimony is not required for a jury to conclude that instructing employees – in "safety meetings" ironically – not to wear PPE was a failure to furnish a reasonably safe place to work. Plaintiff produced sufficient evidence of PATH's breach of duty to ensure that the issue was presented to a jury.

Although acknowledging that assumption of the risk and contributory negligence were not bars to a FELA claim, the trial court concluded that "no rational jury could find otherwise but that" decedent hugging his co-worker in the locker room without a mask was "the sole and only cause of him getting COVID arguably from Martinez." 13T26:21-27:10. "[Decedent's] failure to wear [a mask] in the locker room and hugging a guy and kissing him without a mask was the sole and proximate cause of the accident." 13T27:7-10. That determination exceeded the proper role of the court generally and specifically on summary judgment and in actions under the FELA.

A trial court is justified in withdrawing proximate cause issues from the jury's consideration only in those extremely rare instances where there is a zero

probability either of employer negligence or that any such negligence contributed to the injury of an employee. Pehowic, supra, 430 F.2d at 699-700. Direct evidence is not essential. Circumstantial evidence is sufficient. Rogers, supra, 352 U.S. at 508, n. 17.

> *Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury* or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.

Stevens v. N.J. Transit Rail Ops., 356 N.J. Super. 311, 318-19 (App. Div. 2003) (emphasis in original) (quoting Rogers, supra, 352 U.S. at 506-07). The question becomes simply whether the evidence justifies with reason the conclusion that PATH's negligence played any part, even the slightest, in causing plaintiff's damages, i.e., Robert Elijah's death. A rationale jury could find that it did. The question was for the jury to decide, and summary judgment should have been denied.

D. Evidence of Medical Causation.

Defendant argued that plaintiff could not prove that Mr. Elijah died from COVID-19. Specifically, PATH asserted that Dr. Peters' opinion that Mr. Elijah contracted the COVID-19 virus from Mr. Martinez was a net opinion because he failed to rule in and to rule out other causes. There are three basic requirements for

the admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at least at a state of the art that such an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. State v. Kelly, 97 N.J. 178, 208 (1984). The report and proposed testimony of Dr. Peters satisfies those three requirements.

Evid. R. 703 addresses the foundation for expert testimony. It mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Polzo v. County of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)).

An expert's proposed testimony should not be excluded merely "'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Creanga v. Jardal, 185 N.J. 345, 360 (2005) (quoting State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988), certif. denied, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing Freeman, supra, 223 N.J. Super.

at 115–16). The bases for the expert's opinion are presumptively a proper subject of exploration and cross-examination at a trial. Ibid. (citing Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)).

Defendant speculating that there may be an alternative cause does not make the determination of causation a complex medical decision. Causation is and remains a fact to be determined by a jury. Defendant's speculation is nothing more than a defense tactic to instill doubt. It does not deny plaintiff her right to a jury or to have a jury consider the competing theories and evidence and render a verdict. What defendant is suggesting is that if it can suggest an alternative, it wins. That is not how the legal system works.

As stated in Evid. R. 703, an expert's opinion must be based on "facts or data * * * perceived by or made known to the expert at or before the hearing." An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, only when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Dr. Peters reviewed all the available records regarding decedent's conduct and potential exposures. He considered the timing of the known exposure, the onset of symptoms and the efforts to preclude any other exposures. He considered the environment at the time, the epidemiology of

COVID-19 and the absence of evidence of exposure to the virus from other sources.

Based on his education, experience and the facts and data available, he testified to a reasonable degree of certainty that Mr. Elijah contracted the COVID-19 virus from his hug with Mr. Martinez. "I think it was highly probable that he acquired it through his close contact hugging of Mr. Martinez, who we suspect at that time was infected with COVID. And then, shortly thereafter, Mr. Elijah developed signs and symptoms of COVID, was hospitalized with COVID and respiratory distress, and – and then died." 9T112:7-12. That was the only exposure of decedent to a person known to have had the COVID-19 virus. Dr. Peters explained "in all the information provided to me, that was the one contact." 9T150:24-25. "[Mr. Martinez] was ill and they were in very close contact. They worked together, they hugged. So highly probable that Mr. Martinez was – you know, the source of the infection." 9T157:14-17. The question of causation is presumptively a question of fact for a jury, and the facts and opinions of plaintiff's expert are sufficient for a jury to infer a reasonable conclusion, not mere speculation.

PATH also claimed that Dr. Peters was not qualified to give an opinion of whether decedent died from the COVID-19 virus. However, plaintiff produced evidence of that medical causation at the abandoned trial and presumably could

have done so at a retrial. Dr. Peters reviewed and testified regarding Mr. Elijah's hospital records. The admission reflects that the doctors diagnosed COVID-19 virus on April 3, 2020, the date of admission. 9T166:20-167:1. At the time that Mr. Elijah died, he was diagnosed as having acute respiratory distress syndrome due to the COVID-19 virus. 9T167:3-14.

For purposes of the motion for summary judgment, the trial court assumed that plaintiff would not be able to present any evidence of medical causation to a jury. 13T18:2-5. That assumption was factually and legally incorrect. During the mistrial, plaintiff did produce evidence that decedent had died from heart failure due to COVID-19. In fact, the court acknowledged that such evidence had been introduced by defendant's use of decedent's medical records. 10T292:24-293:14. Plaintiff also had presented the Death Certificate, although the trial court refused to admit it in evidence. However, as recognized at trial, there was an additional avenue for plaintiff to supply the proof of medical causation – decedent's treating physician.

At the time of trial, with the death certificate excluded, plaintiff's counsel was given the opportunity to bring in the treating physician. Under the gun, plaintiff's counsel was not able to secure the doctor's cooperation. Nonetheless, with a new trial scheduled and time to anticipate and to resolve the issue, that testimony was available to plaintiff.

For the trial court to decide as a matter of law on summary judgment that plaintiff could not establish medical causation was contrary to the summary judgment standard of review. R. 4:46-5. The reasonable inference, particularly given the efforts immediately made by plaintiff's counsel to subpoena the treating physician, was that evidence of medical causation would be provided at the retrial. Interrogatory 21 requested the following: "State the name and address of any persons who have any knowledge concerning the facts pertaining to the cause or circumstances of the decedent's death." Pa49. In response, plaintiff identified, among others, "Plaintiff's medical providers at Bayshore Medical Center, 727 North Beers Street, Holmdel, NJ 07733 (see attached medical records)." Pa62. Based on that disclosure in discovery, plaintiff would have been able to call decedent's treating doctor to testify at trial regarding his treatment, including medical causation, specifically that decedent died from heart failure related to exposure to the COVID-19 virus.

In Grossman v. Club Med Sales, supra, 273 N.J. Super. 42, the court heard a motion for summary judgment after a mistrial and dismissed the case. The Appellate Division reversed, finding that the trial court had usurped the role of the jury as the factfinder and failed to apply the proper standard of review to the motion.

> The trial court also concluded that plaintiff had failed to establish that any negligence on the part of the defendants was a proximate cause of

> plaintiff's injuries. Proximate cause is, ordinarily, a factual issue. Geherty v. Moore, 238 N.J. Super. 463, 478-79 (App. Div. 1990), appeal dismissed, 127 N.J. 287 (1991). There was no reason to depart from that principle here. Whether plaintiff's proofs were insufficient to establish proximate cause was a determination for the jury to make based upon the entirety of the record. The trial court discounted, for instance, the opinion of plaintiff's expert that the lock on plaintiff's door was insufficient. It was up to the jury, however, to decide the value of that opinion.
>
> We note that although the court had the benefit of hearing actual testimony at the incomplete trial, defendants' motion, even if presented after that, remained a motion for summary judgment. As such, it should have been decided under the well-known standards governing such motions which require that "[a]ll inferences of doubt are drawn against the moving party and in favor of the opponent of the motion." Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211, (App. Div. 1987).

273 N.J. Super. at 52.

The assumption that plaintiff would be unable to provide evidence of causation denied plaintiff due process under the law. See Klimko v. Rose, supra, 84 N.J. at 501-02; cf. Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 475 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016) ("Trial judges may be sorely tempted to spare jurors the task of hearing a cause that appears to lack merit and turn to the demands of an unyielding calendar. Still, our commitment to the fair administration of justice demands that we protect a litigant's right to proceed to trial when he or she has not been afforded the opportunity to respond to dispositive motions at a meaningful time and in a meaningful manner."). Plaintiff was entitled to proceed to trial.

CONCLUSION

"The standards of liability for negligence under the [FELA] must not be confused with those under the common law." Alamendarez v. Atchison, T. & S.F. Ry. Co., 426 F.2d 1095, 1097 (5th Cir. 1970); see also CSX Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011) ("[W]e have recognized that, in comparison to tort litigation at common law, a relaxed standard of causation applies under FELA." (internal quotation marks and citation omitted)). The case must be submitted to the jury "when there is even slight evidence of negligence," Harbin v. Burlington N. R.R. Co., 921 F.2d 129, 131 (7th Cir. 1990), whether or not the evidence would also reasonably permit the jury to attribute the injury to other causes as well. Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 841 F.2d 1347, 1353 (7th Cir.), cert. dismissed, 487 U.S. 1244 (1988). As was found twice before the abandoned trial, the evidence of PATH's liability involved determinations of disputed material facts. Summary judgment should be reversed, and the matter remanded for trial.

Respectfully submitted,

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Dated: July 30, 2024 *_/s Don P. Palermo, Jr._____*

SHEILA ELIJAH, Administratrix ad Prosequendum and General Administratrix of the Estate of Robert Elijah, Deceased, *Plaintiff-Appellant*, v. PORT AUTHORITY TRANS-HUDSON CORPORATION, *Defendant-Respondent*.	Superior Court of New Jersey Appellate Division Docket No. A-002335-23 CIVIL ACTION ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, HUDSON COUNTY, LAW DIVISION DOCKET NO. HUD-L-2137-20 Sat below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT PORT AUTHORITY TRANS-HUDSON CORPORATION

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TABLE OF CONTENTS

Contents **Page(s)**

TABLE OF AUTHORITIES ii
PRELIMINARY STATEMENT 1
PROCEDURAL HISTORY 2
COUNTER-STATEMENT OF FACTS 4
POINT I 18
PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE SHE LACKED THE REQUIRED STANDARD OF CARE EXPERT TO PROVE WHAT AN EMPLOYER WAS OBJECTIVELY REQUIRED TO DO IN RESPONSE TO THE FIRST PANDEMIC IN A CENTURY TO ATTEMPT KEEP ITS EMPLOYEES SAFE (13T4:15-6:20) 18
POINT II 25
PLAINTIFF'S ARGUMENTS THAT THE TRIAL COURT HELD PATH'S COMPLIANCE WITH CDC AND OSHA STANDARDS IS INCORRECT BASED ON THE RECORD, THESE STANDARDS DO NOT IMPROPERLY DISPLACE THE FRA, AND AN EXPERT WAS NECESSARY TO TESTIFY THAT MASKS WERE REQUIRED (13T4:15-6:20; 13T:9:16-17) 25
POINT III 28
SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE PLAINTIFF LACKED A MEDICAL CAUSATION EXPERT (13T7:13-24) 28
POINT IV 34
PETERS OPINION THAT DECEDENT GOT COVID-19 FROM MARTINEZ WAS NOT ADMISSIBLE BECAUSE HE DID NOT HAVE THE FACTS REQUIRED TO GIVE SUCH AN OPINION AND DID NOT FOLLOW HIS OWN METHODOLOGY (13T8:6-21) 34
POINT V 41
DR. PETERS IS NOT QUALIFIED TO GIVE A CAUSATION OPINION THAT THE DECEDENT CONTRACTED COVID-19 FROM JUAN MARTINEZ (13T7:25-8:5) 41
CONCLUSION 43

TABLE OF AUTHORITIES

Cases **Page(s)**

In re Accutane Litig.,
234 N.J. 340 (2018) 41

Allendorf v. Kaiserman Enterprises,
266 N.J. Super. 662 (App. Div. 1993).....30

Bey v. New Jersey Transit Rail Operations, Inc.,
No. A-4706-04T3, 2006 WL 2085431 (N.J. Super. Ct. App. Div. July 28, 2006) 19

Brooks v. Union Pac. R. Co.,
620 F.3d 896 (8th Cir. 2010).....31

Chirino v. Proud 2 Haul, Inc., 458 N.J. Super. 308, 318 (App. Div. 2017), aff'd, 237 N.J. 440 (2019) 21

Claar v. Burlington N. R. Co.,
29 F.3d 499 (9th Cir. 1994).....20, 31

Cordero v. New Jersey Transit Rail Operations, Inc.,
No. A-3646-21, 2023 WL 5742954 (N.J. Super. Ct. App. Div. Sept. 5, 2023).....18, 19

Creanga v. Jardal,
185 N.J. 345 (2005) 32, 37, 38

CSX Transp., Inc. v. McBride,
131 S. Ct. 2630 (2011).....20

Davis v. Brickman Landscaping, Ltd.,
219 N.J. 395 (2014) 18, 19, 24

Delvecchio v. Twp. of Bridgewater,
224 N.J. 559 (2016) 28

Dhillon v. Princess Cruise Lines, Ltd.,
No. 2:20-CV-11661-GJS, 2022 WL 504560 (C.D. Cal. Feb. 18, 2022), aff'd, No. 22-55215, 2023 WL 5696529 (9th Cir. Sept. 5, 2023) 32

Doe v. Greater New York Blood Program,
304 N.J. Super. 287 (App. Div. 1997).....26

Ehrlich v. Sorokin,
451 N.J. Super. 119 (App. Div. 2017).....35

Fantini v. Alexander,
172 N.J. Super. 105 (App. Div. 1980).....25

Grzanka v. Pfeifer,
301 N.J. Super. 563 (App. Div. 1997).....35

Hearon v. Burdette Tomlin Mem'l Hosp.,
213 N.J. Super. 98 (App. Div. 1986).....23

Higdon v. Keolis Commuter Servs., LLC,
306 F. Supp. 3d 470 (D. Mass. 2018).....26

Hopkins v. Fox & Lazo Realtors,
132 N.J. 426 (1993) 21

J.M. v. T.F.,
No. A-2621-16T4, 2019 WL 237543 (N.J. Super. Ct. App. Div.
Jan. 17, 2019).....38

J.W. v. L.R.,
325 N.J. Super. 543 (App. Div. 1999).....30

James v. Ruiz,
440 N.J. Super. 45 (App. Div. 2015).....30

Jimenez v. GNOC, Corp.,
286 N.J. Super. 533 (App. Div. 1996).....35

Jones v. Nat'l R.R. Passenger Corp.,
942 A.2d 1103 (D.C. 2008).....20

Knight v. Kirby Inland Marine Inc.,
482 F.3d 347 (5th Cir. 2007).....42

Kowalewski v. Port Auth. Trans-Hudson Corp.,
No. A-5051-11T1, 2013 WL 2450102 (N.J. Super. Ct. App. Div.
June 7, 2013) 19, 25

Landrigan v. Celotex Corp.,
127 N.J. 404 (1992) 41, 42

Magistrini v. One Hour Martinizing Dry Cleaning,
180 F. Supp. 2d 584 (D.N.J. 2002), aff'd, 68 F. App'x 356 (3d Cir. 2003) 38, 40

Matthews v. Aganad,
394 Ill. App. 3d 591 (2009).....26

Moody v. Maine Cent. R.R. Co.,
823 F.2d 693 (1st Cir.1987) 31

Myers v. Illinois Central R.R. Co.,
629 F.3d 639 (7th Cir. 2010).....31, 38

Norfolk S. Ry. Co. v. Sorrell,
549 U.S. 158 (2007).....20

Pomerantz Paper Corp. v. New Cmty. Corp.,
207 N.J. 344 (2011) 23

Quail v. Shop-Rite Supermarkets, Inc.,
455 N.J. Super. 118 (App. Div. 2018).....9, 12, 29, 30

Ries v. Nat'l RR Passenger Corp.,
960 F.2d 1156 (3d Cir.1992).....25

Robertson v. Burlington N. R. Co.,
32 F.3d 408 (9th Cir. 1994).....25

Sanzari v. Rosenfeld,
34 N.J. 128 (1961) 22

Shenker v. Baltimore & O. R. Co.,
374 U.S. 1 (1963).....27

Shutter v. CSX Transp., Inc.,
226 Md. App. 623 (2016).....20

Southern Pacific Transportation Co. v. Usery,
539 F.2d 386 (5th Cir. 1976).....26

State v. Cole,
229 N.J. 430 (2017) 34

State v. Kuropchak,
221 N.J. 368 (2015) 34

Townsend v. Pierre,
221 N.J. 36 (2015) 23, 34

Vuocolo v. Diamond Shamrock Chems. Co.,
240 N.J. Super. 289 (App. Div. 1990).....35

Wills v. Amerada Hess Corp.,
379 F.3d 32 (2d Cir. 2004).....20, 31, 38

Other Authorities

85 FR 20335-01 27

N.J.R.E. 808.....29, 30

New Jersey Constitution 21

PRELIMINARY STATEMENT

The trial court correctly granted PATH summary judgment, finding that Plaintiff lacked an expert to testify that PATH breached an objective standard of care with respect to COVID-19 mitigation in the workplace, lacked a medical causation expert, and that his epidemiologist's testimony was an inadmissible net opinion. The trial court did not dismiss this case because PATH complied with CDC guidelines and explicitly said so and, in fact, Judge Jablonski previously rejected such an argument, which is why PATH did not argue that in its subsequent motion for summary judgment.

Plaintiff needed an expert to explain how an employer, such as PATH, deviated from a recognized standard of care with respect to COVID-19 mitigation at the outbreak of the first pandemic in a century. Given that COVID-19 mitigation standards changed drastically and regularly throughout the pandemic – with respect to masking, social distancing, quarantining, vaccination, hand washing, and testing – Plaintiff needed an expert to prove that PATH breached its duty to provide a safe workplace. Mere arguments based on hindsight, a heightened standard of care with no basis in fact, and "common sense" did not suffice.

Plaintiff also needed a medical causation expert but lacked one because she neither named an expert nor provided an expert report to substantiate

medical causation, despite being asked by PATH to provide one. Given that PATH pointed to an alternative cause – influenza – for Decedent's death, an expert was even more necessary for Plaintiff to meet her burden of proof.

Finally, Plaintiff's epidemiologist, Dr. Peters, failed to follow his own methodology by not ruling in or out other potential exposures as the cause of Decedent's COVID-19 infection. As an epidemiologist, who was not concerned with specific causation in an individual, he is not also qualified to give such an opinion.

For these reasons, the trial court's grant of PATH's summary judgment motion should be upheld.

PROCEDURAL HISTORY

On or about June 11, 2020, Plaintiff, Sheila Elijah, filed a Complaint under the Federal Employers Liability Act (FELA) in the Law Division, Hudson County, alleging that Defendant, PATH, was negligent and its negligence caused the wrongful death of her husband, Robert Elijah, a former PATH employee. (Pa2) In the Complaint, Plaintiff alleges that "[o]n or about March 15, 2020, Decedent was exposed to the COVID-19 virus at Defendant's "C" Yard in Jersey City, New Jersey when he embraced a co-worker…. Id. at ¶ 9. Plaintiff's Complaint does not allege that the Decedent got COVID-19 from other potential exposures while employed at PATH. Id.

PATH filed its Answer on July 30, 2020. (Pa14) Discovery proceeded until January 23, 2022. (Pa26) In pretrial discovery, Plaintiff did not amend her interrogatories to assert any treating doctor as an expert or treating physician who would testify on her behalf with respect to medical causation, noting only that Edward Peters, DMD, SM, ScD would be an expert on her behalf. (Pa41; Pa54; Pa59; Pa60; Pa68) Plaintiff also did not produce a report from any medical expert on causation. (Pa59; Pa60; Pa68)

On February 18, 2022, PATH moved for summary judgment, arguing it was not negligent because it followed public health guidelines, should not have known the manner of transmission of COVID-19, owed no duty because there was no evidence that Decedent's co-worker had COVID-19 on the incident date, there was no evidence the co-worker knew or should have known he had COVID-19, there should be no duty as a matter of law, PATH was not liable under respondeat superior, and that PATH was entitled to PREP Act immunity. (1T4:9-1T:5:10) On April 4, 2022, the Court denied PATH's motion. (Pa24) PATH thereafter moved for reconsideration and the Court denied this motion. (Pa25)

The case proceeded to trial on October 2, 2023. During the third week of trial, Plaintiff counsel's father passed away. The trial judge declared a mistrial and scheduled a new trial date of February 5, 2024. (12T130:21-23; Pa26) After

the mistrial and with a new trial date scheduled, on November 17, 2023, Defendant moved for summary judgment, arguing that Plaintiff (1) could not meet her burden of showing PATH was negligent because she failed to have required expert testimony on the standard of care; (2) could not prove causation because she failed to have required expert testimony on medical causation; and (3) Plaintiff's expert's opinion was a net opinion and inadmissible. (13T4:15-8:21) After holding oral argument on February 16, 2024 (13T), on February 20, 2024, the trial court entered an Order granting summary judgment for defendant and dismissed the complaint with prejudice. (Pa1)

COUNTER-STATEMENT OF FACTS

Plaintiff does not allege that the Decedent got COVID-19 from other potential exposures while employed at PATH, as it is only alleged that Plaintiff had a one-time encounter on March 15, 2020, with another PATH employee and that is how he became infected with COVID-19. (Pa2) On a daily basis in early March 2020, the Decedent was regularly around passengers on PATH trains, sometimes less than two and a half feet away from them, and sometimes even "inches" away. (4T55:8-56:13; 4T134:14-22) It goes without saying that some of those passengers could have had COVID-19 at that time. (4T59:14-18; 4T60:18-22; 4T61:9-22) Also at that time, the Decedent went to work, grocery stores, and took New Jersey Transit trains to work. (9T145:15-146-1)

Both PATH and Plaintiff's expert agreed that there were no objective standards which required Plaintiff to wear a mask while working at PATH on or before March 15, 2020. (9T86:7-11; 11T29:1-14; 11T35:1-8; 11T36:5-7; 11T165:8-11) In early March 2020, it is well-known that there were PPE shortages in New York and New Jersey. (6T97:2-4; 8T38:16-25; 8T182:16-18)

Due to the concern about employees hoarding masks and not sharing them with each other, PATH Supervisor Joy Chiu sent the following March 5 email, which only required certain employees to return masks if they could not provide an explanation on who the masks were distributed to and for what purpose (job function):

> Please reach out to your respective employees and advise them to return ALL masks they obtained from Waldo Stockroom **IMMEDIATELY**. Listed below is the quantity they retrieved between last Wednesday 2/25/20 and this Wednesday 3/4/20. For any masks that is not accounted for in their return, they **MUST** provide explanation on who the masks were distributed to (provide name and ID of employee) and for what purpose (job function). Moving forward, all distribution of masks must be approved by Dave Volk. Waldo stockroom staff will be taking note of how many of the masks were returned to compare to what was taken out as listed below. Please have your employees hand in the documentation on who the masks were distributed to and for what function. This will be used for reconciliation of the inventory.
> If the names are incorrectly listed below, please advise immediately, so that the appropriate division may be notified.
> Thank you,
> Joy

(5T208:20-24; 5T209:10-14; 7T234:17-22; 7T245:20-246:4)

Attached to that email was a list that showed, between February 25, 2020, and March 4, 2020, PATH employees had taken 765 masks in approximately a week which, prorated for the year, would be over 39,000 masks for the year for the approximately 1,000 PATH employees. (6T67:25-68:2) PATH signalman, Felipe Desouza, confirmed PATH's concerns about hoarding, testifying that he personally hoarded masks, grabbing as many as he could whenever a box came into the locker room, and he thought everyone was doing that in early March 2020. (6T87:22-88:3) The trial testimony indicated that the Decedent needed a mask for several of his job functions. (4T191:24-193:25; 4T195:5-24) There is no evidence in the record that PATH took the Decedent's mask or masks back.

During the COVID-19 pandemic, PATH regularly published updates on policies and procedures to its employees with respect to COVID-19. (4T138:12-15) These updates were posted in PATH locker room bulletin boards to quickly update PATH employees. (4T138:23-25) PATH employees were required by rule to read these updates on a daily basis. (4T138:18-22; 4T143:9-18) As of March 12, 2020, PATH, via a bulletinized update, permitted its frontline workers to wear masks but, due to supply shortages, employees had to plan to furnish them on their own. (9T154:3-7; 11T37:14-22; 11T141:10-11;

11T142:13-23) The Decedent was considered to be a frontline worker. (4T198:1-5; 6T44:10-12; 7T219:15-22)

On March 15, 2020, PATH worker Juan Martinez was in the locker room at PATH to eat and saw the Decedent. (4T77:9-12; 4T82:6-12) Prior to that date, Martinez had had an argument with the Decedent and, upon seeing him in the locker room, Martinez apologized and the two hugged each other. (4T83:5-21) Neither the Decedent nor Martinez were wearing masks at that time. (4T84:11-16) There is no evidence that anyone at PATH discouraged the Decedent from wearing a mask (Pa2; 2T – 12T) There is no evidence that PATH disciplined any employees for wearing a mask. (6T97:23-98-1) It is not known why the Decedent was not wearing a mask at this time as Plaintiff has merely alleged this in her Complaint but submitted no factual support to substantiate it[1]. (Pa2)

Martinez testified that he did not feel 100% at work on that date but that he "thought that I had like a head cold or something. Nothing, you know. Enough that I could come to work. Nothing crazy that had to be stuck in bed, but enough to come to work." (4T128:9-16) He testified that he had a "headache, slight cough, a little chest pain, you know, nothing." (4T128:17-22) The next morning, Martinez woke up and felt worse than when he went to work the previous day, with symptoms including a fever, headache, and trouble breathing. (4T71:21-

[1] See R. 4:46-5(a), which prohibits resting upon allegations in the pleadings.

23; 4T72:1-5) Martinez had symptoms for a week or so. (4T133:14-23) He took Tylenol and NyQuil because he thought it was a seasonal cold. (4T86:15-21; 4T129:1-5; 4T130:12-25) Martinez was a smoker and it was normal for him to have a slight cough during the time period of March 2020. (4T131:3-14) Martinez was aware that PATH's policy is if an employee is sick, they should not report to work. (4T131:16-18) Despite his slight cough, Martinez did not believe he was sick enough to not report to work. (4T131:19-21)

Martinez went to get tested for COVID-19 but never received his test results back. (4T89:14-24; 4T90:11-12; 4T91:2-4; 4T136:3-5; 9T50:3-7) He did not know if he had COVID-19 at that time. (4T91:5-7) Tellingly, nobody in Martinez's household tested positive for COVID-19 in March of 2020 or exhibited signs and symptoms of it, even though they all shared the same bathroom. (4T136:6-9; 4T136:10-18) In fact, nobody in Martinez's family had COVID-19 for the entire year of 2020. (4T86:2-7) Martinez had another possible COVID-19 exposure in the summer of 2020. (4T96:13-18). On August 27, 2020, Mr. Martinez tested positive for COVID-19 antibodies but the results of his nasal swab from the same day showed he was negative for COVID-19. (4T102:10-24; 4T103:1-4)

A jury trial in this matter commenced on October 2, 2023, before the Honorable Anthony V. D'Elia. (1T-1) In pretrial discovery, Plaintiff did not

amend her interrogatories to assert any treating doctor from the emergency room as an expert or treating physician who would testify on her behalf with respect to medical causation, noting only that Edward Peters, DMD, SM, ScD would be an expert on her behalf. (Pa41; Pa54; Pa59; Pa60; Pa68) PATH specifically asked for this information, and none was provided. Ibid.

During trial, the Decedent's death certificate was barred as a net opinion under the case Quail v. Shop-Rite Supermarkets, Inc., 455 N.J. Super. 118, 121, (App. Div. 2018). (3T38-12; 3T40:7-55:17) Throughout trial, Plaintiff repeatedly attempted to get evidence with respect to the standard of care from lay witnesses, but the trial court repeatedly did not permit such testimony. (4T106:11-25; 4T107:1-109:25; 8T26-17; 8T151:11-25) The trial court noted that a lay witnesses' personal opinions about what was or was not safe was not admissible because he is:

> not qualified to give an opinion as to what was safe or wasn't safe. He may have had a personal belief, because people that think back then that they, even at the time, that they had to wear plastic things over their face and everything like that. That cannot be used to try to prove negligence against an employer for what they did or didn't know at the time.
> You can ask him what they did about taking the masks back, when they took the masks back, and we'll explore later why. Those are all factual questions. But whether he's going to say, hey, by the way, I'm Joe Blow, and I think that was unsafe, and you want the jury to rely upon that in determining whether the employer acted reasonably, I'm not allowing that –

(4T107:1-14)

…

unless you have an expert saying there was a responsibility, a requirement on an employer at the time to say knowing those circumstances, whatever -- whatever the company wants to say and base it on, unless you can proffer that you have an expert saying that, that at the time they were required to have masks when they were working, they were required to retest him before he came back after quarantine, they were required to have him retested before he came back from quarantine, unless you have an expert saying that, then that can't be heard by the jury because it is extremely prejudicial.

Your question implies a requirement that you can't prove existed at the time. The foundation for the question, as I asked to proffer, that's why I asked the proffer from you, can't be made. Without that foundation, you can't imply in a question that the guy should have been tested before he went back to work. Because guess what? That's my personal opinion or that's Juan Martinez's personal opinion.

(4T109:5-15)

I'm not going to let jury go into that jury room and say in their own mind that Port Authority had a duty to do X, Y, and Z before March 15th, they didn't do it, so therefore they were negligent, and just make up the duty in their own mind, because retroactively they feel it would be fair, or because some union guy thinks, jeez there should have been temperature required -- temperature taking beforehand from my union members.

Well, wait a second? Was that required anywhere? Is there going to be any evidence on this record that it was required or should have been done? If not, then it's not relevant to any of us.

(8T26:17-27:4)

> Regardless of what the union members wanted, didn't want, thought was best, et cetera, is not the question here today. That doesn't create the duty on the part of the employer back on March 3 to do something or not do something. In this case, provide N95 masks in order to drive on trains with passengers. I'm guessing where the question's directed. The fact that they asked for it is relevant, maybe, depending on the evidence later. But that is not proof that it was required by PATH before March 15, 2020. Something more is required (indiscernible) that. Employees ask for a lot of things. That doesn't mean that that creates a duty on the part of the employer to do it.

(8T151:11-24)

The trial court noted that it was not going to let the jury speculate that PATH should have done more before March 15, 2020 "when the courts are open… the trains are running, and everybody's on the trains without masks. And masks weren't required anywhere." (6T17:18-23)

At trial, Plaintiff presented no expert testimony on the standard of care applicable to PATH with respect to COVID-19 mitigation in March 2020. (9T6:7-176:15) Instead, Plaintiff presented Dr. Edward Peters, a DMD and epidemiologist. (9T8:6-14; 9T27:2-4) Dr. Peters is not a workplace safety expert and has no background or training in it. (9T27:11-16) Dr. Peters is not an industrial hygienist and has no background or training in it. (9T27:17-20; 9T108:6-8) An industrial hygienist is someone who "looks at workplace safety … to protect the workers." (9T108:10-12) In fact, Dr. Peters has no experience

in the field of industrial hygiene, and he has no specific knowledge of what an industrial hygienist does in terms of that discipline. (9T108:13-17)

Dr. Peters attempted to testify that masks would have been advisable to wear in March 2020. (9T44:18-21) The trial court barred this testimony because Dr. Peters was not a workplace safety expert and attempted to give a personal opinion. (9T45:3-5; 9T48:13-24) Dr. Peters stated that masks should have been worn based on "common sense evidence, less scientific more pluralistic" and the trial court found that "[t]hat is the purest net opinion testimony that you could see … An expert witness cannot issue a personal opinion as to what should or should not be…." (9T67:18-68:1-2; 9T68:10-12) The trial court barred Dr. Peters from giving "an opinion as to what PATH the employer should or shouldn't have done, because he's not an expert in that regard. He's only here to give testimony on epidemiology." (9T107:13-18) The trial court found that Dr. Peters' opinion about masks was a "net" opinion because it was based on his personal opinion. Ibid.

Dr. Peters agreed that the CDC recommended not to wear masks in or around March 2020. (9T86:7-11) Dr. Peters testified that PATH was compliant with CDC guidelines before March 15, 2020. (9T124:2-5; 9T124:13-18) Dr. Peters testified that those were the prevailing standards at that time. (9T124:19-21) Dr. Peters testified that most professional organizations adopted the CDC

guidelines and that the CDC is "the prevailing public health authority in the United States." (9T100:18-22). Dr. Peters testified that in March 2020, the CDC "were the best federal recommendations we had." (9T116:23-25)

Dr. Peters not a medical doctor. (9T33:5-8) The trial court prohibited Dr. Peters from offering medical opinions. (9T101:5-10) Dr. Peters confirmed that epidemiology looks at populations and that epidemiologists are not medical doctors who "look at the individual." (9T32:21-22) According to Dr. Peters, epidemiology is "the basic science of public health. Really what epidemiologist do is we study the distribution and determinance of disease and injury in populations. So what is distribution? Person, place, and time. Who gets it? Why do they -- and, you know, who's affected, right? So the other part of determinance, what causes disease. So we have projects, research, surveillance, that describes the patterns of disease in populations, as well as research that looks at what causes disease, the determinance." (9T9:6-16) As part of his epidemiological methodology, Dr. Peters rules in certain causes of a disease and rules out other causes to make his studies more accurate. (9T29:23-30-1)

Dr. Peters testified that it was "highly probable" that the Decedent acquired COVID-19 "through his close contact hugging of Mr. Martinez, who we suspect at that time was infected with COVID," although he testified you "cannot say that with any certainty," but it was "very likely that that is the

situation." (9T112:7-21) Dr. Peters based his opinion that Mr. Martinez had COVID-19 at that time based on Mr. Martinez's "antibody test and some of the clinical information available in mid-March" and that Mr. Martinez gave the Decedent COVID-19 because he "was ill and they were in very close contact. They worked together, they hugged." (9T125:20-23; 9T157:14-15)

Dr. Peters agreed that the Decedent had three negative COVID-19 tests while at the hospital shortly before his death. (9T135:9-10; 9T138:3-24; 9T139:2-5) These three tests indicated that he did not have COVID-19 at that time. (9T139:5-8) Upon his admission to the hospital on April 3, 2020, the Decedent was diagnosed with influenza A. (9T143:20-21) On the date of his death, one of the impressions was influenza A, meaning he had the flu. (9T141:21-23; 9T142:3-4; 9T143:10-13) Dr. Peters agreed that influenza mimics the same symptoms as COVID-19 and that "people die from the flu." (9T119:9-13; 9T139:16-18)

Dr. Peters acknowledged that masks reduce the risk of COVID-19 but do not totally knock the risk of acquiring COVID-19 to zero, and that you can still get COVID-19 when wearing a mask. (9T145:9-14) Dr. Peters testified that the Decedent went to work, grocery stores, and took New Jersey Transit trains to work. (9T145:19-146:1) Dr. Peters acknowledged that asymptomatic COVID-19 spread was not known in early March 2020 but that we now know that it can

occur. (9T146:14-15; 9T146:21-22) Dr. Peters testified that the Decedent could have gotten COVID-19 somehow else besides his exposure to Martinez but he "did not rule it out. I mean, it – it all – it's a factor." (9T146:23-147:7) Dr. Peters testified the Decedent could have gotten COVID-19 from anyone, could have gotten it from work, could have gotten it from someone wearing a mask, could have gotten it even if he was wearing a mask, could have gotten it from someone who did not have symptoms, and he could have gotten it from someone who did have symptoms. (9T147:8-25) Dr. Peters testified that there were no other exposures, besides the one-time alleged exposure to Martinez, provided to him to rule in or rule out as the cause of Decedent's COVID-19 infection. (9T148:17-21) Although the Decedent left his home, saw other human beings, was on crowded PATH trains, and worked with other co-workers, Dr. Peters did not rule out these exposures as a source of Plaintiff's COVID-19 infection. (9T148:22-149:16) Dr. Peters testified he did not know of any of the people that he did not rule out did or did not have COVID-19 at that time. (9T149:18-21) Dr. Peters did not know if any of those people had a PCR test, a rapid test, or blood test for COVID-19. (9T149:22-150:5) Dr. Peters testified it is impossible to eliminate any of them as the smoking gun to any reasonable degree of certainty. (9T150:14-22) Dr. Peters testified that he did not do any statistical analysis of

the data for New York and New Jersey in early March 2020 to rule in or rule out anything with regard to the Decedent. (9T152:14-24)

PATH put forth the testimony of Dr. Dennis Paustenbach in the areas of industrial hygiene, toxicology, health risk assessment, and state-of-the-art analysis and the trial court qualified him as an expert witness in those fields. (11T19:15-25) Dr. Paustenbach reviewed the CDC guidelines and OSHA guidelines in effect at the time of the Decedent's alleged March 15, 2020 exposure. (11T27:21-28:9) Dr. Paustenbach testified that before March 15, 2020, the CDC did not recommend that the general public or railroad workers wear masks. (11T28:23-29:3) Dr. Paustenbach testified that before March 15, 2020, the CDC did not recommend mask wearing as a mitigation strategy for any employee outside of the healthcare industry. (11T29:11-14)

Dr. Paustenbach testified that OSHA grouped workers in four categories with respect to COVID-19 mitigation: very high risk, high risk, moderate risk, and low risk. (11T30:15-22) He did not find that the Decedent fell into the very high risk, high risk, or medium to moderate groups. (11T31:15-20; 11T34:5-8) Dr. Paustenbach found that the Decedent fell into the low-risk group. (11T34:7-25) Dr. Paustenbach testified that, as of March 15, 2020, OSHA did not mandate general face mask use for people who fell within the medium risk group.

(11T35:1-5) He noted that, as of March 15, 2020, OSHA did not mandate general face mask use for people who fell within the low-risk group. (11T35:6-8)

Dr. Paustenbach testified that PATH complied with the applicable CDC and OSHA guidelines in place on or before March 15, 2020. (11T37:23-38:3) The trial court did not permit Plaintiff to ask Dr. Paustenbach about whether it was reasonable for any employer in the New York City area in March 2020 to do all they can to protect their workers, noting:

> the standard of care for an employer in March of 2020, the railroad, is not going to be what this guy thinks an employer could have done then to make everything safe. That is a personal opinion being expressed by a witness. That is far beyond what an expert opinion should be. It is an opinion. It is the most -- it is the most basic of a personal opinion not based on any standard, rule, regulation, standard of care in the industry that existed at the time, et cetera. This is not a rear-end hit. This is not a slip-and-fall. This is not a -- just a simple general negligence case. And I have other case law to -- later on to back that up. There is a standard of care that is required to be proven, standard of care of negligence that is required to be proven in connection with COVID and PATH in March that is not going to be a personal opinion of either your expert or their expert. I'm treating both the same way. The -- the objection is sustained. Move on to your next question.

(11T81:5-24)

POINT I

PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE SHE LACKED THE REQUIRED STANDARD OF CARE EXPERT TO PROVE WHAT AN EMPLOYER WAS OBJECTIVELY REQUIRED TO DO IN RESPONSE TO THE FIRST PANDEMIC IN A CENTURY TO ATTEMPT KEEP ITS EMPLOYEES SAFE (13T4:15-6:20)

In both FELA and in common law negligence cases, when the standard of care is so esoteric that that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the defendant was reasonable, an expert is required in order for a plaintiff to meet her burden of proving the defendant deviated from an objective standard and therefore did not exercise ordinary care. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)); (Pa71-Pa75) Cordero v. New Jersey Transit Rail Operations, Inc., No. A-3646-21, 2023 WL 5742954, at *4–5 (N.J. Super. Ct. App. Div. Sept. 5, 2023) (granting summary judgment in FELA case to railroad because expert required to show sliding door on locomotive "was in some way dangerous or negligently maintained"). In certain cases, such as this one, the "jury is not competent to supply the standard by which to measure the defendant's conduct," and thus the plaintiff must establish the defendant's standard of care and breach of that standard by presenting expert testimony. Davis, 219 N.J. at 407 (quoting

Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961)); see, e.g., Davis, 291 N.J. at 408 (expert required to explain fire code provisions and standards).

When the standard of care is complex, "a jury should not be allowed to speculate as to the proper standard of care" and, instead, the plaintiff is "required to establish the applicable standard of care through expert testimony." Davis, 219 N.J. at 400–01 (rejecting plaintiff's proposed expert's standard of care because it "represented only his personal view and was not founded upon any objective support"). Absent an expert in this situation, a plaintiff is "unable to establish the required elements of their negligence cause of action." Id. at 401.

These principles apply equally in FELA cases. (Pa71-Pa75) Cordero, No. A-3646-21, 2023 WL 5742954, at *4–5 (granting summary judgment in FELA case to railroad because expert required to show sliding door on locomotive "was in some way dangerous or negligently maintained"); (Pa76-Pa84) Kowalewski v. Port Auth. Trans-Hudson Corp., No. A-5051-11T1, 2013 WL 2450102, at *10 (N.J. Super. Ct. App. Div. June 7, 2013) (granting summary judgment in FELA case to railroad because expert required to show PATH breached its duty to provide a safe workplace and causation in case involving repetitive stress injury); (Pa85-Pa89) Bey v. New Jersey Transit Rail Operations, Inc., No. A-4706-04T3, 2006 WL 2085431, at *6 (N.J. Super. Ct. App. Div. July 28, 2006) (granting summary judgment in FELA case to railroad

because no expert evidence "that plaintiff's workplace was not safe" in case involving repetitive stress injury). Thus, an expert is necessary when a claim involves an issue that is not obvious to a lay juror. Wills v. Amerada Hess Corp., 379 F.3d 32, 46 (2d Cir. 2004) (denoting need for expert testimony in Jones Act cause of action, which incorporates FELA by reference); Claar v. Burlington N. R. Co., 29 F.3d 499, 504 (9th Cir. 1994) (expert required when "special expertise" needed to meet burden of proof in a FELA claim); Jones v. Nat'l R.R. Passenger Corp., 942 A.2d 1103, 1107 (D.C. 2008) (absent expert testimony on applicable standard of care that was not in realm of common knowledge or everyday experience in FELA matter, summary judgment appropriate); Shutter v. CSX Transp., Inc., 226 Md. App. 623, 642–43 (2016) (expert required in FELA matter where standard of care beyond the ken of average layman). And an expert on standard of care in FELA cases is necessary for good reason, because like New Jersey's negligence standard, FELA's negligence standard is "ordinary prudence" under the circumstances. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2643 (2011) ("a railroad is only negligent if it failed to observe the degree of care which people of ordinary prudence and sagacity would use under the same circumstances."); see also Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 168-169 (2007) ("so far as negligence is concerned, that standard is the same – ordinary prudence – for both Employee and Railroad alike."); N.J.

Model Civil Jury Charge 5.10A (defining negligence under the ordinary prudence standard). The New Jersey Constitution or due process, as argued by Plaintiff for the first time on appeal, does not trump the well-recognized principle, applied daily by New Jersey's courts, that when a plaintiff cannot meet her burden of proof, summary judgment is appropriate. Chirino v. Proud 2 Haul, Inc., 458 N.J. Super. 308, 318 (App. Div. 2017), aff'd, 237 N.J. 440 (2019) (appellate courts generally decline to consider issues not raised below).

In this matter, the standard of what employers were required to do at the early outset of the first pandemic in over a century is not a standard that is "relatively commonplace and ordinary" such that it does "not require the explanation of experts…." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993). Here, the trial court repeatedly and correctly found that Plaintiff needed a standard of care expert because it was not common knowledge as to what steps an employer, like PATH, should have taken at the beginning of the outbreak in the first pandemic in over a century in early March 2020 with respect to mitigating COVID-19 at the workplace. (4T106:11-111:8; 4T214:8-216:9, 4T235:5-236:22; 6T16:15-17:23, 6T147:6-148:4; 8T24:5-28:7; 8T149:3-151:24) Plaintiff produced no evidence, expert or otherwise, on an applicable standard of care and that PATH violated it. Ibid., see also, (9T45:3-49:18; 9T65:19-68:14; 9T107:1-18) Dr. Peters, who is neither a workplace safety

expert nor an industrial hygienist, was not permitted to testify as a workplace safety expert or industrial hygienist and, accordingly, his proposed testimony that PATH should have given masks to its employees for COVID-19 mitigation in early March 2020, despite the CDC stating that masks were not required, was barred. (9T45:3-49:18; 9T65:19-68:14; 9T107:1-18) Instead, PATH proffered the sole admissible expert evidence on the standard of care: CDC and OSHA guidelines in effect at the time, which, without dispute, it was opined that PATH complied with. (11T27:17-29:14; 11T37:23-38:3)

Thus, Plaintiff has not produced any expert testimony that PATH deviated from *any* standard of care. Put simply, PATH's unrebutted compliance with the CDC and OSHA guidelines is not at issue because Plaintiff has no evidence PATH breached *any* applicable standard of care, whether CDC, OSHA, WHO, DOH, or otherwise. This is Plaintiff's burden – not PATH's – of proving by a preponderance of the evidence that PATH was negligent, and she has not met it. "In such cases, if the plaintiff does not advance expert testimony establishing an accepted standard of care, it is proper for the court to grant a dismissal at the close of plaintiff's case." Sanzari v. Rosenfeld, 34 N.J. 128, 135 (1961).

Plaintiff's epidemiologist, Dr. Peters, is, admittedly, not qualified to give a workplace safety or industrial hygiene opinion as he has no background or training in either specialty. (9T27:11-20; 9T108:13-17; Pa111, ¶18) During trial,

Dr. Peters made it clear: his opinion that masks should have been worn at that time was a personal opinion that had no objective basis. (9T65:19-68:14) "[I]f an expert cannot offer objective support for his or her opinions but testifies only to a view about a standard that is personal, it fails because it is a mere net opinion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011); Hearon v. Burdette Tomlin Mem'l Hosp., 213 N.J. Super. 98, 103 (App. Div. 1986) (what an expert "would do is not the generally recognized standard…."). The New Jersey Supreme Court has stressed that because of "the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." Townsend v. Pierre, 221 N.J. 36, 55 (2015). Thus, Dr. Peters is neither qualified nor provided an admissible opinion that PATH violated any objective standard of care.

Plaintiff would instead have the jury guess and speculate that an employer, such as PATH, was required to give N-95 respirators to its employees at the beginning of the COVID-19 pandemic, despite both the CDC and OSHA not even requiring *any* masking at that time, and without a qualified expert stating such was required based on objective standards in place at that time. This heightened standard of care, proposed from lay witness union representatives, is not based on any objective standard and has never applied to railroads in the

country – yet Plaintiff wants a jury to speculate that it was an applicable standard and that PATH had an absolute duty to comply with it or would be liable for negligence. Davis, 219 N.J. at 412 (expert opinion that defendant had to meet a "higher standard of care" is inadmissible when there is no "objective support for that conclusion"). Given the continuing shifting standards and requirements surrounding COVID-19 mitigation – which changed rapidly and numerous times during the pandemic – it makes perfect sense that a jury would need the guidance of a qualified expert to employ an objective standard that an employer should have followed in order to prove that the employer did not use "ordinary prudence under the circumstances."

Given this, there was no material issue of fact: without an expert to explain to the jury how PATH violated the appropriate standard of care with respect to COVID-19 mitigation in workplaces in early March 2020, Plaintiff failed to meet her burden that PATH breached a duty of care and such breach caused, in whole or in part, her damages. Accordingly, summary judgment is appropriate.

POINT II

PLAINTIFF'S ARGUMENTS THAT THE TRIAL COURT HELD PATH'S COMPLIANCE WITH CDC AND OSHA STANDARDS IS INCORRECT BASED ON THE RECORD, THESE STANDARDS DO NOT IMPROPERLY DISPLACE THE FRA, AND AN EXPERT WAS NECESSARY TO TESTIFY THAT MASKS WERE REQUIRED (13T4:15-6:20; 13T:9:16-17)

In its post-mistrial summary judgment motion, PATH did not argue that CDC and OSHA preempt FELA and, in any event, the trial court specifically stated that "CDC compliance is not dispositive in my mind." (13T5:1-8:21; 13T9:16-17; 13T17:5-7) "A standard does not mean a principle which every practitioner in the applicable profession will follow. It is a generally recognized standard." Fantini v. Alexander, 172 N.J. Super. 105, 110 (App. Div. 1980). Plaintiff's expert agreed that the CDC guidelines were the prevailing standards at the time and Defendant's expert testified that PATH complied with the applicable OSHA and CDC guidelines in effect at the time. (9T124:19-21; 11T37:23-38:3). Nowhere in any caselaw is it held that requiring an expert to show that a railroad violated an applicable standard of care in complicated FELA cases displaces FELA's negligence standard; instead, it helps a jury determine in complex cases what is, in fact, negligence, in order to prevent a jury from speculating that the negligence standard is higher than ordinary prudence.

Plaintiff's argument that the CDC and OSHA do not apply as potential standards of care in a FELA case has no support in the record, as Plaintiff's own

expert conceded that the CDC is "the prevailing public health authority in the United States," it set the standard with respect to COVID-19 mitigation, and PATH's expert testified as to the applicability of these standards without objection. (9T100:19-22; 9T124:19-21**;** 11T27:17-11T28:22; 11T37:23-38:3); (Pa76-Pa84) Kowalewski, 2013 WL 2450102, at *3 (expert citing to OSHA and CDC standards with respect to repetitive stress standard of care); Robertson v. Burlington N. R. Co., 32 F.3d 408, 410 (9th Cir. 1994) ("OSHA standards may be admitted in an FELA case as some evidence of the applicable standard of care"); Ries v. Nat'l RR Passenger Corp., 960 F.2d 1156, 1164 (3d Cir.1992) (OSHA regulation admissible on issue of negligence); Doe v. Greater New York Blood Program, 304 N.J. Super. 287, 293 (App. Div. 1997) (permitting testimony about CDC guidelines pertaining to blood banks and AIDS); Matthews v. Aganad, 394 Ill. App. 3d 591, 598–99 (2009) (CDC guidelines admissible for applicable standard of care). Thus, as was conceded below, the CDC and OSHA standards were both applicable workplace standards of care with respect to COVID-19 mitigation.

Moreover, Plaintiff's argument that the FRA governs PATH instead of OSHA is similarly unavailing because there is no evidence that the FRA chose to exercise its authority to issue a standard for COVID-19 mitigation before March 15, 2020, the date of Decedent's alleged exposure. Southern Pacific

Transportation Co. v. Usery, 539 F.2d 386, 389 (5th Cir. 1976) (OSHA not ousted of authority when the FRA has not exercised such authority); Higdon v. Keolis Commuter Servs., LLC, 306 F. Supp. 3d 470, 473 (D. Mass. 2018) (same). It was not until April 10, 2020, that the FRA issued a safety advisory on COVID-19 – and it stated that railroad were encouraged "to take action consistent with the recommendations and guidance cited above to help reduce the risk that railroad employees and contractors contract COVID-19 and then spread it to others," and cited, in part, CDC and OSHA guidelines. Safety Advisory 2020-01; Safety Precautions Related to Coronavirus Disease 2019 (COVID-19), 85 FR 20335-01 (noting that "[t]he understanding of COVID-19 is constantly evolving; FRA recommends checking the CDC website for the most current information and recommendations."). Therefore, Plaintiff's arguments that neither the CDC nor OSHA applies lack merit.

And with respect to Plaintiff's argument that PATH has a non-delegable duty, such duty is irrelevant here, as that non-delegation only applies when a railroad's employees "are required to go onto the premises of a third party over which the railroad has no control." Shenker v. Baltimore & O. R. Co., 374 U.S. 1, 7–11 (1963) (holding otherwise would permit railroads to "tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity."). No

such defense or allegation was made here, as the incident in question occurred in a PATH employee locker room. (2T37:20-22; 2T93:1-4; 4T153:22-24)

Plaintiff then argues that an expert is not required to conclude that withdrawing PPE indiscriminately and instructing employees not to wear PPE are failures to provide a reasonably safe place to work. However, this argument suffers, again, from the fatal foundational flaw that Plaintiff assumes the standard at that time was that employers were required to provide N-95 respirators to prevent COVID-19 spread when she has no evidence, expert or otherwise, demonstrating such was the applicable standard of care at the time the COVID-19 pandemic began. Absent this evidence, there is no breach by PATH of its duty of ordinary prudence, and FELA's lessened causation standard is unavailing. For these reasons, and the reasons discussed above, Plaintiff needed a standard of care expert to meet her burden of proving PATH's negligence.

POINT III

SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE PLAINTIFF LACKED A MEDICAL CAUSATION EXPERT (13T7:13-24)

Court Rules "4:17–4(a), (e) and 4:10–2(d)(1) compel the service of reports by treating physicians who will testify at trial, in the event that those reports are requested in discovery." Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 582–83 (2016). Here, PATH requested such reports during discovery, and none were

provided. (Pa41; Pa54; Pa59; Pa60; Pa68) Plaintiff's argument that the trial court improperly "assumed that plaintiff would not be able to present any evidence of medical causation to a jury," is incorrect because the trial court did not base its opinion on an assumption but on the applicable court rules and case law. Without the requisite expert testimony to prove medical causation, Plaintiff was not entitled to proceed to trial and was not denied due process of law; instead, the trial court correctly held that she did not meet her burden of proof. Accordingly, and for the further reasons discussed below, Plaintiff has no expert or treating physician on medical causation and, absent such an expert, dismissal was appropriate.

Second, the Decedent's death certificate and any conclusions reached by its author were found inadmissible by the trial court. (2T40:7-55:17) In Quail v. Shop-Rite Supermarkets, Inc., 455 N.J. Super. 118, 121 (App. Div. 2018), the decedent died after injuring her leg in a supermarket and the Death Certificate stated, "that the cause of death was 'complications of blunt trauma of [the] right lower extremity.'" Ibid. The Appellate Division upheld the trial court's findings that the Death Certificate was inadmissible hearsay and "properly excluded by the trial court under N.J.R.E. 808, the net opinion doctrine, and pertinent case law." Id. at 122. In excluding the Certificate under N.J.R.E. 808, the Appellate Division noted that "it is manifest that the terse finding within the Certificate

reciting a cause of death is the very sort of disputed opinion on a complex subject that should not be admitted without the opportunity to cross-examine the author." Id. at 132.

The Court also found that excluding the Certificate was appropriate under the net opinion doctrine because the "'whys and wherefores' supporting the death certificate's opinions about decedent's cause of death are clearly absent from the document" and it was a "classic 'net opinion' that must not be allowed in the absence of testimony by the author elaborating the basis for the conclusions reached. Id. at 132-33. Here, the trial court properly excluded the Decedent's death certificate and, without it, no other admissible evidence exists to prove that COVID-19 caused the Decedent's death, as any further medical records are further insufficient to prove medical causation, absent an expert testifying. (2T40:7-55:17)

Third, it is well-settled that a plaintiff seeing to prove medical causation is required to proffer "competent expert testimony." J.W. v. L.R., 325 N.J. Super. 543, 548 (App. Div. 1999); see also Allendorf v. Kaiserman Enterprises, 266 N.J. Super. 662, 672 (App. Div. 1993) (stating that the "logical relationship" underlying a claim of medical causation "generally must be established by appropriate expert medical opinion"); see also Quail, 455 N.J. Super. at 121 (affirming grant of summary judgment where trial court ruled that plaintiff

would be unable to show proximate cause of death without expert testimony, for which the certificate of death was not a substitute); N.J.R.E. 808; James v. Ruiz, 440 N.J. Super. 45, 62 (App. Div. 2015) (non-testifying expert's opinions should be excluded under N.J.R.E. 808).

This principle equally applies in FELA cases, where "[e]xpert evidence is often required to establish the causal connection between the accident and some item of physical or mental injury unless the connection is a kind that would be obvious to laymen, such as a broken leg from being struck by an automobile." Moody v. Maine Cent. R.R. Co., 823 F.2d 693, 695 (1st Cir.1987); Brooks v. Union Pac. R. Co., 620 F.3d 896, 899 (8th Cir. 2010) (summary judgment for railroad in FELA action when Plaintiff lacked medical causation expert). Thus, "when there is no obvious origin to an injury and it has multiple potential etiologies, expert testimony is necessary to establish causation." Myers v. Illinois Central R.R. Co., 629 F.3d 639, 643 (7th Cir. 2010) (expert testimony was required where neither the plaintiff nor his doctors could point to a specific event, employee claimed injuries resulted from years of working for the railroad, and such "cumulative trauma injuries" involved gradual deterioration resulting in numerous disorders caused by repetitive work over time such that causation is not obvious to a layperson). When an injury has "multiple potential etiologies, expert testimony is necessary to establish causation." Wills, 379 F.3d at 46–47;

Claar, 29 F.3d at 504 (noting "expert testimony is necessary to establish even that small quantum of causation required by FELA"). Nothing under FELA "alters the accepted fact that unless the connection between the negligence and the injury is a kind that would be obvious to laymen, expert testimony is required." Myers, 629 F.3d at 643-44.

Moreover, medical causation experts have been held necessary for cases claiming that COVID-19 caused symptoms "given the complex nature of COVID-19, and the fact that symptoms associated with COVID-19 substantially overlap with symptoms of other diseases, including the common cold, influenza, and numerous other viral and bacterial infections." (Pa90-Pa94) Dhillon v. Princess Cruise Lines, Ltd., No. 2:20-CV-11661-GJS, 2022 WL 504560, at *3 (C.D. Cal. Feb. 18, 2022), aff'd, No. 22-55215, 2023 WL 5696529 (9th Cir. Sept. 5, 2023). Thus, because "numerous potential causes account for the symptoms of COVID-19, a trier of fact must rely on more than common sense to draw inferences that rise beyond the speculative level regarding exactly where and when the exposure occurred, and whether Plaintiffs' symptoms were the product of COVID-19 or some other illness. Ultimately, "the alleged mechanisms of causation are beyond the experience of laypeople," and thus, Plaintiffs cannot establish causation absent such expert testimony." Ibid. (granting summary

judgment in COVID-19 exposure case due to lack of medical expert causation evidence).

Fourth, because PATH has pointed to an alternative cause of Plaintiff's death – infection with influenza – and Plaintiff has no expert medical testimony which ruled influenza out as a cause of Plaintiff's death, she cannot meet her burden of proving medical causation absent necessary expert testimony. See infra, discussion of differential diagnosis and Creanga, see also (Pa90-Pa94) Dhillon, 2022 WL 504560 at 3 (symptoms associated with COVID-19 substantially overlap with symptoms of influenza). (9T139:16-19) Dr. Peters agreed that influenza mimics the same symptoms as COVID-19. (9T139:16-19) Dr. Peter testified "people die from the flu." (9T119:9-13) Dr. Peters testified that, upon his admission to the hospital on April 3, 2020, Plaintiff was diagnosed with influenza A. (9T143:10-24) Dr. Peters testified that on the date of Plaintiff's death, one of the impressions was influenza A, meaning he had the flu. (9T141:11-142:4)

Here, Plaintiff has no treating physician or other medical doctor to provide the requisite medical causation opinion that COVID-19 caused the Decedent's death. In pretrial discovery, Plaintiff did not amend her interrogatories to assert any treating doctor from the ER as an expert or treating physician who would testify on her behalf with respect to medical causation, noting only that Edward

Peters, DMD, SM, ScD would be an expert on her behalf. (Pa41; Pa54; Pa59; Pa60; Pa68) Dr. Peters is not a medical doctor. (9T33:5-8) The trial court correctly prohibited Dr. Peters from offering medical opinions. **(**9T100:23-101:12) Dr. Peters confirmed that epidemiology looks at populations and that epidemiologists are not medical doctors who "look at the individual." (9T32:6-32:22). The Decedent's death certificate was properly barred, and any medical records are inadequate to prove causation. Because PATH has pointed to an alternative cause of Plaintiff's death – influenza, which mimics the symptoms of COVID-19 and can be deadly – the medical causation in this case is disputed, complex, and beyond the ken of the average juror. Accordingly, expert testimony is required to prove medical causation and, because Plaintiff lacks it, summary judgment was appropriate.

POINT IV

PETERS OPINION THAT DECEDENT GOT COVID-19 FROM MARTINEZ WAS NOT ADMISSIBLE BECAUSE HE DID NOT HAVE THE FACTS REQUIRED TO GIVE SUCH AN OPINION AND DID NOT FOLLOW HIS OWN METHODOLOGY (13T8:6-21)

Appellate courts afford substantial deference to the trial court's evidentiary rulings and only reverse for abuse of discretion. State v. Cole, 229 N.J. 430, 449 (2017). The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend, 221 N.J. at 52 (citing Berry, 140 N.J. at 293). When reviewing decisions under that deferential

standard, an appellate court "should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" State v. Kuropchak, 221 N.J. 368, 385–86 (2015) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Here, the trial court correctly found that Dr. Peters' testimony was a not admissible to prove that the Decedent got COVID-19 from Martinez.

In this regard, Dr. Peters testified the Decedent could have gotten COVID-19 from anyone, could have gotten it from work, could have gotten it from someone wearing a mask, could have gotten it even if the Decedent was wearing a mask, could have gotten it from someone who did not have symptoms, and he could have gotten it from someone who did have symptoms. (9T147:8-148:1) Dr. Peters did not rule out these other exposures and did not employ the same methodology that he employed for ruling in the one purported exposure to Martinez to rule out any other exposures. (9T148:22-149:16; 9T149:22-150:10) Accordingly, his methodology is flawed, and his opinion is inadmissible.

"An expert's conclusion 'is excluded if it is based merely on unfounded speculation and unquantified possibilities" because "when an expert speculates, 'he [or she] ceases to be an aid to the trier of fact and becomes nothing more than an additional juror,'" thereby affording no benefit to the fact finder. Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997); Jimenez v.

GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)); see also Ehrlich v. Sorokin, 451 N.J. Super. 119, 134 (App. Div. 2017) ("The net opinion rule is a prohibition against speculative testimony." A judge should not admit expert testimony "if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 299 (App. Div. 1990).

Here, Dr. Peters, neither possessed the requisite facts nor employed an appropriate methodology to conclude that the Decedent contracted COVID-19 from Martinez. Dr. Peters concluded that "it was "highly probable" that the Decedent acquired COVID-19 "through his close contact hugging of Mr. Martinez, who we suspect at that time was infected with COVID," although he testified you "cannot say that with any certainty," but it was "very likely that that is the situation." (9T112:3-21) Dr. Peters based his opinion that Mr. Martinez had COVID-19 at that time based on Mr. Martinez's "antibody test and some of the clinical information available in mid-March" and that Mr. Martinez gave the Decedent COVID-19 because he "was ill and they were in very close contact. They worked together, they hugged." (9T125:20-23; 9T157:12-17)

Thus, the basis of Dr. Peters' causation opinion is that Mr. Martinez had a positive COVID-19 antibody test several months later, had COVID-19 like symptoms at the time he hugged the Decedent, and had close contact with the Decedent. Although Dr. Peters "ruled in" Mr. Martinez as a source of infection, he did not properly "rule out" other known causes. (9T145:15-148:1, 9T149:18-21) Accordingly, his opinion lacks sufficient methodology to be admissible or reliable.

The New Jersey Supreme Court has opined on how an expert employs appropriate methodology with respect to a differential diagnosis:

> The first step in properly conducting a differential diagnosis is for the expert to rule in all plausible causes for the patient's condition by compiling a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration. At this stage, the issue is which of the competing causes are *generally* capable of causing the patient's symptoms or mortality. A differential diagnosis that rules in a potential cause that is not so capable or fails to consider a plausible hypothesis that would explain the condition has not been properly conducted. Including even rare entities in the list ensures that such disorders are not overlooked.
> Second, after the expert rules in plausible causes, the expert then must rule out those causes that did not produce the patient's condition by engaging in a process of elimination, eliminating hypotheses on the basis of a continuing examination of the evidence so as to reach a conclusion as to the most likely cause of the findings in that particular case. An expert need not conduct every possible test to rule out all possible causes of a patient's [injury], so long as he or she employed sufficient diagnostic techniques to have good grounds for his or her conclusion.

Creanga v. Jardal, 185 N.J. 345, 356 (2005) (citations and quotations omitted). "A court is justified in excluding evidence if an expert 'utterly fails ... to offer an explanation for why the proffered alternative cause' was ruled out." Ibid. (citations omitted). "In rejecting the alternative hypotheses, the expert must use "scientific methods and procedures" and justify an elimination on more than "subjective beliefs or unsupported speculation." Ibid. "And in a differential etiology, the doctor rules in all the potential causes of a patient's ailment and then by systematically ruling out causes that would not apply to the patient, the physician arrives at what is the likely cause of the ailment." Myers v. Illinois Cent. R. Co., 629 F.3d 639, 644 (7th Cir. 2010) (differential etiology determines what caused a patient's illness). Even when an expert appropriately rules in a specific cause, his failure to rule out alternative causes, as required under differential diagnosis methodology, must be rejected. Id. at 680; Wills, 379 F.3d at 50 (noting that an expert's opinion suffered from a "fatal flaw" when he acknowledged that cigarettes and alcohol were risk factors for developing squamous-cell carcinoma but "failed to account for these variables in concluding that decedent's cancer was caused by exposure to toxic chemicals such as benzene and PAHs").

Importantly, "when an individual is exposed to two or more risk factors, the same method for both risk factors would have to be applied in order to assess

the risk attributable to each of those risk factors." Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584, 610 (D.N.J. 2002), aff'd, 68 F. App'x 356 (3d Cir. 2003). "In rejecting alternative hypotheses, the expert uses scientific methods and procedures and justifies an elimination on more than subjective beliefs or unsupported speculation. (Pa103-Pa110) J.M. v. T.F., No. A-2621-16T4, 2019 WL 237543, at *7 (N.J. Super. Ct. App. Div. Jan. 17, 2019) (citations and quotations omitted).

As part of his epidemiological methodology, Dr. Peters rules in certain causes of a disease and rules out other causes to make his studies more accurate. (9T27:24-30:1) Dr. Peters testified that the Decedent went to work, grocery stores, and took New Jersey Transit trains to work. (9T145:15-146:1) Dr. Peters testified that the Decedent could have gotten COVID-19 somehow else besides his exposure to Mr. Martinez, but he "did not rule it out. I mean, it – it all – it's a factor." (9T146:23-147:7) Dr. Peters testified the Decedent could have gotten COVID-19 from anyone, could have gotten it from work, could have gotten it from someone wearing a mask, could have gotten it even if the Decedent was wearing a mask, could have gotten it from someone who did not have symptoms, and he could have gotten it from someone who did have symptoms. (9T147:8-148:1)

Dr. Peters testified that there were no other exposures provided to him to rule in or rule out. (9T148:17-21) Crucially, although Plaintiff left his home, saw other human beings, was on crowded PATH trains, and worked with other co-workers, he did not rule out these exposures as a source of Plaintiff's COVID-19 infection. (9T148:22-149:16) Dr. Peters testified he did not know if any of the people that he did not rule out did or did not have COVID-19 at that time. (9T149:18-21) Dr. Peters did not know if any of those people had a PCR test, a rapid test, or blood test for COVID-19. (9T149:22-150:10) Dr. Peters testified it is impossible to eliminate any of them as the smoking gun to any reasonable degree of certainty. (9T151:6-13) Dr. Peters testified that he did not do any statistical analysis of the data for New York and New Jersey in early March 2020 to rule in or rule out anything with regard to the Decedent. (9T152:14-153:3)

Accordingly, he did not employ the same methods he used to rule Mr. Martinez in as the source of the Decedent's infection – symptoms, a positive test months later, and close contact – to rule out other exposures. And with good reason – as he testified doing so was impossible. He ruled Mr. Martinez in because he had a positive COVID-19 antibody test five months after the incident, had COVID-19 like symptoms at the time of the incident, and because he had close contact with the Decedent. Yet, he did not and could not employ

this methodology to rule in or rule out other potential COVID-19 exposures Plaintiff had. "When an individual is exposed to two or more risk factors, the same method for both risk factors would have to be applied in order to assess the risk attributable to each of those risk factors." Magistrini, 180 F. Supp. 2d at 610. Here, the Decedent was exposed to numerous other potential sources of COVID-19 infection in early March 2020 beside the one-time hug by Mr. Martinez. Dr. Peters did not rule these other sources out and did not employ the same methodology he used to rule in Martinez as a source of exposure to rule out these other sources.

Accordingly, the trial court correctly held that Dr. Peters' opinion is a net opinion that should be excluded. Absent this required evidence, summary judgment was appropriately granted by the trial court.

POINT V

DR. PETERS IS NOT QUALIFIED TO GIVE A CAUSATION OPINION THAT THE DECEDENT CONTRACTED COVID-19 FROM JUAN MARTINEZ (13T7:25-8:5)

It is well-settled that:

> epidemiology is the study of disease occurrence in human populations. Epidemiology studies the relationship between a disease and a factor suspected of causing the disease, using statistical methods to determine the likelihood of causation. By comparison to the clinical health sciences, which are directly concerned with diseases in particular patients, epidemiology is concerned with the statistical analysis of disease in groups of patients.

Landrigan v. Celotex Corp., 127 N.J. 404, 415–16 (1992) (quotations and citations omitted). "[E]pidemiology focuses on the question of general causation, that is, whether the agent under study is capable of causing disease, and does not focus on specific causation in a particular individual." In re Accutane Litig., 234 N.J. 340, 352 (2018) (quotations and citations omitted). General causation is whether an agent is capable of causing a particular illness in the general population, while specific causation is whether the agent caused a particular individual's illness. Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 351 (5th Cir. 2007).

According to Dr. Peters, epidemiology is "the basic science of public health. Really what epidemiologist do is we study the distribution and determinance of disease and injury in populations. So what is distribution? Person, place, and time. Who gets it? Why do they -- and, you know, who's affected, right? So the other part of determinance, what causes disease. So we have projects, research, surveillance, that describes the patterns of disease in populations, as well as research that looks at what causes disease, the determinance." (9T9:3-16) Dr. Peters confirmed that epidemiology looks at populations and that epidemiologists are not medical doctors who "look at the individual." (9T32:6-32:22) Dr. Peters testified that he did not do any statistical

analysis of the data for New York and New Jersey in early March 2020 to rule in or rule out anything with regard to the Decedent. (9T152:14-153:3)

Accordingly, Dr. Peters is not qualified to give a specific causation opinion that Mr. Martinez gave the Decedent COVID-19. As stated above, he performed no recognized or reliable methodology to scientifically arrive at his conclusions. As an epidemiologist, he conducted no method – statistical or otherwise – to render his conclusions reliable and he is not qualified to render a specific causation opinion as epidemiologist only deal with whether a given population is more susceptible to contracting disease which, as discussed above, is a general, not specific, causation opinion. Absent this required evidence, summary judgment is appropriate.

CONCLUSION

Defendant respectfully submits that the trial court properly held that Plaintiff needed an expert on the appropriate standard of care and an expert on medical causation and that his epidemiological expert put forth a net opinion and, accordingly, summary judgment was properly granted.

Port Authority Law Department
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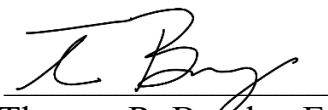
By: 
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SHEILA ELIJAH, ADMINSTRATRIX AD PROSEQUENDUM AND GENERAL ADMINISTRATRIX OF THE ESTATE OF ROBERT ELIJAH, DECEASED, Plaintiff-Appellant, v. PORT AUTHORITY TRANS-HUDSON CORPORATION, Defendant-Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-002335-23** CIVIL ACTION On Appeal from an Order of the Law Division, Hudson County, granting summary judgment dated February 20, 2024 Docket No. HUD-L-2137-20 Sat Below: Hon. Anthony V. D'Elia, J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF THE APPEAL

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TABLE OF CONTENTS – REPLY BRIEF

	Page
TABLE OF CONTENTS – REPLY BRIEF	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS	ii
TABLE OF TRANSCRIPT DESIGNATIONS	ii
TABLE OF CONTENTS - APPENDIX	iii
TABLE OF AUTHORITIES	viii
LEGAL ARGUMENT	1
POINT I: **DEFENDANT DOES NOT DISPUTE THAT THE TRIAL COURT DECIDED THE SUMMARY JUDGMENT MOTION USING THE WRONG STANDARD.**	1
POINT II: **PLAINTIFF DID NOT NEED AN EXPERT TO ESTABLISH THAT PATH'S WITHDRAWAL OF STANDARD PPE IN THE FACE OF INCREASED RISK OF HARM CONSTITUTED A FAILURE TO PROVIDE A SAFE WORKPLACE.**	4
POINT III: **CDC GUIDELINES ARE NOT THE STANDARD OF CARE, AND COMPLIANCE DOES NOT JUSTIFY SUMMARY JUDGMENT.**	8
POINT IV: **DEFENDANT IGNORES THAT PLAINTIFF HAD SUFFICIENT PROOF OF MEDICAL CAUSATION TO PROCEED.**	10
CONCLUSION	15

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	Page
Order granting summary judgment, filed February 20, 2024	1a
Reasons on the record, dated February 16, 2024	13T15:5

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Decision dated April 4, 2022

2T – Transcript of Hearing dated May 13, 2022

3T – Transcript of Trial dated October 4, 2023

4T – Transcript of Trial dated October 5, 2023 (vol. 1)

5T – Transcript of Trial dated October 5, 2023 (vol. 2)

6T – Transcript of Trial dated October 10, 2023 (vol. 1)

7T – Transcript of Trial dated October 10, 2023 (vol. 2)

8T – Transcript of Trial dated October 11, 2023

9T – Transcript of Trial dated October 12, 2023 (vol. 1)

10T – Transcript of Trial dated October 12, 2023 (vol. 2)

11T – Transcript of Trial dated October 16, 2023

12T – Transcript of Trial dated October 17, 2023

13T – Transcript of Hearing dated February 16, 2024

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 1 – Pa1 to Pa157)

	Page
Order granting summary judgment, filed September 25, 2023	1a
Complaint, filed June 11, 2020	2a
Exhibit 1 to Complaint, Letters of Administration ad Prosequendum, dated June 8, 2020	13a
Answer of Porth Authority Trans-Hudson Corporation, filed July 30, 2020	14a
Order denying Summary Judgment, filed April 4, 2022	24a
Order denying reconsideration of Order denying Summary Judgment, filed May 13, 2022	25a
Notice of Motion for Summary Judgment, filed November 17, 2023	26a
Statement of Undisputed Material Facts, filed November 17, 2023	28a
Certification of Thomas R. Brophy, filed November 17, 2023	38a
Exhibit A to Certification, Complaint, filed November 17, 2023 (omitted here – see Pa2)	--
Exhibit B to Certification, Excerpts from Transcript of Trial dated October 5, 2023 (vol. 1), filed November 17, 2023 (omitted here – see 4T)	--
Exhibit C to Certification, PATH's Interrogatories, filed November 17, 2023	41a
Exhibit C to Certification, PATH's Request for Production, filed November 17, 2023	54a

	Page
Exhibit D to Certification, Letter dated April 14, 2021, filed November 17, 2023	59a
Exhibit D to Certification, Plaintiff's Responses to Interrogatories, filed November 17, 2023	60a
Exhibit D to Certification, Plaintiff's Responses to Request for Production, filed November 17, 2023	68a
Exhibit E to Certification, Excerpts from Transcript of Trial dated October 4, 2023, filed November 17, 2023 (omitted here – see 3T)	--
Exhibit F to Certification, Excerpts from Transcript of Trial dated October 4, 2023, filed November 17, 2023 (omitted here – see 2T)	--
Exhibit G to Certification, Excerpts from Transcript of Trial dated October 10, 2023 (vol. 1), filed November 17, 2023 (omitted here – see 6T)	--
Exhibit H to Certification, Excerpts from Transcript of Trial dated October 11, 2023, filed November 17, 2023 (omitted here – see 8T)	--
Exhibit I to Certification, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 1), filed November 17, 2023 (omitted here – see 9T)	--
Exhibit J to Certification, Excerpts from Transcript of Trial dated October 16, 2023, filed November 17, 2023 (omitted here – see 11T)	--
Exhibit K to Certification, Cordero v. N.J. Transit Rail Ops., Inc., No. A-3646-21 (N.J. App. Div. Sep. 5, 2023)	71a
Exhibit L to Certification, Kowalewski v. Port Auth. Trans-Hudson Corp., A-5051-11 (N.J. App. Div. June 7, 2013)	76a
Exhibit M to Certification, Bass-Bey v. N.J. Transit Rail Ops., Inc., A-4706-04 (N.J. App. Div. July 28, 2006)	85a

Page

Exhibit N to Certification, Dhillon v. Princess Cruise Lines, Ltd., No. 2:20-cv-11661 (C.D. Cal. Feb. 18, 2022), aff'd, No. 22-55215 (9th Cir. Sep. 5, 2023) 90a

Exhibit O to Certification, Whaley v. Norfolk S. Ry. Co., No. 4:14-cv-0108 (N.D. Ga. June 2, 2015) 95a

Exhibit P to Certification, J.M. v. T.F., No. A-2621-16 (N.J. App. Div. Jan. 17, 2019) 103a

Plaintiff's Answer to Statement of Undisputed Facts, filed January 11, 2024 111a

Certification of Don P. Palermo, Jr., filed January 11, 2024 137a

Exhibit A to Certification, Complaint dated June 11, 2020, filed January 11, 2024 (omitted here – see Pa2) --

Exhibit B to Certification, Excerpts from Transcript of Trial dated October 5, 2023 (vol. 1), filed January 11, 2024 (omitted here – see 4T) --

Exhibit C to Certification, Excerpts from Transcript of Trial dated October 4, 2023, filed January 11, 2024 (omitted here – see 3T) --

Exhibit D to Certification, Affidavit of Service dated October 12, 2023, filed January 11, 2024 141a

Exhibit D to Certification, Affidavit of Due Diligence dated October 12, 2023, filed January 11, 2024 142a

Exhibit E to Certification, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 1), filed January 11, 2024 (omitted here – see 9T) --

Exhibit F to Certification, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 2), filed January 11, 2024 (omitted here – see 10T) --

	Page
Exhibit G to Certification, Excerpts from Transcript of Trial dated October 5, 2023 (vol. 2), filed January 11, 2024 (omitted here – see 5T)	--
Exhibit H to Certification, Excerpts from Transcript of Trial dated October 16, 2023, filed January 11, 2024 (omitted here – see 11T)	--
Exhibit I to Certification, Excerpt from CDC Guidelines and Recommendations: A CDC Primer, filed January 11, 2024	144a
Exhibit J to Certification, Excerpt from Occupational Health and Safety Administration, section 4, filed January 11, 2024	148a
Exhibit K to Certification, April 4, 2022, Transcript of Decision dated April 4, 2022, filed January 11, 2024 (omitted here – see 1T)	--
Exhibit L to Certification, Transcript of Hearing dated May 13, 2022, filed January 11, 2024 (omitted here – see 2T)	--
Exhibit M to Certification, Excerpts from Transcript of Trial dated October 17, 2023, filed January 11, 2024 (omitted here – see 12T)	--
Exhibit N to Certification, Excerpts from Transcript of Trial dated October 10, 2023 (vol. 2), filed January 11, 2024 (omitted here see 7T)	--
Exhibit A to Sur-Reply, Excerpts from Transcript of Trial dated October 10, 2023 (vol. 1), filed January 17, 2024 (omitted here – see 6T)	--
Exhibit B to Sur-Reply, Email dated March 9, 2020, filed January 17, 2024	150a
Exhibit C to Sur-Reply, Excerpts from Transcript of Trial dated October 11, 2023, filed January 17, 2024 (omitted here – see 8T)	--
Exhibit D to Sur-Reply, Excerpts from Transcript of Trial dated October 16, 2023, filed January 17, 2024 (omitted here – see 11T)	--

	Page
Exhibit E to Sur-Reply, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 1), filed January 17, 2024 (omitted here – see 9T)	--
Exhibit F to Sur-Reply, Excerpts from Transcript of Trial dated October 12, 2023 (vol. 2), filed January 17, 2024 (omitted here – see 10T)	--
Exhibit G to Sur-Reply, Excerpt from Transcript of Trial dated October 17, 2023, filed January 17, 2024 (omitted here – see 12T)	--
Notice of Appeal, filed April 5, 2024	151a
Statement of Summary Judgment Motion Record	154a

TABLE OF AUTHORITIES

Cases	**Pages**
Allenbaugh v. BNSF Rwy. Co., 832 F. Supp. 2d 1260 (E.D. Wash. 2011)	8
Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803 (6th Cir. 1996)	8,10
Bailey v. Central Vermont R.R., 319 U.S. 350 (1943)	9
Bey v. N.J. Transit Rail Ops., Inc., A-4706-04 (N.J. App. Div. Jul. 28, 2006)	7
Buckelew v. Grossbard, 87 N.J. 512 (1981)	14
Butler v. Acme Mkts., Inc., 89 N.J. 270 (1982)	5
Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016)	13
Cordero v. N.J. Transit Rail Ops., Inc., A-3646-21 (N.J. App. Div. Sep. 5, 2023)	7
Creanga v. Jardal, 185 N.J. 345 (2005), certif. denied, 114 N.J. 525 (1989)	13
Davis v. Brickman Landscaping, Ltd., 219 N.J. 395 (2014)	4,5,6
Geherty v. Moore, 238 N.J. Super. 463 (App. Div. 1990), appeal dismissed, 127 N.J. 287 (1991)	12
Giantonnio v. Taccard, 291 N.J. Super. 31 (App. Div. 1996)	5
Grossman v. Club Med Sales, 273 N.J. Super. 42 (App. Div. 1994)	2,12
Hines v. Consolidated Rail Corp., 926 F.2d 262 (3d Cir. 1991)	9
Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968 (8th Cir.1995)	9
Klimko v. Rose, 84 N.J. 496 (1980)	8,11,12,13

Cases	**Pages**
Kowalewski v. Port Authority Trans-Hudson Corp., A-5051-11 (N.J. App. Div. Jun. 7, 2013)	7
Nadel v. Bergamo, 160 N.J. Super. 213 (App. Div. 1978)	11
Pehowic v. Erie Lackawanna R.R. Co., 430 F.2d 697 (3d Cir. 1970)	10
Pepe v. Urban, 11 N.J. Super. 385 (App. Div.), certif. denied, 7 N.J. 80 (1951)	3,11
Polzo v. County of Essex, 196 N.J. 569 (2008)	13
Rodriguez v. Delray Connecting R.R., 473 F.2d 819 (6th Cir.1973)	9
Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500 (1957)	3,9
Rosenberg v. Tavorath, 352 N.J. Super. 385 (App. Div. 2002)	14
Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)	14
Sanzari v. Rosenfeld, 34 N.J. 128 (1961)	4,5,6
Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200 (App. Div. 1987)	2,12
Shenker v. Baltimore & O.R. Co., 374 U.S. 1 (1963)	9
Sindoni v. Consolidated Rail Corp., 4 F. Supp. 2d 358 (M.D. Pa. 1996)	8
State v. Freeman, 223 N.J. Super. 92 (App. Div. 1988)	13,14
State v. Townsend, 186 N.J. 473 (2006)	13
Stevens v. N.J. Transit Rail Ops., 356 N.J. Super. 311 (App. Div. 2003)	2,3
Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39 (2001)	7

Cases	**Pages**
United Advertising Corp. v. Metuchen, 35 N.J. 193 (1961)	2
Urie v. Thompson, 337 U.S. 163 (1949)	10
Walsh v. Consolidated Rail Corp., 937 F. Supp. 380 (E.D. Pa. 1996)	9

Constitutions	**Pages**
N.J. Const. art. I, ¶9	2

Statutes	**Pages**

Regulations	**Pages**

Rules of Court	**Pages**
Evid. R. 703	13,14
R. 1:36-3	7
R. 4:46-2	1
R. 4:46-5	11

Other Authorities	**Pages**

LEGAL ARGUMENT

POINT I

DEFENDANT DOES NOT DISPUTE THAT THE TRIAL COURT DECIDED THE SUMMARY JUDGMENT MOTION USING THE WRONG STANDARD.

Defendant, Port Authority Trans-Hudson Corporation (PATH), sets forth as "undisputed" numerous material facts that were disputed below. In doing so, it fails to address that the trial court assumed material facts based on the mistrial rather than determining the motion in accordance with Rule 4:46-2. Whether PATH breached its duty to decedent was a disputed material factual issue for a jury to decide. Neither Center for Disease Control (CDC) nor Occupational Safety and Health Administration (OSHA) guidelines immunize PATH. Those guidelines are not dipositive of whether PATH owed a duty to its employee or whether it breached its duty to Mr. Elijah. The guidelines are simply evidence relevant to the jury's determination of PATH's duty to provide a reasonably safe place to work and whether PATH breached that duty.

The trial court concluded that "no rational jury could find otherwise but that" decedent hugging his co-worker in the locker room without a mask was "the sole and only cause of him getting COVID arguably from Martinez." 13T26:21-27:10. "[Decedent's] failure to wear [a mask] in the locker room and hugging a guy and kissing him without a mask was the sole and proximate cause of the

accident." 13T27:7-10. That determination exceeded the proper role of the court generally, specifically on summary judgment and in actions under the Federal Employers Liability Act (FELA). Moreover, that determination of the disputed factual issue of proximate cause effectively denied plaintiff the benefit of all reasonable inferences as required on summary judgment and deprived her of her right to a jury of her peers.

As found on the initial motion for summary judgment and the motion to reconsider, there were numerous material facts in dispute bearing on PATH's duty, negligence and causation that precluded summary judgment. The mistrial did not change that. The court was not entitled to assume that the evidence and rulings on retrial would be the same as the first trial. Grossman v. Club Med Sales, 273 N.J. Super. 42, 52 (App. Div. 1994).

Summary judgment should not be granted where the decision of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961). Under the New Jersey Constitution, whether the facts impose liability is for a jury, not the court. N.J. Const. art. I, ¶9; see Stevens v. N.J. Transit Rail Operations, Inc., 356 N.J. Super. 311, 318-319 (App. Div. 2003). The decision denied plaintiff her

constitutional right to a jury trial and should be reversed. See Pepe v. Urban, 11 N.J. Super. 385, 389 (App. Div.), certif. denied, 7 N.J. 80 (1951) (trial judge's failure to adjourn or to grant dismissal without prejudice when plaintiff's medical expert for damages did not appear infringed plaintiff's substantial rights; new trial granted).

> *Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury* or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.

Stevens, 356 N.J. Super. at 318-19 (emphasis in original) (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506-07 (1957)). The question becomes simply whether the evidence justifies with reason the conclusion that PATH's negligence played any part, even the slightest, in causing plaintiff's damages, i.e., Robert Elijah's death. A rational jury could find that it did. The question was for the jury to decide, and summary judgment should have been denied.

POINT II

PLAINTIFF DID NOT NEED AN EXPERT TO ESTABLISH THAT PATH'S WITHDRAWAL OF STANDARD PPE IN THE FACE OF INCREASED RISK OF HARM CONSTITUTED A FAILURE TO PROVIDE A SAFE WORKPLACE.

The trial court erred by imposing a requirement to establish a standard of care by expert testimony that is not required under the FELA. The caselaw, including the caselaw cited by defendant, recognizes and acknowledges that expert testimony is normally **not** required to establish the standard of care. Although defendant does not deny the existence of their legal duty to plaintiff in general, they assert that plaintiff in this case did not adequately define the contours of that duty. Db18. Specifically, defendant contends that plaintiff must set forth the applicable standard of care and a breach of that standard through expert testimony.

In most negligence cases, the plaintiff is not required to establish the applicable standard of care. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406-07 (2014); Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961). In those cases, "[i]t is sufficient for [the] plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury[,] which is competent to determine what precautions a reasonably prudent man in the position of the defendant would have taken." Davis, 219 N.J. at 407; Sanzari, 34 N.J. at 134. Such cases involve facts about which "a layperson's

common knowledge is sufficient to permit a jury to find that the duty of care has been breached without the aid of an expert's opinion." Davis, 219 N.J. at 407; Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996).

In some cases, however, the "jury is not competent to supply the standard by which to measure the defendant's conduct," Sanzari, 34 N.J. at 134-35, and the plaintiff must instead "establish the requisite standard of care and [the defendant's] deviation from that standard" by "present[ing] reliable expert testimony on the subject." Davis, 219 N.J. at 407; Giantonnio, 291 N.J. Super. at 42. When deciding whether expert testimony is necessary, a court properly considers "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Davis, 219 N.J. at 407; Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982).

There is no need for expert testimony that taking away personal protective equipment (PPE) and ordering that PPE not be worn while around passengers may cause employees to be exposed to illnesses and to become sick. It is not simply, as defendant suggests, that no one was requiring masks at the time. Masks were standard available personal protective equipment for PATH employees before the pandemic. Defendant took that PPE from its employees and directed them not to wear masks around customers. Even when PATH changed course and allowed

masks, it declined to make them available as before and left its employees to fend for themselves.

That is not an issue unique to railways and their employees. It is the type of concern that an average person of common judgment can discern. Literally every employer and place of public accommodation would be familiar with the need to provide a safe workplace. Jurors would have no trouble considering what defendant did and what the risks and consequences of its conduct would be. The jury was fully competent "to determine what precautions a reasonably prudent man in the position of the defendant would have taken." Davis, 219 N.J. at 407; Sanzari, 34 N.J. at 134.

Defendant cites the unique circumstances of the pandemic as a basis for demanding expert testimony on the standard of care, but its reasoning is flawed. Db21. Accepting for the sake of argument that the pandemic created some esoteric standard of care, no one would be qualified to testify to the proper standard because it was unprecedented. Put another way, no "expert" would be any better able to determine what precautions a reasonably prudent man would have taken because no "expert" would have greater experience with the situation than the average juror. The expert would have no insight; they would simply be invading the province of the jury. The uniqueness of the pandemic actually renders expert testimony on the standard of care speculative. The issue should properly have been

left to the jury to determine based on its common judgment in light of the circumstances presented by the evidence.

As a preliminary matter, the unreported decisions cited by defendant "serve no precedential value, and cannot reliably be considered part of our common law." Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); see R. 1:36-3. Moreover, they are distinguishable because of the factual circumstances. Cordero v. N.J. Transit Rail Operations, Inc., A-3646-21 (N.J. App. Div. Sep. 5, 2023), dealt with proof that a door was defective. Kowalewski v. Port Authority Trans-Hudson Corporation, A-5051-11 (N.J. App. Div. Jun. 7, 2013), involved the narrow issue of cumulative trauma due to repetitive tasks. Bey v. N.J. Transit Rail Operations, Inc., A-4706-04 (N.J. App. Div. Jul. 28, 2006), also dealt with repetitive stresses leading to carpal tunnel syndrome. Notably, while distinguishable factually, all those cases acknowledge that expert testimony to establish the standard of care is **not** required in all cases.

Expert testimony is not required for a jury to conclude that withdrawing PPE indiscriminately and prohibiting employees from wearing PPE constitutes a failure to provide decedent with a reasonably safe place to work. Expert testimony is not required for a jury to conclude that instructing employees – in "safety meetings" ironically – not to wear PPE was a failure to furnish a reasonably safe place to work. Failure to take measures to address known risk factors at the workplace may

constitute a breach of the duty owed by an employer to its employees. Klimko v. Rose, 84 N.J. 496, 506 (1980); see Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803, 812 (6th Cir. 1996). That is neither novel nor limited to this defendant or this workplace. The demand for expert testimony to establish the standard of care was erroneous, and the dismissal on that basis should be reversed.

POINT III

CDC GUIDELINES ARE NOT THE STANDARD OF CARE, AND COMPLIANCE DOES NOT JUSTIFY SUMMARY JUDGMENT.

Defendant asserts, as a matter of fact and law, that PATH "complied" with CDC guidelines and, therefore, did not breach the duty owed to Mr. Elijah. Compliance with CDC guidelines is evidential, not dispositive. Industry practice may be relevant but also is never dispositive. Allenbaugh v. BNSF Rwy. Co., 832 F. Supp. 2d 1260, 1265 (E.D. Wash. 2011). "[W]hen a risk is obvious and a precautionary measure available, an industry or professional standard or custom that does not call for such precaution is not conclusive if, regardless of the standard or custom, the exercise of reasonable care would call for a higher standard, i.e., for precautionary measures." Klimko, 84 N.J. at 506.

The granting of summary judgment under the FELA demands a stringent approach. Sindoni v. Consolidated Rail Corp., 4 F. Supp. 2d 358, 361 (M.D. Pa. 1996). Under the FELA, an employer is deemed liable to its injured or killed

employee on any showing of negligence, no matter how slight. Walsh v. Consolidated Rail Corp., 937 F. Supp. 380, 382 (E.D. Pa. 1996). A FELA plaintiff need present only a minimum amount of evidence to defeat a summary judgment motion. Hines v. Consolidated Rail Corp., 926 F.2d 262, 268 (3d Cir. 1991).

A railroad has a non-delegable duty to provide its employees with a reasonably safe place to work. Shenker v. Baltimore & O.R. Co., 374 U.S. 1 (1963). The FELA establishes a duty on the part of a common carrier to use reasonable care in providing employees a safe work environment. Bailey v. Central Vermont R.R., 319 U.S. 350, 352 (1943). Ensuring that employees have proper equipment with which to perform their work assignments falls within that non-delegable duty. Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 978 (8th Cir.1995); Rodriguez v. Delray Connecting R.R., 473 F.2d 819, 821 (6th Cir.1973). The availability of safer alternative equipment is evidential on that issue. Rodriguez, 473 F.2d at 821.

Under the FELA,

> "'[T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. *It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes*, including the employee's contributory negligence.' Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) (emphasis added)."

Pehowic v. Erie Lackawanna R.R. Co., 430 F.2d 697, 699 (3d Cir. 1970); see Aparicio, 84 F.3d at 810 ("railroads have a duty to furnish employees with a 'reasonably safe place in which to work and such protection [against the hazard causing the injury] as would be expected of a person in the exercise of ordinary care under those circumstances'") (quoting Urie v. Thompson, 337 U.S. 163, 179 n. 16 (1949)). CDC guidelines and compliance is not dispositive of the issue to be decided. They are factors that may be considered by a jury, nothing more. Under the FELA and New Jersey law, the resolution of the material factual issues is reserved for the factfinder.

POINT IV

DEFENDANT IGNORES THAT PLAINTIFF HAD SUFFICIENT PROOF OF MEDICAL CAUSATION TO PROCEED.

Defendant asserts that plaintiff did not have sufficient evidence of medical causation to proceed. Db28. Similarly, for purposes of the motion for summary judgment, the trial court assumed that plaintiff would not be able to present any evidence of medical causation to a jury. 13T18:2-5. That assumption was factually and legally incorrect. During the mistrial, plaintiff did produce evidence that decedent had died from heart failure due to COVID-19. In fact, the court acknowledged that such evidence had been introduced by defendant's use of decedent's medical records. 10T292:24-293:14. Plaintiff also had the ability with

time and notice to compel the testimony of decedent's treating physician. At the time of trial, plaintiff's counsel was not able to secure the doctor's cooperation. Nonetheless, with a new trial scheduled and time to anticipate and to resolve that issue, that testimony was available to plaintiff. To deny plaintiff that opportunity was erroneous. See Klimko, 84 N.J. at 501-02; see also Nadel v. Bergamo, 160 N.J. Super. 213 (App. Div. 1978) (error to grant summary judgment when plaintiff's medical expert died; trial court should have allowed time to find new expert); Pepe, 11 N.J. Super. at 389 (trial judge's failure to adjourn or grant dismissal without prejudice when plaintiff's medical expert for damages did not appear infringed plaintiff's substantial rights; new trial granted).

For the trial court to decide as a matter of law on summary judgment that plaintiff could not establish medical causation was contrary to the summary judgment standard of review. R. 4:46-5. The reasonable inference, particularly given the efforts immediately made by plaintiff's counsel to subpoena the treating physician, was that evidence of medical causation would be provided at the retrial. In discovery, plaintiff identified, among others, "Plaintiff's medical providers at Bayshore Medical Center, 727 North Beers Street, Holmdel, NJ 07733 (see attached medical records)." Pa62. Based on that disclosure in discovery, plaintiff would have been able to call decedent's treating doctor to testify at trial regarding

his treatment, including medical causation, specifically that decedent died from heart failure related to exposure to the COVID-19 virus.

In Grossman v. Club Med Sales, 273 N.J. Super. 42, the court heard a motion for summary judgment after a mistrial and dismissed the case. The Appellate Division reversed, finding that the trial court had usurped the role of the jury as the factfinder and failed to apply the proper standard of review to the motion.

> The trial court also concluded that plaintiff had failed to establish that any negligence on the part of the defendants was a proximate cause of plaintiff's injuries. Proximate cause is, ordinarily, a factual issue. Geherty v. Moore, 238 N.J. Super. 463, 478-79 (App. Div. 1990), appeal dismissed, 127 N.J. 287 (1991). There was no reason to depart from that principle here. Whether plaintiff's proofs were insufficient to establish proximate cause was a determination for the jury to make based upon the entirety of the record. The trial court discounted, for instance, the opinion of plaintiff's expert that the lock on plaintiff's door was insufficient. It was up to the jury, however, to decide the value of that opinion.
>
> We note that although the court had the benefit of hearing actual testimony at the incomplete trial, defendants' motion, even if presented after that, remained a motion for summary judgment. As such, it should have been decided under the well-known standards governing such motions which require that "[a]ll inferences of doubt are drawn against the moving party and in favor of the opponent of the motion." Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211, (App. Div. 1987).

273 N.J. Super. at 52.

The assumption that plaintiff would be unable to provide evidence of causation denied plaintiff due process under the law. See Klimko, 84 N.J. at 501-

02; cf. Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 475 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016) ("Trial judges may be sorely tempted to spare jurors the task of hearing a cause that appears to lack merit and turn to the demands of an unyielding calendar. Still, our commitment to the fair administration of justice demands that we protect a litigant's right to proceed to trial when he or she has not been afforded the opportunity to respond to dispositive motions at a meaningful time and in a meaningful manner."). Plaintiff was entitled to proceed to trial.

Defendant also contests medical causation by arguing that Dr. Peters' opinion that Mr. Elijah contracted the COVID-19 virus from Mr. Martinez was a net opinion because he failed to rule in and to rule out other causes. Db28. Evid. R. 703 addresses the foundation for expert testimony. It mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Polzo v. County of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)).

An expert's proposed testimony should not be excluded merely "'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Creanga v. Jardal, 185 N.J. 345, 360 (2005) (quoting State v. Freeman,

223 N.J. Super. 92, 116 (App. Div. 1988), certif. denied, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing Freeman, 223 N.J. Super. at 115–16). The bases for the expert's opinion are presumptively a proper subject of exploration and cross-examination at a trial. Ibid. (citing Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)).

As stated in Evid. R. 703, an expert's opinion must be based on "facts or data * * * perceived by or made known to the expert at or before the hearing." An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, only when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Dr. Peters reviewed all the available records regarding decedent's conduct and potential exposures. He considered the timing of the known exposure, the onset of symptoms and the efforts to preclude any other exposures. He considered the environment at the time, the epidemiology of COVID-19 and the absence of evidence of exposure to the virus from other sources. Based on his education, experience and the facts and data available, he testified to a reasonable degree of certainty that Mr. Elijah contracted the COVID-

19 virus from his hug with Mr. Martinez. The question of causation is a question of fact for a jury, and the facts and opinions of plaintiff's expert are sufficient for a jury to infer a reasonable conclusion, not mere speculation.

PATH also claimed that Dr. Peters was not qualified to give an opinion of whether decedent died from the COVID-19 virus. However, at the abandoned trial, Dr. Peters reviewed and testified regarding Mr. Elijah's hospital records. The admission records reflect that the doctors diagnosed COVID-19 virus on April 3, 2020, the date of admission. 9T166:20-167:1. At the time that Mr. Elijah died, he was diagnosed as having acute respiratory distress syndrome due to the COVID-19 virus. 9T167:3-14. Presumably, that same evidence would be available for the retrial.

CONCLUSION

The evidence at the abandoned trial and on summary judgment presented disputed issues of material fact regarding PATH's breach of duty and causation. Those issues should have been decided by a jury. Summary judgment should be reversed, and the matter remanded for trial.

Respectfully submitted,

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Dated: November 6, 2024 *_/s Don P. Palermo, Jr._____*