TERRI NEWMAN and ERIC NEWMAN

Plaintiffs/Appellants,

vs.

JOSE CABRERA AND/OR JOHN DOE (HIS NAME BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF); ATEEL TRANS AND/OR "XYZ" CORPORATION", (ITS NAME BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF)

Defendants/Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 2369-24T2

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NUMBER: BER-L-8293-21

CIVIL ACTION:

Sat Below:

HON. KELLY A. CONLON, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS TERRI NEWMAN AND ERIC NEWMAN

MATTERA, MATTERA & ZISA, LLC
470 Chamberlain Avenue, Suite 6
Paterson, New Jersey 07522
(973) 595-6240
Fax: (973) 595-6237
Counsel for Plaintiffs-Appellants

NICHOLAS A. MATTERA. ESQ.,
Attorney I.D. No. 021091981
Of Counsel and On the Brief
E-Mail: nicholas.mattera@gmail.com

Date Submitted: July 3, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Court Rules

Other Authorities:

TABLE OF JUDGMENT ORDERS AND RULINGS

PRELIMINARY STATEMENT

Plaintiffs-Appellants Terri Newman and Eric Newman (collectively "Plaintiffs") seek reversal of the trial court's Denial of a Motion to Vacate the order dismissing their complaint without prejudice dated June 20, 2024 and the order dismissing their complaint with prejudice dated September 27, 2024 ("Motion to Vacate").

Plaintiff Terri Newman was seriously injured as a result of a motor vehicle accident caused by the negligence of Defendants-Respondents Jose A. Cabrera and Atteel Trans (collectively "Defendants). Plaintiff Eric Newman has asserted a per quod claim.

The trial court should have granted Plaintiff's Motion to Vacate because this office and Plaintiffs themselves had no notice of the motions that resulted in the entry of these orders due to the fact, through an honest mistake, this office did not file a substitution of attorney before the dismissal orders were entered. Importantly, this omission occurred through no fault of Plaintiffs themselves. Considerations of fairness and due process dictate that the orders of dismissal should have been vacated because Plaintiffs and their attorneys were deprived of the opportunity to oppose their entry.

Especially significant is the fact that Plaintiffs were unaware that their complaint was dismissed with prejudice and were deprived of the protections

incorporated in the court rule governing such dismissals. These protections included requirements that: (1) counsel for a plaintiff whose complaint is subject to dismissal with prejudice file an affidavit demonstrating that the plaintiff has been notified of the motion to dismiss and its legal consequences; and (2) counsel for the plaintiff personally appear at the oral argument of the motion to dismiss the complaint with prejudice. Since this office did not receive notice of Defendants' Motion to Dismiss Plaintiffs' Complaint With Prejudice, the innocent Plaintiffs were deprived of and did not have the benefit of the protections afforded by the applicable court rule.

Moreover, case law interpreting the court rule governing such dismissals establishes that an abuse of discretion occurs when a motion judge fails to "meticulously" assure that a plaintiff whose complaint is subject to dismissal with prejudice is afforded the protections afforded by the rule. It is respectfully submitted that such an abuse of discretion occurred in this matter on the part of the motion judge who dismissed Plaintiffs' complaint with prejudice. It follows that the motion judge clearly committed abused her discretion in denying the Motion to Vacate.

It is also clear that the court rules provide an ample basis for Plaintiffs' Motion to Vacate. Moreover, the fact that a limited amount of post deposition additional discovery demands made to Plaintiffs were outstanding at the time

the Motion to Vacate was heard should not have resulted in the trial court dismissing Plaintiffs' Complaint with prejudice. Both Plaintiffs attended oral argument on February 28, 2025 and were prepared to comply with any order compelling discovery entered by the court. It is respectfully submitted that the denial of Plaintiffs' Motion to Vacate the Dismissal With Prejudice despite only limited discovery being outstanding was an abuse of discretion by the trial court. The Court did not take into account *R.* 4:23-5 which is there to afford blameless Plaintiffs protections in exactly situations like the case at hand.

For these and other reasons discussed in detail below, it is respectfully submitted that the trial court's denial of the Motion to Vacate must be reversed and this matter remanded for restoration to the active trial calendar.

PROCEDURAL HISTORY

Plaintiff's complaint was filed by Joseph C. Zisa, Jr., Esq. of the Law Offices of Joseph C. Zisa, Jr., Esq. on December 20, 2021. Pa1 to Pa11. On March 10, 2022, an Answer was filed on behalf of Defendants. Pa15 to Pa19

On May 2, 2024, the Hon. John D. O'Dwyer, P.J.cv., entered an order which, among other things, extended discovery until July 19, 2024 and required that Plaintiffs respond to certain discovery demands made by Defendants. Pa38 to Pa39. On June 4, 2024, Defendants filed a Motion to

Dismiss Plaintiffs' Complaint Without Prejudice for Failure to Comply With the Court's May 2, 2024 Order or alternate relief. Pa20 to Pa40. On June 20, 2024, Judge O'Dwyer entered an order dismissing Plaintiffs' complaint without prejudice Pa41 to Pa42.

On September 10, 2024, Defendants filed a Motion to Dismiss Plaintiffs' Complaint With Prejudice. Pa43 to Pa47. A hearing on the motion took place on September 27, 2024 before Hon. Kelly A. Conlon, J.S.C. without an appearance by Plaintiffs' counsel. 1T3-1 to 1T8-13.[1] Following argument, the motion judge rendered an oral opinion and entered an order dismissing Plaintiffs' complaint with prejudice. 1T8-15 to 1T10-5; Pa48 to Pa49.

On January 15, 2025, a Substitution of Attorney was filed replacing the Law Offices of Joseph C. Zisa, Jr., Esq. with Mattera, Mattera & Zisa, LLC.. Pa50. On the same day, the undersigned filed a Motion to Vacate the order dated June 20, 2024 dismissing Plaintiffs' Complaint without prejudice and the September 27, 2024 dismissing Plaintiffs' complaint with prejudice ("Motion to Vacate"). Pa51 to Pa79. Plaintiffs supplemented the motion. Pa80 to Pa128. Defendants filed opposition to the Motion to Vacate. Pa129 to Pa190. Plaintiffs filed papers in reply to Defendants' opposition papers. Pa191 to

[1] "1T" refers to the transcript of motion proceedings that took place on September 27 2024.
"2T" referred to motion proceedings that took place on February 28, 2025.

Pa200. On February 28, 2025, oral argument was heard on Plaintiffs' Motion to Vacate. 2T5-1 to 2T49-23. The motion judge subsequently entered an order dated February 28, 2025 denying the motion with a rider explaining her reasons for denying the motion. Pa201 to Pa206.

On April 8, 2025, Plaintiffs filed a Notice of Appeal from the February 28, 2025 order. Pa207 to Pa213.

STATEMENT OF FACTS

This action arises out of a motor vehicle accident that occurred on January 16, 2020 in Closter, New Jersey involving a vehicle owned and operated by Plaintiff Terri Newman and a vehicle operated by Defendant Jose A. Cabera and owned by Atteel Trans. Pa1 to Pa2; Pa66 to Pa67. As a result of the accident, Ms. Newman sustained serious and permanent injuries to her neck, back, hip, knees and other body parts. Pa67. She underwent cervical surgery on January 7, 2022 and was advised that she needs lumbar surgery. *Ibid.* Plaintiff Eric Newman asserts a per quod claim. Pa4 to Pa5.

On December 20, 2021, a complaint on behalf Plaintiffs was filed by Joseph C. Zisa, Jr., Esq. of the Law Offices of Joseph C. Zisa, Jr., Esq. Pa1 to Pa12. While discovery proceeded in this matter, the Law Offices of Joseph C. Zisa, Jr., Esq. merged with the Law Offices of Nicholas A. Mattera, Esq. and became Mattera, Mattera & Zisa, LLC. Pa54. Mr. Zisa, however, retained his

e-Courts account and was the only attorney with access to the account. *Ibid.* Subsequent to the merger, Mr. Zisa became semi-retired and the undersigned, Nicholas A. Mattera, Esq., took over the handling of this matter on behalf of Plaintiffs. *Ibid*.

After the above-mentioned merger of the two law firms took place, this office filed a substitution of attorney in a number of cases that had been handled by the Law Offices of Joseph C. Zisa, Jr., Esq. Pa54. Through honest mistake, however, no substitution of attorney was filed in this matter before January 15, 2025. *Ibid.*. Consequently, this office did not have access to e-Court notices in this matter. *Ibid.*

Accordingly, this office never received notice of Defendants' Motion to Dismiss Plaintiff's Complaint Without Prejudice, etc. (Pa20 to Pa40), the June 20, 2024 order dismissing Plaintiffs' complaint without prejudice (Pa41 to Pa42), Defendants' motion to dismiss Plaintiffs' Complaint With Prejudice (Pa43 to Pa47) and the September 27, 2024 order dismissing Plaintiffs' Complaint with prejudice (Pa48 to Pa49). Pa55.

Furthermore, this office did not receive two court notices sent to Mr. Zisa's e-Courts account on September 17 regarding Defendants' motion to dismiss Plaintiff's Complaint with prejudice. Pa55. The document text of the first notice reads as follows:

> CLERK NOTICE: re: MOTION DISMISS WITH PREJUDICE DUE TO DISCOVERY DELINQUENCY LCV20242296964 -Plaintiffs' attorney shall file and serve an affidavit by 9/20/24 reciting that plaintiff was previously served under R. 4:23- 5(a)(1) and served with additional notification, as prescribed by Appendix II-B, of the pendency of the motion to dismiss.

Pa86. The document text of the second notice reads as follows:

> CLERK NOTICE: re: MOTION DISMISS WITH PREJUDICE DUE TO DISCOVERY DELINQUENCY LCV20242296964 -Counsel, oral argument in this matter is scheduled for Friday, September 27th, 2024, at 9:00 am in Chambers 335. Appearances are to be in person, and plaintiffs' attorney shall appear with the plaintiffs.

Pa85.

The judge hearing the Motion to Dismiss With Prejudice also stated that her chambers attempted to call Mr. Zisa about the hearing twice and left a message when deciding the underlying order to Dismiss With Prejudice. 2T13-13 to 2T13:18, 2T18-11 to 2T18-13. According to the motion judge, one of those phone calls were made on September 27, 2024, the day of the hearing on Defendant's Motion to Dismiss Plaintiff's Complaint with prejudice. 2T13-17 to 2T13-18. Although this office had call forwarding from Mr. Zisa's phone line, the undersigned never received the call. 2T34-20 to 2T34:23. Counsel for Defendants was aware that the undersigned was involved in this matter as evidenced by the notice of motions and proof of service for both the motion to

dismiss without prejudice and the motion to dismiss with prejudice. Pa20, Pa43, Pa40, Pa47.

Due to the lack of knowledge of the filing the motions to dismiss Plaintiffs' complaint without prejudice and the motion to dismiss it with prejudice along with the resulting orders, no action was taken by the undersigned's office to provide the outstanding documents or information, oppose the motions or move to reinstate this case to the active calendar. Pa57, Pa58. In the opinion granting Defendants' Motion to Dismiss Plaintiff's Complaint With Prejudice, the motion judge noted that Plaintiff's counsel did not oppose the motion, did not file the notices to Plaintiff required by *R.* 4:23-5(a) (1) & (2) and did not personally appear with Plaintiffs pursuant to the court's directive. 1T9-6 to 1T9-13.

The undersigned did not become aware that this matter was dismissed with prejudice until January 8, 2025 when Plaintiff's attorney on another case involving a subsequent accident happened to review the e-Courts case jacket. Pa60. After attempting to call Defendants' counsel, the undersigned filed a Motion to Vacate the June 20, 2024 and the September 27, 2024 orders of dismissal a week later. Pa57 to Pa58; Pa51 to Pa79.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION DENYING PLAINTIFFS' MOTION TO VACATE. (Pa201 to Pa206)

A. This office had no notice of the motions to dismiss Plaintiffs' Complaint without and with prejudice and the resulting orders.

It is undisputed that this office never received notice of Defendants' motion to dismiss Plaintiff's Complaint Without Prejudice, etc. (Pa20 to Pa40), the June 20, 2024 order dismissing Plaintiffs' complaint without prejudice (Pa41 to Pa42), Defendants' Motion to Dismiss Plaintiffs' Complaint with prejudice (Pa43 to Pa17) and the September 27, 2024 order dismissing Plaintiffs' Complaint with prejudice (Pa48 to Pa49). Pa55. This is because through honest mistake, no substitution of attorney was filed in this matter before January 15, 2025 and consequently, this office did not have access to e-Court notices in this matter. Pa54. Fairness and due process require notice and an opportunity to be heard. *See e.g. Mettinger v. Globe Slicing Mach. Co.*, 153 N.J. 371, 389 (1998); *N.J. Dept. of Labor v. Pepsi-Cola Co.*, 336 N.J. Super. 532, 536 App. Div. 2001). For this reason alone, the trial court abused its discretion in refusing to vacate the June 20, 2024 and September 27, 2024 orders.

B. Plaintiffs did not have the benefit of the critical safeguards mandated by *R.* 4:23-5(a) (2) & (3) before their complaint was dismissed with prejudice.

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

Moreover, "it is a tenet of our jurisdiction that resolution of disputes on the merits are to be encouraged rather than resolution by default for failure to comply with procedural requirements. " *St. James AME Development Corp. v. City of Jersey City*, 403 N.J. Super. 480, 484 (App. Div. 2008), *citing The Trust Co. of N.J. v. Sliwinski*, 350 N.J. Super. 187, 192(App. Div. 2002). (*citing Aujero v. Cirelli*, 110 N.J. 566, 573-74 (1988)). Therefore, the main objective of *R.* 4:23-5 is to compel discovery responses rather than dismiss a case. *A & M Farm & Garden Center v. American Sprinkler Mechanical L.L.C.*, 423 N.J. Super. 528, 534 (App. Div. 2012); *see also Zimmerman v. United Services Auto. Ass'n.*, 460 N.J. Super. 368, 374 (App. Div.1992) (the

Rule "is designed to elicit answers rather than punish the offender by the loss of his cause of action of defense").

Accordingly, *R.* 4:23-5(a)(2), mandates safeguards that must be stringently applied before complaint can be dismissed with prejudice. The Rule reads in applicable part as follows:

> With Prejudice. If an order of dismissal or suppression without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 60 days from the date of the order, move on notice for an order of dismissal or suppression with prejudice. ***The attorney for the delinquent party shall, not later than 7 days prior to the return date of the motion, file and serve an affidavit reciting that the client was previously served as required by subparagraph (a)(1) and has been served with an additional notification, in the form prescribed by Appendix II-B, of the pendency of the motion to dismiss or suppress with prejudice.*** In lieu thereof, the attorney for the delinquent party may certify that despite diligent inquiry, which shall be detailed in the affidavit, the client's whereabouts have not been able to be determined and such service on the client was therefore not made . . . ***Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party.*** The moving party need not appear but may be required to do so by the court. The motion to dismiss or suppress with prejudice shall be granted unless a Motion to Vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.

(emphasis added). This court has summarized the notice requirements imposed by *R.* 4:23-5(a) (2) as follows:

> When the aggrieved party files a motion to dismiss with prejudice, the delinquent party's attorney has two non-waivable obligations: (1) file an affidavit with the motion judge indicating that the client has been notified of the pending motion's legal consequences in accordance with the form prescribed; and (2) personally appear before the motion judge on the return date of the motion.

Thabo v. Z Transp., 452 N.J. Super. 359, 371(App. Div. 2017). The requirements exist for the protection of the client whose complaint is subject to dismissal with prejudice. These provisions were "designed as fail-safe measure to insure that the ultimate sanction is not needlessly imposed." *A & M Farm & Garden Center v. American Sprinkler Mechanical L.L.C.*, supra, 423 N.J. Super. at 537. In *Zimmerman v. United Auto Services Auto Ass'n.*, *supra*, the court observed that "client notification. . . .is at the heart of dismissal with prejudice practice. . . ." 260 N.J. Super. at 375. The "notice rules reduce the risk of depriving a blameless client of a claim because of an attorney's inattention, which is an outcome to be avoided in a judicial system that prefers resolution of disputes on the merits." *Kim v. Magarelli*, Docket No. A-2440-10T2, 2011 N.J. Super. Unpub. LEXIS 2848 (App. Div. October 3, 2011)

(Pa212 to Pa317) [2] at *9-10 *citing St. James AME Dev. Corp. v. City of Jersey City*, *supra*, 403 N.J. Super. at 483-484.

A dismissal with prejudice should not be entered without notification to the plaintiff himself or herself. *Zimmerman*, 260 N.J. Super. at 376. The *Zimmerman* court noted that

> achievement of the salutary scheme of [*Rule* 4:23-5] requires ***meticulous attention to its critical prescriptions***, and particularly to those provisions which are intended to afford a measure of protection to the party who is faced with the ultimate litigation disaster of termination of his cause.

Id. at 366-367. *See also A & M Farm & Garden Center v. American Sprinkler Mechanical L.L.C.*, *supra*, 423 N.J. Super. at 535-536 (quoting *Zimmerman*). *And see Klajman v. Fair Lawn Estates*, 292 N.J. Super. 54, 60 App. Div.1996), *quoting Suarez v. Sumitomo Chemical Co.*, 256 N.J. Super. 683, 688 (Law Div. 1991) ("'it is absolutely essential that the courts require counsel for the delinquent party to adhere to the notice and appearance provisions [of R. 4:23-5(a)(2)]; Pressler & Verniero, *Current N.J. Court Rules* (2025**)**, comment 1.5 to *R.* 4:23-5 *citing Zimmerman* ("Strict adherence to the prerequisites of . . .[*R.*

[2] Pursuant to *R.* 1:36-3, the undersigned is unaware of any unpublished opinions that contain holding that are contrary to those found in the unpublished opinions cited in this brief

4:23-5(a)] is required before an order of dismissal with prejudice may be entered).

Here, before entering an order dismissing this matter with prejudice, the court below did file notices on e-Courts (set out above) in an attempt to inform Plaintiffs' counsel that he was required (1) to file an affidavit reciting that Plaintiffs were informed of the pending motion to dismiss their complaint with prejudice and (2) that Plaintiffs' counsel was to appear in person at oral argument of the motion. Pa84 to Pa86; 1T7-15 to 1T8-1. Nevertheless, no affidavit or other indication that Plaintiffs were notified of the motion was filed and neither Plaintiffs nor Plaintiffs' counsel appeared at the hearing. 1T7-12 to 1T7-14, 1T3-24 to 1T4-1. This was, of course, owing to the fact that this office had no notice of the Motion to Dismiss Plaintiffs' Complaint With Prejudice since it did not have access to Mr. Zisa's e-Courts account. Pa54 to Pa55.

When a plaintiff's counsel fails to file an affidavit demonstrating that plaintiff was notified of the motion to dismiss with prejudice or fails to appear at the oral argument of the motion, the intent and letter of *R.* 4:23-5 requires some action of the part of the motion judge. *Thabo v. Z Transp.*, *supra*, 452 N.J. Super. at 369. *R.* 4:23-5(a)(3) reads in part as follows:

> . , . If the attorney for the delinquent party fails to timely serve the client with the original order of dismissal or suppression without prejudice, fails to file and serve the affidavit and the notifications required by this rule, or fails to appear on the return date of the motion to dismiss or suppress with prejudice, the court shall, unless exceptional circumstances are demonstrated, ***proceed by order to show cause or take such other appropriate action as may be necessary to obtain compliance with the requirements of this rule.*** If the court is required to take action to ensure compliance or the motion for dismissal or suppression with prejudice is denied because of extraordinary circumstances, the court may order sanctions or attorney's fees and costs, or both. . .

(emphasis added).

If a plaintiff's counsel fails to properly notice the client of a motion to dismiss a complaint with prejudice or fails to attend the oral argument of the motion,'" the court must adjourn the motion to a date when a proper hearing may occur.'" *A & M Farm & Garden Center v. American Sprinkler Mechanical L.L.C.*, *supra*, 423 N.J. Super. at 537, *quoting Suarez v. Sumitomo Chem. Co*., *supra*, 256 N.J. Super. at 688; *see also Klajman v. Fair Lawn Estates*, *supra*, 292 N.J. Super. at 59-60.

Rather than adjourn the Motion to Dismiss Plaintiffs' Complaint With Prejudice, the motion judge, proceeded in the absence of Plaintiffs and Plaintiffs' counsel. 1T3-24 to 1T4-1. Although she later stated during oral argument on Plaintiffs' Motion to Vacate filing an order to show cause would

be "moot" because this office was not receiving e-Courts notifications (2T13-19 to 2T13-21), such a delay, as mandated by the case law cited in the preceding paragraph, would have given the trial court the opportunity to enter an order to show cause to have Nicholas A. Mattera, Esq. appear in person. The court had received Defendants' Motion papers in support of their Motion to Dismiss Plaintiffs' Complaint With Prejudice which indicated that the undersigned, Nicholas A. Mattera, Esq. was representing the Plaintiffs. Pa43, Pa47.

At the hearing on Plaintiffs' Motion to Vacate, the motion judge indicated that the court attempted to call Mr. Zisa before the hearing on Defendants' Motion to Dismiss Plaintiffs' Complaint with Prejudice and left a message and tried to call again on the day of the hearing. 2T13-13 to 2T13-18; 2T18-11 to 2T18-13. This court has suggested that "[t]he action 'necessary to obtain compliance with the requirements of [the] rule' may be as simple as having a law clerk call the attorney for the delinquent party. . . " *A & M Farm & Garden Center v. American Sprinkler Mechanical L.L.C.*, *supra*, 423 N.J. Super. at 538, *quoting R.* 4:23-5(a)(3). In this case, however, the court below did not reach Mr. Zisa or anyone else by telephone. 2T34-20 to 2T34-25. Merely attempting to reach an attorney for the delinquent party does not comply with the requirements of the rule. *See Chen v. Pep Boys, Inc.*, Docket

No. A-5123-18T2 (App. Div. July 13, 2020) (Pa223 to Pa227) at *13-14. Certainly, if the court had reached Mr. Zisa he would have informed the court that the undersigned was handling the case on behalf of Plaintiffs.

Significantly, the undersigned's name was included in the notice of motion and proof of service for Defendants' Motion to Dismiss Plaintiffs' Complaint With Prejudice (Pa43, Pa47) as well as their Motion to Dismiss Plaintiff's Complaint Without Prejudice (Pa20, Pa40). Thus, Defendants' counsel were certainly aware of the undersigned's involvement in this case. In fact, in his certification in support of Defendants' Motion to Dismiss Plaintiffs' Complaint Without Prejudice filed on June 4, 2024, counsel for Defendant indicated that he knew that Plaintiff's counsel had merged with another law firm but that a substitution of attorney had not been filed. Pa24. Unfortunately, Defendants' counsel did not inform the court that the undersigned was representing Plaintiff, even when the court below attempted to call Mr. Zisa on the day of oral argument of the Motion to Dismiss With Prejudice with Defendants' counsel present. 2T13-17 to 2T13-18.

Moreover, *R.* 4:23-5 requires the attorney for the moving party to consult with the attorney for the delinquent party before filing a motion to dismiss without ***or*** with prejudice. *Kim v. Magarelli*, *supra*, 2011 N.J. Super. Unpub. LEXIS *4 *citing* R. 4:23-5(a)(3) and *Zimmerman v. United Services Auto*

Ass'n., supra, 260 N.J. Super. at 376. Such motions must include certification of a prior consultation. *Zimmerman*, 260 NJ. Super. at 376. In this case, neither defense counsel's certification in support of the motion to dismiss without prejudice nor his certification in support of the motion to dismiss with prejudice demonstrated that such a consultation took place. Pa22 to Pa28, Pa45 to Pa47. For this reason alone the motion to dismiss with prejudice should have been vacated.

Furthermore, the motion judge's oral opinion and order granting Defendants' Motion to Dismiss Plaintiffs' Complaint With Prejudice did not set forth any efforts that the court made to secure compliance with *R.* 4:23-5(a)(2) as required. See *A & M Farm & Garden Center v. American Sprinkler Mechanical L.L.C., supra.,* 423 N.J. Super. at 539.

At the oral argument of Plaintiff's Motion to Vacate, the court below stated that it did all that it could to secure compliance with *R.* 4:23-5(a)(2). 2T13-3 to 2T13-22. Certainly, however, it should have done more including adjourning the hearing on the motion to dismiss with prejudice to conduct further investigation to assure compliance with the rule. Since the motion papers identified the undersigned as counsel for the Plaintiffs, the court below had the information to enable it to enter an order to show cause or contact the undersigned after such investigation, if not on the day of the hearing itself.

As demonstrated above, it is respectfully submitted that in dismissing Plaintiff's complaint with prejudice, the trial court did not exhibit "meticulous attention" in applying the "critical prescriptions" of *R.* 4:23-5. *See Zimmerman v. United Servs. Auto. Ass'n*., supra, 260 N.J. Super. at 376-377. The lack of such "meticulous attention" is grounds for reversal. *See Chen v. Pep Boys, Inc., supra,* at *11.

The circumstances in this matter are the same as those in *A & M Farm & Garden Center v. American Sprinkler Mechanical, LLC, supra.* In *A & M*, the defendant's motion to dismiss plaintiff without prejudice due to failure to provide discovery responses was unopposed and granted. 423 N.J. Super. at 532-533. In the sixty days that followed, plaintiff did not provide the discovery responses or move to vacate the dismissal. *Id.* at 533. Accordingly, defendant filed a motion to dismiss plaintiff's complaint with prejudice. *Ibid.* Plaintiff's counsel filed no affidavit evidencing notice to the plaintiff and no attorney appeared on behalf of plaintiff at the oral argument of the motion as required by *R.* 4:23-5(a)(2). 423 N.J. Super. at 533. The motion to dismiss with prejudice was granted as unopposed. *Ibid.*

Plaintiff filed a motion to vacate the dismissal with prejudice and reinstate the complaint. 423 N.J. Super. at 534. At the oral argument of the motion to vacate, plaintiff's counsel acknowledged that the motion to dismiss

with prejudice had been received by his office but stated that it had not been forwarded to him. *Ibid.* The motion judge considered this to be administrative error and denied the motion. *Ibid*.

In reversing the orders dismissing plaintiff's complaint with prejudice and denying the Motion to Vacate, the *A & M* court found that the record showed two failures to comply with *R.* 4:23-5(a)(2), *i.e.* a failure to supply an affidavit evidencing notice to the plaintiff itself along with the failure to appear on the return date and no evidence of compliance with these requirements. 423 N.J. Super.at 538. Accordingly

> [t]he court had no way of knowing that plaintiff had received the protections afforded by the rule and therefore could not make an informed decision to dismiss the complaint with prejudice. Some action was required before a dismissal with prejudice was ordered.

Ibid. The court held that the trial court abused its discretion in dismissing plaintiff's complaint with prejudice despite that fact that the provisions of *R.* 4:23-5 (a) were not complied with and in denying Plaintiff's Motion to Vacate the dismissal. 423 N.J. Super. at 532.

The *A & M* court stated that if the court had called plaintiff's counsel he would have corrected the deficiency prior to the motion to dismiss with prejudice. *Id.* at 538-539. In this case, as noted above, the court below did attempt to call Mr. Zisa regarding the Motion to Dismiss Plaintiffs' Complaint

With Prejudice but did not reach him. 2T13-13 to 2T13-18, 2:18-11 to 2T18-13. Although this office had call forwarding from Mr. Zisa's phone line, the undersigned never received the call. 2T34-20 to 2T34:23.As also noted above, however, the inclusion of the undersigned's name in the motion papers as counsel for Plaintiff's, enable the court to call the undersigned or otherwise contact him.

Thus, *A & M* is controlling here because it establishes that when a plaintiff is not notified about a motion to dismiss his or her complaint due to an administrative error (such as the failure to file a substitution of attorney in this case) a dismissal of the complaint with prejudice should be vacated.

The holdings of other cases call for reversal of the trial court's denial of Plaintiff's Motion to Vacate dismissal of their complaint with prejudice

For example, in *Klajman v. Fair Lawn Estates*, *supra*, a dismissal with prejudice was reversed when plaintiff was not notified of the motion to dismiss with prejudice and there was no argument on the motion. 292 N.J. Super. at 60. Here, not only were Plaintiffs not notified of the motion to dismiss with prejudice, but there was no real oral argument on the motion since this office had no notice of it. Thus, Plaintiffs were deprived of their opportunity to be heard as was the case in *Klajman*. *See ibid.* Accordingly, the *Klajman* court

reversed the order dismissing plaintiff's complaint with prejudice and the order denying the plaintiff's motion to vacate that order. *Id.* at 62.

Similarly in *Chen v. Pep Boys*, supra, this court was "constrained to reverse" the trial courts order dismissing plaintiff's complaint with prejudice because plaintiff's counsel failed to advise plaintiff "that his lawsuit was on the brink of dismissal and the court did not take sufficient steps to obtain compliance." Pa118. Here, the trial court dismissed Plaintiff's Complaint with prejudice in the absence of filings indicating that the notices required by *R.* 4:23-5 were sent to Plaintiffs and counsel for Plaintiffs had not appeared. 1T0-6 to 1T9-13.

Finally and most importantly, the dismissal of Plaintiffs' Complaint did not result from any fault of Plaintiff's themselves. It occurred because this office did not receive notice of motion to dismiss without prejudice and the motion to dismiss with prejudice due to the honest mistake of Plaintiffs' counsel in not filing a substitution of attorney in this matter before January 15, 2025. Pa54; Pa50. Plaintiffs, like the undersigned, did not know that this matter had been dismissed until January 8, 2025. 2T5-8 to 2T5-2. Upon learning of the dismissal, Plaintiffs cooperated with the undersigned fully in the efforts to vacate the dismissal as they had throughout the litigation of his matter. 2T6-2 to 2T6-11.

Since Plaintiffs themselves were the innocent victims of an oversight on the part of their attorneys, the court below should have vacated the dismissal of their Complaint in the interest of justice. It is well established that the sins of an attorney should not be visited upon the attorney's client. *See e.g. Burns v. Belafsky*, 326 N.J. Super. 462, 471 (App. Div. 1999), *aff'd,* 166 N.J. 466 (2001); *Parker v. Marcus*, 281 N.J. Super. 589, 594 (App. Div. 1995); *Jansson v. Fairleigh Dickinson Univ.*, 198 N.J. Super. 190, 196 (App. Div. 1985).

A trial court has discretion as to whether to grant or deny a motion to reinstate a complaint that has been dismissed for failure to provide discovery. *See e.g. A & M Farm & Garden Center v. American Sprinkler Mechanical LLC*, *supra*, 423 N.J. Super. at 534. It is respectfully submitted, however, that, for the foregoing reasons, the trial court clearly abused its discretion in denying Plaintiffs' Motion to Vacate the dismissal of their complaint. This is especially so due to the trial court failure to meticulously enforce prescriptions of *R.* 4:23-5(a)(2) designed to assure that a plaintiff is given notice of the application to dismiss the plaintiff's complaint with prejudice.

POINT II

THE RULES OF COURT AND CASE LAW PROVIDED AMPLE MEANS FOR THE TRIAL COURT TO VACATE ITS JUNE 20, 2024 AND SEPTEMBER 27, 2024 ORDERS DISMISSING PLAINTIFFS' COMPLAINT. (Pa204 to Pa205)

A. A & M Farm & Garden Center v. American Sprinkler Mechanical, LLC.

A & M illustrates that where, as here, it is demonstrated that a motion court failed to enforce the requirements of *R.* 4:23-5(a)(2), it must vacate its order dismissing a complaint with prejudice. As noted above, the *A & M* court found that the record showed two failures to comply with *R.* 4:23-5(a)(2), *i.e.* a failure to supply an affidavit evidencing notice to the plaintiff itself and a failure of plaintiff's counsel to appear on the return date. 423 N.J. Super.at 538. This court concluded that the motion judge did not take sufficient action to assure compliance with the Rule. *Ibid.* Therefore, it concluded that the motion court abused its discretion in ordering the dismissal of the complaint with prejudice and erred in denying a motion to vacate the order and reversed both rulings. *Id.* at 532, 540.

B. *R.* 4:50-1.

R. 4:50-1 reads as follows:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the

> following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

An analogous example of the application of *R.* 4:50-1 in a matter such is this is found in *Christoph v. Port Auth. Of NY/NJ*, Docket No. A-5636-08T2, 2010 N.J. Super. Unpub. LEXIS 1339 (App. Div. June 18, 2010) (Pa219 to Pa222). In *Christoph*, the trial court entered an order dismissing the complaint with prejudice. 2010 N.J. Super. Unpub. LEXIS 1339 at *3. The order did not indicate that there was any opposition to the motion to dismiss with prejudice, it did not reflect that plaintiff was served with notice of the pendency of the motion and it did not indicate that plaintiff's counsel appeared on the return date of the motion. *Ibid.* Several month later, it was discovered that the attorney handling the matter on behalf of plaintiff had missed critical deadlines, lied to clients about the status of their cases, and neglected to respond to mail and telephone calls. *Id.* at *3-4.

After finding that the *Christoph* matter had been dismissed with prejudice as a result of the attorney's neglect, a motion to restore plaintiff's complaint was filed, alleging exceptional circumstances under *R.* 4:50-1 was filed. 2010 N.J. Super. Unpub. LEXIS 1339 at *4-5. The motion court denied the motion and a motion for reconsideration of the denial, finding that there were no "extraordinary circumstances" to warrant relief under *R.* 4:50-1 and case law. *Id.* at *5-6.

In reversing the orders denying Plaintiff relief under *R.* 4:50-1, the Appellate Division stated that it had

> serious concerns about the apparent non-compliance with the prerequisites for a dismissal with prejudice under *Rule* 4:23-5(a)(2), which resulted in plaintiff apparently being left in the dark that his lawsuit was about to be consigned to permanent dismissal.

2010 N.J. Super. Unpub. LEXIS 1339 at *8-9. Although the appeals court agreed with the trial court that applicable ground for relief under both *R.* 4:23-5(a)(2) and *R.* 4:50-1 is exceptional circumstances, *id.* at *12, it found that the case was

> not one of mere attorney neglect or a failure of office protocol. Instead, we seemingly have a situation in which the client apparently was deprived of the advance notice and opportunity to cure mandated by the procedures set forth in *Rule* 4:23-5(a) [footnote omitted].

Id. at *13.

Accordingly, even if the court should find that the fact that this office received no notice of the motions to dismiss through e-Courts or otherwise does not constitute exceptional circumstances, the fact that this lack of notice resulted in Plaintiffs' not being informed of the motion to dismiss with prejudice warranted relief under *R.* 4:50-1.

Similarly, in *A & M Farm & Garden Center v. American Sprinkler Mechanical, LLC, supra*, this court held the trial court abused its discretion in dismissing a complaint with prejudice due to breaches of the requirements of *R.* 4:23-5(a)(3). 423 N.J. Super. at 532. The court held that even though the inter-office failure did not constitute "extraordinary circumstances", the trial court's abuse of discretion called for the reversal of the denial of the motion to vacate the dismissal. *Id.* at 534. As discussed above, such an abuse of discretion occurred in this matter.

While the *Christoph* court did not specify which subsection of *R.* 4:50-1 was applicable in this matter, at least two subsections of the Rule could have been applied to provide relief to Plaintiff's this case. *R.* 4:50-1(a) provides for relief in cases of "mistake, inadvertence. . . and excusable neglect." This subsection has generally been liberally construed. *See Triffin v. Maryland Child Support Enforcement Admin.*, 436 N.J. Super. 621, 630 (Law Div. 2014).

Certainly, this office's failure to file a substitution of attorney before January 15, 2025 fits into this category. In *Febus v. Barot*, 260 N.J. Super. 322 (App. Div. 1992), the court found that an error in diarying a motion for summary judgment constituted excusable neglect under *R.* 4:50-1(a) "since it was 'attributable to honest mistake, accident, or any cause not incompatible with proper diligence.'" *Id.* at 326 citing *In re T.*, 95 N.J. Super. 228, 235 (App. Div. 1967). Such is the case here as the office's failure timely file a substitution of attorney in this matter was such an honest mistake.

If *R.* 4:50-1(a) does not apply, *R.* 4:50-1(f) provides for relief for "any other reason justifying relief from the operation of the judgment or order." It affords relief in "'exceptional circumstances'" and "its boundaries 'are as expansive as the need to achieve equity and justice.'" *Housing Auth. of Morristown v. Little*, 135 N.J. 274, 290 (1994) (first quoting *Baumann v. Marinaro*, 95 N.J. 380, 395 (1984) and then quoting *Palko v. Palko*, 73 N.J. 395, 398 (1977).

R. 4:50-1(f) was applied to grant relief from an order dismissing plaintiff's complaint with prejudice in *Klajman v. Fair Lawn Estate*, *supra*, a case similar to this one. In *Klajman* the trial court granted a motion to dismiss plaintiff's complaint with prejudice pursuant to *R.* 4:23-5(a)(2) without conducting a hearing, requiring plaintiff counsel's appearance or ascertaining

whether plaintiff was notified of the motion. 292 N.J. Super. at 58. The court also denied plaintiff's cross-motion to restore her complaint. *Id.* at 58-59. No explanation for either ruling was place on the record. *Id.* at 59. Finding that the trial court erred in dismissing the complaint with prejudice without requiring compliance with the "essential underpinnings" of *R.* 4:23-5(a)(2), 292 N.J. Super. at 60, this court found that "exceptional circumstances" existed for the vacating of the dismissal under *R.* 4:50-1(f). 292 N.J. Super. at 59. Since the motion judge in this case also failed to secure compliance with the "essential underpinnings" of *R.* 4:23-5(a)(2) as discussed in POINT I above, "exceptional circumstances" for the application of *R.* 4:50-1(f) also existed here.

In her opinion denying Plaintiffs' Motion to Vacate in this matter, the motion judge acknowledged that:

> An attorney's error, misconduct or incompetence may constitute exceptional circumstances under *R.* 4:50-1(f). Citing *Jansson v. Farleigh [sic] Dickinson University*, 198 N.J. Super. 190, 196 (App. Div. 1985). Specifically, there are four factors that must be considered (1) the extent of the delay, (2) the underlying reason or cause, (3) the fault or blamelessness of the litigant, and (4) the prejudice that would accrue to the other party. *Id*. at 195.

Pa202. The Supreme Court has approved the application of these factors

Aujero v. Cirelli, *supra*, 110 N.J. at 577. They continue to be applied in cases involving the application of *R.* 4:50-1(f). *See e.g. Ridge at Back Brook, LLC v. Klenert*. 437 N.J. Super. 90, 98-99 (App. Div. 2014); *Parker v. Marcus*, 281 N.J. Super. 589, 593 (App. Div. 1995), *certif. denied* 143 N.J. 325 (1996). In *Ridge at Back Brook* this court noted that:

> Appropriate applications of these factors have excused litigants from the negligence of their attorneys in failing to answer interrogatories or other discovery requests.

437 N.J. Super. at 99, *citing Jansson*, 198 N.J. Super. at 195-196.

The *Jansson* factors cited by the court below (Pa205) favored the granting of Plaintiffs' Motion to Vacate.

As to the extent of the delay, *R.* 4:50-2 provides that a motion for relief under *R.* 4:50-1 "shall be made within a reasonable time, and for reasons (a), (b) and (c) of *R.* 4:50-1 not more than a year after the judgment, order or proceeding was entered of taken." Plaintiffs' Motion to Vacate was filed on January 15, 2025, Pa51 to Pa79, a week after January 8, 2025, the day that the undersigned learned that Plaintiffs' complaint had been dismissed with prejudice. Pa57 to Pa58. Therefore, the Motion to Vacate was filed within a reasonable time and well within a year of both the June 20, 2024 and September 27, 2024 dismissal orders. This court has found that plaintiffs were entitled to relief under R. 4:50-1 when applications were made far longer after

the dismissal of complaints. *See Parker v. Marcus*, *supra*, 281 N.J. Super. at 591-592 (two and one-half years); *Klajman v. Fair Lawn Estates*, *supra*, 292 N.J. Super. at 58-59 (one year); *Jansson v. Fairleigh Dickinson Univ.*, *supra*, 198 N.J. Super. at 193 (almost three years).

As to the underlying reason or cause, this office received no notice of Defendants' Motion to Dismiss Plaintiff's Complaint Without Prejudice and their Motion to Dismiss Plaintiff's Complaint With Prejudice due to the failure of Plaintiffs' counsel to timely file a substitution of attorney in this action as discussed above. This failure was due to an honest mistake rather than any attempt to conceal or to evade.

As to the fault or blamelessness of the Plaintiffs themselves, they are entirely innocent as discussed above. In her opinion regarding Plaintiff's motion to vacate, the motion judge found that Plaintiffs were blameless regarding the tardy filing of the substitution of attorney and the resultant dismissal of their complaint. Pa205. Plaintiffs, like the undersigned, did not know that this matter had been dismissed until January 8, 2025. 2T5-8 to 2T5-2. Upon learning of the dismissal, Plaintiffs cooperated with the undersigned fully in the efforts to vacate the dismissal as they had throughout the litigation of his matter. 2T6-2 to 2T6-11.

Finally, as to the prejudice that would accrue to Defendants if the Motion to Vacate had been granted, the motion judge asked Defendants' counsel how Defendants would be prejudiced if the motion was granted. 2T31-20 to 2T31-2. The reply of Defendants' counsel did not indicate that Defendants would be unfairly prejudiced in any way by reinstatement of Plaintiffs' complaint; she merely indicated that reinstatement would require additional discovery and result in delay. 2T31-2 to 2T34-12. She made no claim that evidence or witnesses would become unavailable or that Defendants themselves be burdened in any way. Certainly, any prejudice that Defendants would incur pales in comparison to the innocent Plaintiffs' detriment if their cause of action is lost. For this reason, the motion judge wrongly concluded that reinstatement would result in "injustice" and "unjustifiable delay." Da206. Moreover, insofar as the motion judge concluded that Defendants would be prejudiced by reinstatement of Plaintiff's Complaint because the discovery period had ended (*ibid.*), discovery could have been reopened. This court has noted that "a motion judge has great discretion in the manner he or she manages a case." *Conrad v. Michelle & John, Inc.*, 394 N.J. Super. 1, 10 (App. Div. 2007).

C. *R.* 4:49-2

R. 4:49-2 reads as follows:

> Except as otherwise provided by R. 1:13-1 (clerical errors), a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than ***20 days after service of the judgment*** or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

(emphasis added). In denying Plaintiff's Motion to Vacate, the motion judge indicated that Plaintiffs could not be granted relief under *R.* 4:49-2 because the motion was filed more than 20 days after the entry of the September 27, 2024 order dismissing Plaintiffs' Complaint with prejudice. Pa204. It cannot be said, however, that this office was served with the order on September 27, 2024. Although the order provide that it was deemed to be served by e-filing on "all attorneys of record", the order also provided that "[p]ursuant to *R.* 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically, not personally in court this date, within seven (7) days of this order." Pa48 to Pa49. Since this office did not have access to Mr. Zisa's e-Courts account, it was not served on September 27, 2024. Since the Motion to Vacate was filed seven (7) days after the undersigned was made aware of the

orders of dismissal (Pa57 to Pa58; Pa51 to Pa79), it is respectfully submitted that the motion was timely for purposes of *R.* 4:49-2.

R. 4:49-2 requires that a motion made pursuant to the Rule include "a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it erred. . . " This was done in the undersigned's certification in support of the Motion to Vacate in which the undersigned stated that the motion judge failed to take appropriate action to assure compliance with R. 4:23-5(a)(2). Pa58 to Pa59.

Furthermore, *R.* 4:49-2 allows a litigant to

> "bring new or additional information to the court's attention which it could not have provided on the first application, [and] the court should in the interest of justice (and in the exercise of sound discretion) consider the evidence. . ."

Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), *quoting D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Certainly the fact that the undersigned is representing Plaintiff and had no notice of the Motion to Dismiss Without Prejudice and the Motion to Dismiss With Prejudice was new information that the undersigned was prevented from bringing to the trial court's attention before the Motion to Vacate was filed.

Accordingly, *R.* 4:49-2 as well as *R.* 4:50-1 may have served as the vehicle by which Plaintiff's Motion to Vacate may have been brought.

D. *R.* 1:1-2(a)

R. 1:1-2(a) reads as follows:

> The rules in Part I through Part VIII, inclusive, shall be construed to secure ***a just determination***, simplicity in procedure, ***fairness in administration*** and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes and, in civil cases, consistent with the case management/trial management guidelines set forth in Appendix XX of these rules.

(emphasis added).

It is respectfully submitted that, for all the reasons discussed above, the trial court abused its discretion in denying Plaintiff Motion to Vacate. Plaintiffs are innocent of any wrongdoing. They were unaware of the motion to dismiss their complaint without prejudice and the motion to dismiss it with prejudice. Since this office made an innocent mistake in not timely filing a substitution of attorney, Plaintiffs were not notified as required by *R.* 4:23-5 and their interests were not defended in opposition to the motions. Plaintiffs were not given the opportunity to comply with the discovery demands to defeat the dismissal motions and did not receive the protections afforded by *R.* 4:23-5(a)(2) including notice of the motion to dismiss with prejudice and a mandatory personal appearance by their attorney. As discussed above, the

motion judgment did not do what had to be done assure that Plaintiff had the benefit of these protections.

Accordingly, it is respectfully submitted that if the grounds for relief under *R.* 4:50-1 and *R.* 4:49-2 are not technically met, *R.* 1:1-2(a) provides for the relaxation of these and other court rules to prevent injustice. This court has observed in this context that "'justice is the polestar and our procedures must ever be moulded and applied with that in mind.'" *Parker v. Marcus*, *supra*, 281 N.J. Super. at 593, *quoting Jansson v. Fairleigh Dickinson Univ.*, *supra*, 198 N.J. *Super.* 190 at 195 (*quoting N.J. Highway Auth. v. Renner*, 18 N.J. 485, 495, (1955)).

In sum, the *Rules of Court* provided ample means for the court below to grant Plaintiffs' Motion to Vacate.

POINT III

DISCOVERY ISSUES SHOULD NOT HAVE PRECLUDED THE TRIAL COURT FROM GRANTING PLAINTIFFS' MOTION TO VACATE. (Pa205-206)

In her opinion denying Plaintiffs' Motion to Vacate, the motion judge commented that "it does seem that the plaintiffs have not been entirely compliant in producing discovery throughout the pendency of the case, resulting in multiple motions to dismiss for discovery delinquencies." Pa205. Also, in opposition to Plaintiffs' Motion to Vacate, defendants' counsel

emphasized the purported discovery deficiencies on the part of Plaintiffs during the litigation of this action. *See e.g.* Pa134, Pa136 to Pa139, 2T20-2 to 2T23-22. Such emphasis is inappropriate since, as noted above, *R.* 4:23-5 is designed to elicit discovery responses rather than to punish a delinquent party with the loss of a cause of action or defense. *Zimmerman v. United Services Auto Ass'n.*, *supra*, 460 N.J. Super. at 374.

More importantly, Plaintiff's Motion to Vacate should have been granted because Plaintiff complaint was dismissed with prejudice without their being afforded the protections provided by *R.* 4:23-5 as discuss in POINT I above. This has nothing to do with any discovery deficiency that may have existed before the Motion to Vacate was decided or at the time that it was decided. Defendants have not cited any authority that establishes that discovery demands have to be completely satisfied before a motion to dismiss a complaint with prejudice can be vacated when the essential requirements of *R.* 4:23-5 have not been enforced by the court.

Even if the Plaintiff's response to Defendants' additional post deposition discovery demands were relevant to their Motion to Vacate, Plaintiffs have responded to practically all of Defendants' discovery demands including all of the major items of discovery. They have responded to uniform interrogatories, supplemental interrogatories, provided multiple HIPAA authorizations and

responses to Defendants' Notice to Produce Documents. Pa24, Pa54. Plaintiffs' have been deposed and Plaintiff Terri Newman has undergone an independent medical examination. Pa24, Pa25, Pa54, Pa139.

As soon as Plaintiffs' counsel learned that Plaintiffs' Complaint had been dismissed with prejudice, Plaintiff's counsel, along with Plaintiffs themselves, undertook to comply with the outstanding discovery demands. 2T6-2 to T6-22. Had the undersigned received timely notice that a motion had been filed to dismiss Plaintiffs' Complaint Without Prejudice returnable June 20, 2024, he would have complied with the outstanding discovery demands before the complaint was dismissed with prejudice. Furthermore, he would have been required to notify Plaintiffs of both motions so that they could be informed and present at oral argument. Such is the design of the two-step dismissal process provided for in *R.* 4:23-5.

The June 20, 2024 order dismissing Plaintiffs' complaint without prejudice was based on Plaintiffs' failure to provide the information compelled by Judge O'Dwyer's May 2, 2024 order. Pa41 to Pa42. The September 27, 2024 order dismissing Plaintiffs' Complaint with prejudice followed from that order. Pa48 to Pa49. The May 2, 2024 order provided, among other things that:

1. Plaintiffs must provide all information requested by Defendants' counsel in his February 5, 2024 letter (Pa90);

2. Plaintiffs shall provide the addresses for Plaintiff's healthcare requested in the March 25, 2024[3] letter of Defendants' counsel (Pa92 to Pa93);
3. Plaintiffs' expert reports must be served by June 1, 2024.

Pa38 to Pa39. By the time of the February 28, 2025 return date of the Motion to Vacate, Counsel for Plaintiffs had complied with most of the discovery requests made in the February 5, 2024 and March 25, 2025 letter and exhibited a good faith effort to obtain the information and documents not produced. Pa88 to Pa128, Pa197. Moreover, Plaintiffs' expert report had been served on June 12, 2024. Pa199 to Pa200. After Plaintiffs' Motion to Vacate was denied, there was no point is providing further discovery. If this appeal is successful and the matter is reinstated, we will provide any discovery that the trial court concludes was not provided.

In a letter dated February 14, 2025, Defendants' counsel listed discovery demands which she claims were outstanding. Pa181 to Pa183. Most of these demands which were not satisfied by the subsequent provision of HIPAA authorizations by Plaintiff's counsel (Pa197) related to Plaintiff's economic claims, *i.e.* demands for materials related to income tax, social security benefits and temporary disability benefits. Pa184 to Pa186. The major part of the case, however, relates to Plaintiff Terri Newman's noneconomic damages.

[3] Erroneously referred to as "March 26, 2024." Pa39

2T11-18 to 2T11-19. In arguing in favor of Plaintiffs' Motion to Vacate, Plaintiff's counsel expressed a willingness to dismiss Plaintiff's claims for economic damages in the interest of restoring Plaintiffs' claim for noneconomic damages. 2T11-13 to 2T11-19, 2T35-23 to 2T36-2. Furthermore, the *A & M Farm & Garden Center v. American Sprinkler Mechanical, LLC* court discussed as an alternative form of relief instead of dismissal of imposing sanctions upon plaintiff's counsel if the motion court found it to be appropriate. 423 N.J. Super. at 539-540. Also included in arguing in favor of Plaintiffs' Motion to Vacate Plaintiffs' counsel expressed a willingness to pay counsel fees or costs as an alternative to depriving Plaintiffs' of their right to proceed to a jury trial.

As noted above, the ultimate sanction of dismissal of a complaint with prejudice should be imposed "'only sparingly.'" *Abtrax Pharms. v. Elkin Sinn, supra*, 139 N.J. at 514, *quoting Zaccardi v. Becker*, *supra*, 88 N.J. at 253. (1982). As also noted above, this court has said that "a motion judge has great discretion in the manner he or she manages a case." *Conrad v. Michelle & John, Inc.*, *supra*, 394 N.J. Super. at10. It said, however, "the sanction of dismissal with prejudice for a procedural violation must be a recourse of last resort." *Id.* at 11. The dismissal of a claim for failure to comply with discovery is the "last and least favorable option." *Il Grande v.*

DiBenedetto, 366 N.J. Super. 597, 624 (App. Div. 2004). As the Supreme Court has stated:

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

Zaccardi v. Becker, supra, 88 N.J. at 253 (citations omitted).

With these considerations in mind, any prejudice that may be suffered by a lack of discovery response related to economic damages could be readily cured by dismissal of Plaintiffs' claim for economic damages as suggested by the undersigned. 2T11-13 to 2T11-19, 2T35-23 to 2T36-2. In the interest of justice and the protection of the rights of the innocent Plaintiffs, the motion judge could have vacated the dismissal of Plaintiff's complaint with respect to noneconomic damages.

Alternatively the court, if finding it appropriate, could have sanctioned Plaintiffs' counsel which would include an award of counsel fees and costs to defense counsel. Plaintiff's counsel suggested to the court below that such sanctions could be imposed. Pa66; 2T45-21 to 2T46-2, 2T48-17 to 2T48-22, 2T25-15 to 2T51-16. Indeed, case law support the imposition of sanctions such as attorneys fees as alternative to dismissal with prejudice under circumstance such as those in this case. *See A & M Farm & Garden Center v. American*

Sprinkler Mechanical, LLC, supra, 423 N.J. Super. at 539-540; *Chen v. Pep Boys, supra*, 2020 N.J. Super. Unpub. LEXIS 1387 at *15.

The motion judge's failure to impose sanctions or other measures that would not punish the innocent Plaintiffs and instead opting for the retention of the ultimate sanction of dismissal with prejudice constituted an abuse of discretion. *See Georgis v. Scarpa*, 226 N.J. Super. 244, 251 (App. Div. 1988) ("If a lesser sanction than dismissal suffices to erase the prejudice to the non-delinquent party, dismissal of the complaint is not appropriate and constitutes an abuse of discretion"). The options of reversing the trial court's denial of the Motion to Vacate with the dismissal of Plaintiffs' claim for economic damages as well as awarding fees and costs to counsel for Defendants is, of course, open to this court.

Alternatively, if this court reverses the trial court's denial of the Motion to Vacate, Defendant could move in limine to bar any evidence or claims to cure any prejudice that they may perceive results from any deficiency in discovery responses.

In sum, the discovery deficiencies claimed by Defendants should not have precluded the trial court from granting Plaintiff's Motion to Vacate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court's order dated February 28, 2025 denying the motion of Plaintiffs Terri Newman and Eric Newman to vacate the orders dated June 20, 2024 and September 27, 2024 should be reversed and this matter restored to the active trial calendar.

Respectfully submitted,
LAW OFFICES OF MATTERA,
MATTERA & ZISA, LLC
Attorneys for Plaintiffs-Appellants
Terri Newman and Eric Newman

By: /s/ Nicholas A. Mattera
Nicholas A. Mattera, Esq.

Dated: July 22, 2025

SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION
Docket No. A-002369-24T02

TERRI NEWMAN and ERIC NEWMAN Plaintiffs/Appellants vs. JOSE A CABRERA and/or JOHN DOE his name being fictitious and unknown to Plaintiff, ATTEEL TRANS and/or XYZ CORPORATION: Its name being fictitious and unknown to Plaintiff Defendants/Respondents:	: ON APPEAL FROM AN ORDER : FROM THE SUPERIOR COURT : OF NEW JERSEY : LAW DIVISION: BERGEN COUNTY : Docket No. BER-L-8293-21 : Sat Below: HON. KELLY A. CONLON, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS JOSE CABRERA AND ATEELL TRANS.

FISHMAN McINTYRE LEVINE
SAMANSKY, PC
120 Eagle Rock Avenue
East Hanover, New Jersey 07936
973-560-9000
Fax: 973-560-0060
Counsel for Defendants-Respondents

CASSANDRA A. WILLOCK, ESQ.
Attorney I.D. 038311998
Of Counsel/On the Brief
Date Submitted: September 24, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Rules

TABLE OF JUDGEMENTS AND ORDERS

Procedural History

On December 20, 2021, the Law Offices of Joseph C. Zisa, Jr. Esq. filed a complaint on behalf of plaintiffs alleging personal injury resulting from a motor vehicle accident that occurred on or about January 16. 2020. Pa1-11. Defendants filed an answer on March 10, 2022. Pa125-19. From September, 2022 through April, 2024, defendants filed seven motions, including two Motions to Dismiss for failure to provide discovery on September 20, 2022 and December 20, 2023; Motions to Extend and Compel Discovery on November 30, 2022, February 1, 2023; August 16, 2023, November 26, 2023, and April 10, 2024. Pa131 ¶5-9, ¶11; Pa132, ¶ 15-16; Pa176 LCV20223383712 LCV20224090249, LCV2023420982, LCV20232254277, LCV20233494346; LCV20233691243, LCV2024920664.

Defendants' motion to compel and extend discovery demanded on February 5, 2024 was returnable on May 2, 2024. Pa154-162. On that date, the parties appeared for oral argument before Presiding Judge John D. O'Dwyer, who entered an order compelling plaintiff to the outstanding discovery on or before May 10, 2024. Pa132 -133, ¶17-18; Pa 155-162; Pa164; Pa165 – 173. Plaintiffs failed to provide discovery, and defendants filed a motion to dismiss plaintiff's complaint, or in the alternative, for an order compelling the outstanding discovery and extending discovery. Pa20a-29. The court entered an order

dismissing plaintiff's complaint without prejudice pursuant to R.4:23-5(a)(1) and R 4:23-2(b)(3) on June 20, 2024. Pa41. Plaintiffs failed to provide discovery within 60 days, and defendants filed a motion to dismiss plaintiffs' complaint with prejudice. Pa43-47. The court held oral argument and entered an order dismissing plaintiff's complaint pursuant to R. 4:23-5(a)(2) on September 27, 2024. Pa48-50; 1T.

On January 15, 2025, plaintiff filed a motion to vacate the orders of dismissal of September 27, 2024 (with prejudice) and June 20, 2024 (without prejudice) and restore plaintiff's complaint to the trial calendar. Pa51-79. Defendants' submitted opposition on or about February 19, 2025. Pa129-190. The Honorable Kelly A. Conlon, J.S.C. heard oral argument and entered an Order and Rider to Order denying plaintiffs' motion on February 28, 2025. 2T; Pa201-206.

Plaintiffs filed an appeal of Judge Conlon's order on April 8, 2025. Pa207-213.

COUNTER STATEMENT OF FACTS

This action arises out of a motor vehicle accident which occurred on or about January 16, 2020. Plaintiffs' complaint was filed on December 20, 2021 by Joseph C. Zisa Jr., Esq. of the Law Offices of Joseph C. Zisa, Jr. Pa1-11. Defendants filed an answer on March 10, 2022. Pa125-19. Ibid. Defendants'

filed a Motion to Dismiss Plaintiff's Complaint for Failure to Provide Answers to Uniform Interrogatories and Supplemental Interrogatories and Defendants' Notice to Produce pursuant to R. 4:23-5(a)(1) returnable October 21, 2022, which was ultimately withdrawn when plaintiffs provided the outstanding discovery. Pa131 ¶5; Pa176 LCV20223383712; LCV20223567737. Defendants' filed motions to extend discovery on February 1, 2023 and August 8, 2023, which were granted. Pa30-31; Pa32-33; Pa131 ¶6.

After plaintiff's depositions were scheduled and adjourned on 6 separate occasions, defendants filed a motion to Extend Discovery and Compel Plaintiffs' Depositions. Pa131 ¶7; Pa176, LCV20233494348. On December 15, 2023, The Honorable Anthony R. Suarez, J.S.C. entered an Order compelling the plaintiffs' depositions and granting these defendants authority to file a motion to dismiss plaintiffs' complaint should plaintiffs fail to appear for depositions. Pa 34-35; Pa131,¶8.

When plaintiffs failed to appear for the court-ordered depositions, on December 20, 2023, defendants' filed a motion to compel plaintiffs' depositions and extend discovery, or in the alternative, to dismiss plaintiff's complaint for failure to appear for depositions and comply with the court's December 15, 2023 order. Pa 131, ¶9; Pa176, LCV20233684446.

At some time not disclosed by plaintiffs' counsel, The Law Offices of Joseph C. Zisa, Jr., Esq. "merged" with the law firm of Mattera, Mattera & Zisa, LLC. Pa53, ¶6; Pa145. No substitution of attorney was filed. Pb5-6; Pa53, ¶6. The court issued a notice via eCourts that defendants' motion to dismiss filed on December 20, 2023 was rescheduled to January 19, 2024. Pa143. This notice was served on plaintiffs' counsel via email to ZISALAWNJ@GMAIL.COM; JZISAESQ@GMAIL.COM; AND APINA.LAW@GMAIL.COM. Ibid. Despite not having filed a substitution of attorney, plaintiffs' counsel still received this notice from the court via the email addresses of "prior" counsel Joseph C. Zisa, Jr,. Esq., and in response, Nicholas A. Mattera, Esq. filed a letter with the court requesting an adjournment of defendants' motion on letterhead of Mattera, Mattera & Zisa, LLC on January 18, 2024. Pa131, ¶10; Pa146.

Plaintiffs' depositions were conducted and, based on testimony provided, defendants forwarded two letters demanding additional information and documents on February 5, 2024. Pursuant to these letters, defendants forwarded six (6) HIPAA authorizations for execution and requested:

1. Plaintiff's tax returns along with W2s, 1099s, worksheets, etc. for the tax years 2018 through 2022.
2. Copies of plaintiff's application for Temporary Disability benefits.
3. Copies of plaintiff's application for Social Security benefits.
4. The proper name and address of the physical therapy facility that visited plaintiff in her home.
5. The name and address of plaintiff's primary care physician prior to Dr. Amy Wry.

6. The name and address of the physical therapy facility in Hackensack where plaintiff visited two times for treatment to her wrist.

Pa132, ¶12; Pa147-148**.** On February 7, 2024, The Honorable Anthony R. Suarez, J.S.C. entered an Order extending discovery. Pa 36-37. Defendants followed up for the demanded discovery on February 28, 2024 and March 24, 2024. Pa132, ¶13-14.

After plaintiffs failed to provide the outstanding discovery requested, defendants filed a Motion to Adjourn the Arbitration, To Compel the discovery demanded via the correspondences of February 5, 2024 and Extend Discovery on April 4, 2024. Pa132, ¶14-16; Pa 155-162. On April 26, 2024, the court filed a CLERK NOTICE scheduling Oral Argument with The Honorable John D. O'Dwyer on May 2, 2024 and Zoom Link information, via eCourts which was emailed to ZISALAWNJ@GMAIL.COM; JZISAESQ@GMAIL.COM; AND APINA.LAW@GMAIL.COM. Pa132, ¶17; Pa164. Nicholas Mattera Jr., Esq., appeared for Oral Argument with Judge O'Dwyer on May 2, 2024. Pa133, ¶18; Pa166-173. Again, despite not filing a substitution of attorney, plaintiffs' counsel appeared for oral argument pursuant to the court's notice. Pa166-173.

During oral argument, Judge O'Dwyer addressed plaintiffs' deficiencies and delays in providing discovery. Judge O'Dwyer asked Mr. Mattera, "Has your office decided to do some discovery in this case and participate in the

process or what? Pa169, T4-14 to T4-15. Judge O'Dwyer advised that he read the certification (of defense counsel) and found "despite the fact this case has a 21 docket number, information of the plaintiff has been slow in being forthcoming…" Pa169 – 170, T4-24 to T5-2. Judge O'Dwyer asked plaintiff's counsel, "Are you planning to provide that stuff sometime soon?" Pa 170, T5-3 to T5-14. Judge O'Dwyer advised that he was going to enter an order and addressed Mr. Mattera, " And I'm not blaming you, but obviously this file has been neglected, so unless I push it might remain neglected. So we need to put it on top of the pile. Are you with me?" Pa172-173, T6-19 to T7-4. In response, Mr. Mattera advised the court "this is a case we took over from when we merged…" Pa172, T7-6 to T7-7. Judge O'Dwyer added "So tell senior to put it on top of the pile, okay?" Pa172, T7-18 to T7-19. Mr. Mattera responded "Yeah…I'll definitely get on that." Pa172, T7-20 to T7-21. Judge O'Dwyer also advised plaintiffs' counsel that he was going to sign the order requiring discovery by May 10, 2024 and requiring experts' reports due June 1, 2024, and warned "… I don't know if that works for you or not, but if it doesn't, you better file a motion right away and tell me why..." Pa171, T6-14 to T6-24. Mr. Mattera indicated he understood Judge O'Dwyer's rulings and instructions and would "definitely get on that." Pa171, T6-25; Pa172, T7-5 to T7-21.

As stated on the record, on May 2, 2024, Judge O'Dwyer entered an Order compelling the plaintiffs to produce all information requested by defendants in their February 5, 2024 letter and the addresses for plaintiff's healthcare providers requested on March 26, 2024 on or before May 10, 2024. Pa38-39; Pa171, T6-14 – T6-25. The order further allowed defendants to file a motion to dismiss plaintiff's complaint if the information was not provided, adjourned the arbitration and extended discovery. Pa38-39.

Despite Mr. Mattera's appearance at oral argument and representation that he understood Judge O'Dwyer's holding that an order would be entered to provide the discovery by May 10, 2024 and instructions to attend to the "obviously neglected" file, plaintiffs failed to provide the outstanding discovery pursuant to the court order by the required date. Pa171 - 173, T6-14 to T7-21; Pa22-23, ¶ 5-7. On June 4, 2024, twenty-five (25) days after the court ordered date for providing the outstanding discovery, defendants filed a motion dismissing plaintiffs' complaint pursuant to Rule 4:23-5(a)(1) and/or Rule 4:23-24:23-5(3) for failing to provide the discovery compelled in the May 2, 2024 Order, or in the alternative, for an order adjourning the arbitration and extending discovery. Pa20-40; Pa 20-21, ¶5-7; Pa27, ¶47. Judge O'Dwyer denied defendants' motion to compel and extend discovery and entered an order

dismissing plaintiffs' complaint pursuant to R. 4:23-5(a)(1) and Rule 4:23-2(b)(3) and on June 20, 2024. Pa41-42.

Plaintiffs failed to provide the outstanding discovery pursuant to the May 2, 2024 order, and on September 10, 2024, defendants filed a motion to dismiss with prejudice pursuant to R. 4:23-5(a)2. Pa43-47. On September 17, 2024, The Honorable Kelly A. Conlon issued a notice to plaintiff's counsel to "file and serve an affidavit by 9/20/24 reciting that plaintiff was previously served under R. 4:23-5(a)(1)" and Appendix II-B, and requiring plaintiffs and counsel appear in person at oral argument on September 28, 2024. 1T7-12 to 1T7-8-1; Pa85-86. Plaintiffs' counsel did not appear. Unbeknownst to defendants, Judge Conlon left messages for plaintiff's counsel once prior to the return date of the motion and once on the morning of oral argument. 2T13-13 to 2T13-18; 2T18-11 to 2T18- 13; 2TT34-24 to 2T34-25.

At oral argument, defendants' counsel provided a history of plaintiffs' failure to provide discovery and appear for depositions. 1T5-23-1T4-4. Judge Conlon noted that the matter was afforded eight hundred and sixty two (862) days of discovery, that the court uploaded a notice on September 17, 2024 for plaintiffs' counsel to serve the affidavit pursuant to Rule 4:23-5(a)(1) as prescribed by Appendix II-B which plaintiffs' counsel failed to do. 1T7-9 through 1T8-1. Judge Conlon found that plaintiffs had not provided the

outstanding discovery pursuant to the court order of May 2, 2024, and entered an order dismissing plaintiffs' complaint with prejudice. 1T8-15 through 1T10-3; Pa48-49.

Plaintiffs' Motion to Vacate/Reinstate

On or about January 15, 2025, plaintiffs' counsel filed a substitution of attorney and a motion to vacate the orders of dismissal. Pa50; Pa51-79. At the time of the filing of that motion, plaintiffs had not provided any of the discovery demanded in defendants' February 5, 2024 correspondences, the names and addresses of the providers demanded, or the outstanding HIPAA authorizations pursuant to the court's May 2 2024 order. Pa87-115; Pa136-139, ¶49-64.

In support of plaintiffs' motion, plaintiffs' counsel, Nicholas A. Mattera, Esq., certified that the Law Offices of Joseph C. Zisa, Jr. merged with his office and became "Mattera, Mattera & Zisa, LLC" and since the merger, Mr. Zisa, Esq. became "semi-retired." Pa54, ¶4. Mr. Mattera **did not certify** when the firms "merged," however, a letter dated January 18, 2024 e-filed by Nicholas A. Mattera, Esq. on letterhead of Mattera, Mattera & Zisa, LLC on Pa131, ¶10; Pa145. Mr. Mattera **did not certify** when Mr. Zisa became "semi-retired," and/or that Mr. Zisa was no longer performing work at the firm. Pa53-64.

Mr. Mattera certified that, "through honest mistake" the firm failed to file a substitution of attorney and the eCourt notices had been going to Joseph C.

Zisa, Jr. Esq.'s old eCourts account email addresses and that **he** did not have access to Mr. Zisa's account. Pa54, ¶6. Mr. Mattera **did not certify** that Mr. Zisa was not accessing or checking his eCourts account/emails or that **no one in the firm** had access to the account/emails.

Mr. Mattera certified that, because they were not receiving notices via Mr. Zisa's eCourts account, his office "had absolutely no notice" of defendants' motion to dismiss without prejudice granted on June 20, 2024 and/or motion to dismiss with prejudice granted on September 27, 2024. Pa55-56, ¶7-11. Mr. Mattera further **certified** that "due to the lack of knowledge of the above motions, absolutely no actions were taken by my office to provide the requested documents…" Pa57,¶12. Mr. Mattera did not disclose in the motion papers that Nicholas A. Mattera, Jr., Esq. attended oral argument on May 2, 2024 during which Judge O'Dwyer advised an order would be entered compelling the outstanding discovery by May 10, 2024, and instructed that this matter to be given attention going forward. Pa51-64; Pa172-173, T6-19 to T7-4**.** Mr. Mattera **did not certify** or explain why "absolutely no actions" were taken to produce the documents contrary to Judge O'Dwyer's instructions/holdings. Id. Mr. Mattera **did not certify** or assert that he had no knowledge of and/or did not receive the court's order compelling discovery of May 2, 2024. Pa 38-39; Pa51-64.

Mr. Mattera also certified, "Only last week on January 8, 2025 was I made aware that the case had been dismissed with prejudice by my client's attorney on a subsequent accident **after he happened to look at the case jacket on eCourt and noticed a dismissal with prejudice."** (emphasis added) Pa57, ¶13. Mr. Mattera **did not certify** or explain why or how he or anyone in his firm failed to monitor this pending case for eight (8) months since the May 2, 2024 oral argument. Pa51-64. Mr. Mattera also admitted that he contacted his clients "and have attempted to obtain the outstanding discovery…" Pa62,¶19.

Defendants submitted a certification, brief, and exhibits in opposition to plaintiffs' motion. Pa130-188. In opposition, defendants set forth the history of plaintiffs' ongoing non-compliance with discovery and the multiple motions filed by defendants to obtain said discovery. Pa131—134, ¶5 – 17; Pa142-143; Pa144-145; Pa146-149; Pa154-156; Pa157-162; Pa174-178. Defendants also advised the court that Judge John D. O'Dwyer held oral argument on May 2, 2024 which was attended by Nicholas A. Mattera, Jr., Esq., notice of which was filed via eCourts to the email addresses on Mr. Zisa's account. Pa132-133, ¶17-18; Pa163-164; Pa165 - 173. Defendants also provided the transcript of oral argument and Judge O'Dwyer's order compelling discovery be produced by May 10, 2025 and allowed defendants to file a motion to dismiss if discovery was not provided. Pa38-39; Pa133-134, ¶18-27; Pa165-173. Defendants cited

Judge O'Dwyer's acknowledgement of plaintiffs' continued delay in providing discovery, neglect of the file and warning to counsel to attend to the file going forward. Pa169, T4-14 to T4-15; Pa169 – 170, T4-24 to T5-2; Pa 170, T5-3 to T5-14; Pa172-173, T6-19 to T7-4**.** Defendants provided proofs of plaintiff's failure to comply with the May 2, 2024 court order and had not provided names/addresses of providers, failed to provide Social Security Disability and New Jersey Disability information/applications, had provided expired and altered HIPAA authorizations preventing the collection of records, failed to provide plaintiffs' tax returns/information and provided a "release" which prevented obtaining such information. Pa88, ¶1 - 6; Pa89 ¶8-9; Pa 94-127; Pa184-186, ¶1, 3, 5-6.

The Honorable Kelly A. Conlon held oral argument on February 28, 2025. 2T. Plaintiffs' counsel, Nicholas A. Mattera, Esq. admitted that, on or about January 8, 2025 he advised plaintiffs that the complaint was dismissed with prejudice pursuant to court order "…through my office's lack of due diligence in this matter and neglect[.]" and the case fell through the cracks. 2T5-9 to 2T5-24; 2T8-15 to 2T8-20. Mr. Mattera admitted he advised his clients he was going to "…need their cooperation to provide some discovery." 2T5-22 to 2T5-24. Mr. Mattera also admitted that Joseph C. Zisa, Esq. still had access to his

eCourts account and was still a partner in the firm of Mattera, Mattera & Zisa, LLC. 2T8-21 to 2T8-25; 2T46-17 to 2T46-23.

Mr. Mattera admitted that his son, who appeared for oral argument on May 2, 2024, knew that Judge O'Dwyer told him "get Senior to put this on top of the pile, things have to be done." 2T9-12 to 2T9-14. Mr. Mattera also stated that "[t]he file was looked at" after Judge O'Dwyer brought the case to his son's attention, but he thought the substitution of attorney was filed. 2T9-19 to 2T10-3. Mr. Mattera also admitted that plaintiffs had still not provided the outstanding discovery pursuant to the order, that his office sent altered/expired HIPAA authorizations, did not send the tax returns and he was "working on that" and did not send the Social Security information. 2T11-4 to 2T11-12.

Judge Conlon set forth the actions taken by the court prior to entering the order of dismissal with prejudice: posting a clerk's notice as a reminder to Mr. Zisa, the attorney on record, to serve the notice on plaintiffs that their case was dismissed; calling Mr. Zisa's office and leaving a message when he did not provide proof of service of the notice; posting a notice for oral argument requiring an in-person appearance; and calling Mr. Zisa when he did not appear on the day of oral argument. 2T13-4 to 2T13-18; 2T44-1 to 2T44-14. Judge Conlon also noted that any further actions would have been posted to the eCourts account on record and ignored. 2T18-2 to 2T18-7. Mr. Mattera admitted that

Judge Conlon "wouldn't have known this at that point that it was Nick Mattera handling [this case]." 2T15-5 to 2T15-6. Judge Conlon also questioned the lack of certification or explanation from Joseph C. Zisa, Jr., Esq., and, as an attorney in good standing and partner of the firm with an active eCourts account regarding his failure to check his account and his disregard of court emails. 2T46-3 to 2T47-17.

Cassandra A. Willock, Esq. presented proofs illustrating: plaintiffs pervasive and continuous failure to provide discovery and appear for depositions requiring the filing of multiple motions(2T20-20 to 2T21-22; 2T26-11 to 2T26-17; 2T30-9 to 2T30-16); plaintiffs' counsels' failure to attend to the file and/or provide discovery despite their knowledge of possible issues receiving court notices and Judge O'Dwyer's warnings as of May 2, 2024. (2T21-23 to 2T23-22; 2T27-13 to 2T27-16; 2T30-16 to 2T30-18); plaintiffs' knowledge that dismissal was possible and inevitable if discovery was not provided (2T31-5 to 2T30-15); and the prejudice suffered by defendants due to plaintiffs' failure to provide discovery (2T26-18 to 2T27-12; 2T31-25 to 2T34-12; 2T36-17 to 2T37-19; 2T40-8 to 2T40-24). Citing the New Jersey Court Rules and applicable case law, Ms. Willock argued: plaintiffs were not entitled to automatic vacation of dismissal due to the court and/or plaintiffs' counsel's failure to comply with the procedural requirements of Rule 4:23-5(a)(1) and (2)

(2T25-9 to 2T25-17); the admitted and documented lack of due diligence and administrative errors did not warrant vacation of a dismissal with prejudice (2T25-18 to 2T26-1; 2T29-14 to 2T31-6); plaintiffs' were aware of the consequences of failing to provide discovery purpose of Rule 4:23-5(a)(1) and (a)(2) (2T26-2 to 2T26—17; 2T31-6 to 2T31-15); plaintiffs' had no legal basis for the relief requested (2T28-1 to 2T28-25; 2T30-7 to 2T30-13; 2T31-11 to 2T31-16-18; 2T33-17 to 2T34-12); and the cases relied upon by plaintiff in support of their motion were not applicable (2T23-23 to 2T24 – 13; 2T25-9 to 2T9 – 2T25-17; 2T48-25 to 2T49-23). Ms. Willock also demonstrated the prejudice, undue hardship, expense and delay, suffered by the defendants. Defendants incurred undue hardship and expense, filing three motions to dismiss and six motions to extend/compel discovery that led to the dismissal of plaintiffs' complaint. Pa131-132; 2T22-22 to 2T23-22; 2T25-17; 2T32-2T33-4. Ms. Willock also demonstrated defendants' prejudice due to the undue delay and inability to defend the matter on damages, claimed injuries, disability and lost wages. Pa132,¶12-14; Pa147-149; 2T26-18 to 2T30-10 to 2T30-18; 2T31-11 to 2T34 – 12. Ms. Willock also argued that defendants will suffer undue prejudice, hardship and delay resulting from the vacation of the dismissal orders as defendants still did not have the discovery regarding treatment, tax returns and disability regarding two subsequent accidents, as per the court order and are

in no better position in obtaining discovery than when the court issued the order on May 2, 2024. 2T32-21 to 2T33-21. Finally, Ms. Willock demonstrated the injustice that would result as reinstatement of the complaint would ultimately disregard the discovery rules in place and defendants' compliance with same. 2T22-12 to 2T34-3. Finally Ms. Willock argued that even if the prior orders were vacated and plaintiffs' complaint was reinstated, defendants would still be entitled to file a motion to dismiss plaintiff's complaint pursuant to R. 4:23-2 for plaintiffs' failure to comply with the May 2, 2024 order. 2T34-4 to 2T34-12.

Judge Conlon issued an order denying plaintiff's motion with a Rider to Order dated February 28, 2025. Pa201-206. Based on the record and oral argument, Judge Conlon found that plaintiffs, while blameless in counsel's failure to file a substitution of attorney, had not been entirely compliant in producing discovery throughout litigation resulting in multiple motions to dismiss for discovery delinquencies, and had still not complied with the court ordered discovery obligations. Pa203-206. Judge Conlon held that plaintiffs had no basis for reinstatement pursuant to R. 4:49-2; R. 4:50-1 and/or R.1:1-2. Id. Judge Conlon held that reinstatement of the complaint would be "entirely prejudicial" to the defendant, and doing so would "effectively disregard Rules

4:18-1; 4:23-2; 4:23-5(a)(1); 4:23-5(a)(2); 4:49-2 and 2:4-1 and result in injustice, unjustifiable delay and expense to the defendant." Pa206.

Outstanding Discovery Pursuant to Court Order of May 2, 2024.

On February 7, 2025, plaintiffs made their first attempt to comply with the May 2, 2024 order and served "post deposition documents requested in response to your [defendants'] letters dated February 5, 2024 and March 25, 2024." Pa87-128; Pa137, ¶50. Plaintiffs' did not provide all discovery as required by the court's May 2, 2024 order as set forth by way of correspondence dated February 14, 2025: failure to provide identities of treating medical facilities, failure to provide tax returns, failing to provide disability and Social Security applications, and providing altered and expired HIPAA authorizations. Pa137 - 139, ¶52 – 64; Pa184-186. As set forth in defendants' letter, plaintiffs did not provide the requested discovery and were otherwise deficient:

- In response to defendants' demand #1 for "Plaintiff's tax returns along with W2s, 1099s, worksheets, etc. for the tax years 2018 through 2022" plaintiffs' provided **NO TAX RETURNS, only** "W-2 Tax Statements from 2022 and 2023 and a "signed form 8821 release so that your firm can request full 2018-2022 tax records of my client." Pa88, ¶1; Pa122-127; Pa184-185, ¶1.
- The **"**signed form 8821 release**"** contains only plaintiff, Terri Newman's name/signature which will not allow the information to be released as plaintiffs Terri *and Eric Newman* filed together; **does not** contain plaintiffs' social security numbers, only a "Tax ID number" which will not allow the release of individual tax returns/documents; and only allows for the release of W2 and 1099s and not the 1040, the individual tax return form, preventing

defendants' from obtaining plaintiffs' tax returns. Pa88, ¶1; Pa 127; Pa184-185, ¶1.

- In response to defendants' demand #2 for copies of plaintiff's application for Temporary Disability benefits, plaintiffs' responded by attaching a signed authorization for New Jersey Division of Disability Services even though plaintiff testified that she had submitted her application for temporary disability benefits and she had to submit more paperwork, and could have accessed this information and provided it to defendants through The New Jersey Department of Labor - Division of Temporary Disability and Family Leave Insurance website, myLeaveBenefits.njgov allows claimants access to "Access Claim Documents." Pa88, ¶2; Pa185,¶3; Pa188;
- In response to defendants request #3 for Copies of plaintiff's application for Social Security benefits, plaintiffs provide printout of Social Security benefits received and claim to provide an executed authorization form directed to Social Security, but no authorization was provided and the documents could have been obtained and produced via The Social Security website ssa.gov which allows applicants to "Check application or appeal status;" and "Manage benefits." Pa88, ¶2; Pa94-128; Pa185,¶3; Pa189.
- In response to defendants request #4 for the proper name and address of the physical therapy facility that visited plaintiff in her home, plaintiff claims "is not sure" and "will attempt to locate the name of the physical therapist." Pa89, ¶9; Pa185, ¶4.
- In response to defendants' request #5, the name and address of a prior primary care physician, plaintiffs provided the name and address of a physician on an executed HIPAA authorization form which expired on January 1, 2025. Pa89, ¶8; Pa103; Pa185, ¶5.
- In response to defendants' request # 6 for the identity and address of a physical therapist plaintiff visited in Hackensack, plaintiffs state they are "attempting to obtain records and dates and will supply this information. Pa89, ¶7; Pa185, ¶6.
- With regard to the HIPAA authorizations directed to Hackensack Medical Center (3) and New Jersey Division of Disability Services, plaintiff provides authorizations that were NOT provided by this office and were altered as they fail to allow the release of the records to "MAGNA LEGAL SERVICES/RECORD TRAK on behalf of Fishman McIntyre Levine Samansky, P.C." Pa88, ¶3-6; Pa94-102; Pa185 - 186.

Pa184-187.

Despite advising plaintiffs that their complaint was dismissed and that discovery was needed on or about January 8, 2025, at oral argument on February 28, 2025, plaintiffs' counsel admitted that plaintiffs had not provided the outstanding discovery as per the May 2, 2024 order. 2T11-4 to 2T11-12.

LEGAL ARGUMENT
POINT I
THE TRIAL COURT'S RULING MUST BE AFFIRMED AS THERE WAS NO ABUSE OF DISCRETION

Appellate courts "are not to intervene" and must defer to the trial court's rulings on matters of discovery absent a showing of an abuse of discretion. Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 78-79 (2017). Appellate courts are not to "second guess" the decisions of the trial court, as to do so "exceed[s] the limit imposed by the standard of appellate review." See Capital Health Sys., Inc., supra, 230 N.J. at 81, 83. Absent an abuse of discretion by the lower court judge, his/her decision on discovery matters will be upheld. Pomerantz Paper Corp. v. New Cnty. Corp., 207 N.J. 344, 371 (2011). Abuse of discretion only occurs when a trial court's decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." U.S. Bank Nat'l Ass'n v. Guillaume, 202 N.J. 449, 467-468 (2012) *quoting* Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007).

Rule 1:7-4 requires a trial court provide an opinion or memorandum decision which provides a clear and adequate explanation for the court's decision. Curtis v. Finneran, 83 N.J. 563, 569-70 (1980). The factual conclusions of a trial court will not be disturbed unless so "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quotes omitted).

Plaintiffs were ordered to provide outstanding discovery by Judge John D. O'Dwyer, P.J.Cv. at oral argument and by way of order on May 2, 2024. Pa38-39; Pa171,T6-14 to T6-24. Failing to provide the court-ordered discovery, plaintiffs' complaint was dismissed without prejudice pursuant to R. 4:23-3(b) and R. 4:23-5(a)(1) pursuant to order of June 20, 2024. Pa41-42. On September 27, 2024, setting forth factual and legal findings on the record, the Honorable Kelly A. Conlon entered an order dismissing plaintiffs' complaint with prejudice for failure to provide discovery pursuant to the court's order of May 2, 2024. Pa48-49; 1T8-15 through 1T10-3. Plaintiffs filed a motion to reinstate the complaint and vacate the dismissal orders of June 20, 2024 and September 27, 2024, plaintiffs did not move to vacate the court order of May 2, 2024. Pa51-52. On February 28, 2025, plaintiffs, Mr. and Mrs. Newman appeared, in person, for oral argument before Judge Conlon. 2T5-3 to 2T5-6. After oral argument,

the Judge Conlon denied plaintiffs' motion to reinstate the complaint and vacate the court orders dismissing plaintiffs' complaint pursuant to R. 4:23-5(a)(1) and R. 4:23-2(b)(3) without prejudice dated June 20, 2024 and with prejudice dated September 27, 2024. Pa41-42; Pa48-49; 2T. Judge Conlon articulated her factual findings, analysis, and the legal standard applied in reaching her conclusion. Pa201-206. Plaintiffs assert that the court abused its discretion denying their motion to vacate the orders dismissing plaintiffs' complaint with and without prejudice because plaintiffs' counsel's office had not notice of the motions for dismissal and plaintiffs' were not afforded the protections of Rule 4:23-(5)(a)(2) and (3), however have not set forth proofs disputing Judge Conlon's factual findings or misinterpretation or misunderstanding of the applicable law or standard of review. Pa207-213; Pb9-23. Plaintiffs have not made the requisite showing of an abuse of discretion warranting the reversal of Judge Conlon's decision. Pb9-23.

A. Judge Kelly A. Conlon's Factual Findings Are Based on Substantial and Credible Evidence .

The factual conclusions of a trial court will not be disturbed unless so "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quotes omitted). The reviewing Court is only to decide if there is adequate, substantial and credible

evidence to support the trial court's factual findings. Abtrax Pharms. Inc. v. Elkins Sinn Inc., 139 N.J. 499, 520 (1995). There was no abuse of discretion as Judge Conlon's factual findings are overwhelmingly supported by the evidence on record and presented at oral argument. Pa20-39; Pa41-42; Pa43-46; Pa48-49; Pa130-141; Pa144-190; 1T; 2T.

It is undisputed that plaintiffs failed to comply with the discovery rules throughout the litigation requiring the filing of three motions to dismiss and six motions to compel and extend discovery to attempt to obtain discovery from plaintiffs. Pa131- ¶5-9, ¶11; Pa132, ¶ 15-16; Pa176 LCV20223383712 LCV20224090249, LCV2023420982, LCV20232254277, LCV20233494346; LCV20233691243, LCV2024920664; Pa203-206; 2T20-2T21-22. It is undisputed that plaintiffs failed to comply with Judge Suarez' December 15, 2023 order and appear for depositions. Pa 34-35; Pa131,¶8-9; Pa176, LCV20233684446. It is undisputed that plaintiffs' counsel failed to file a substitution of attorney when plaintiffs' prior counsel, Joseph C. Zisa, Jr. Esq., merged with and became a named partner of Mattera, Mattera and Zisa some time prior to January 18, 2024. Pa54,¶4, ¶6; Pa144. It is undisputed that at oral argument on May 2, 2024, plaintiffs' counsel appeared and understood Presiding Judge John D. O'Dwyer's holdings/warnings that an order to produce discovery by May 10, 2024 would be entered and for counsel to pay attention to the

"obviously neglected" [Newman] file. Pa169, T4-14 to T4-15; Pa169 – 170, T4-24 to T5-14; Pa172-173, T6-19 to T7-21; 2T9-12 to2T9-14. It is undisputed that despite the warnings and instructions of Judge O'Dwyer, plaintiffs took no action to provide the court-ordered discovery demanded by defendants in correspondences dated February 5, 2024, February 28, 2024 and March 25, 2024. Pa38-39; Pa57,¶12; Pa147-149. It is undisputed that Judge Kelly A. Conlon issued two court notices prior to the motion to dismiss with prejudice directing plaintiffs' counsel to provide an affidavit of notice as per R. 4:23-5(a)(20 and Appendix II-B and to appear in person for oral argument on September 27, 2024. Pa85-85. It is undisputed that Mr. Zisa was a practicing attorney and named partner of the firm with access to his active eCourts account from January 18, 2024 through February 28, 2025. Pa144; 2T6-23 to 2T7-9; 2T8-20 to 24; 2T2T46-12 to 2T46-23; 2T46-25 to 2T47-17. It cannot be disputed that Plaintiffs' counsel did not review the eCourts docket from May 2, 2024 until, at the earliest, January 8, 2025. Pa56,¶12-13; 2T5-8 to 2T5-13. It is undisputed that plaintiffs, Mr. and Mrs. Newman, were notified by their attorney on or about January 8, 2025 that the case was dismissed pursuant to an order and outstanding discovery had to be provided. Pa57,¶13; Pa62,¶19; 2T5-9 to 2T5-24. It is undisputed that plaintiffs had still not provided fully responsive discovery compelled by the May 2, 2024 order as of the return date of plaintiffs'

motion to vacate. Pa62,¶19; 2T11-3 to 2T11-12; 2T25-7 to 2T25-8; T27-1 to 2T27-12

Judge Conlon's factual findings are clearly supported by the evidence on record. She found there was a five-month delay between the dismissal with prejudice and plaintiffs' motion due to plaintiffs' counsel's failure to file a substitution of attorney which is well supported, not only by the evidence of the record, but plaintiffs' counsel's admissions at oral argument. Pa205; Pa54, ¶6; 2T6-23 to 2T7-16. Judge Conlon also found that plaintiffs "have not been entirely compliant in producing discovery throughout the dependency of the case," relying upon the court docket documenting the failure to comply with Judge Suarez' order of December 15, 2023 and multiple motions to dismiss and compel discovery filed by defendants. Pa34-35; Pa131- ¶5-9, ¶11; Pa132, ¶ 15-16; Pa176 LCV20223383712 LCV20224090249, LCV2023420982, LCV20232254277, LCV20233494346; LCV20233691243, LCV2024920664; Pa205. Judge Conlon also found that plaintiffs' counsel failed to oppose the motion to dismiss with prejudice, failed to appear for oral argument, and fulfill the service obligation pursuant to R. 4:23-5(a)(1) despite the filing of clerk's notices and voicemail messages left for counsel by the court. Pa85-86; Pa203-204; 1T7-12 to 1T7-8-1; 2T13-13 to 2T13-18; 2T18-11 to 2T18- 13; 2TT34-24 to 2T34-25.

Judge Conlon found, and plaintiffs' counsel admitted, that plaintiffs had still not complied with their discovery obligations pursuant to the Court Order entered by the Honorable John D. O'Dwyer, P.J. Cv. in May, 2024. Pa206. The record is replete with overwhelming evidence of plaintiffs continuing defiance of the Presiding Judge's Order. Pa20-29; Pa38-39; Pa88-89, ¶1, 3-6, 9 Pa122-127; Pa137 - 139, ¶52 – 64; Pa184-186; 1T5-23 to1T7-4; 2T11-4 to 2T11-12; 2T20-20 to 2T21-22; 2T26-11 to 2T26-17. Judge Conlon was fully aware that despite Judge O'Dwyer's warnings at oral argument to pay attention to the file and produce discovery, "absolutely no actions were taken" to produce the discovery. Pa57,¶12; 2T9-12-2T9-24. Judge Conlon was also aware that plaintiffs, Mr. and Mrs. Newman, were notified by their attorney on or about January 8, 2025 that the case was dismissed and had been asked for the outstanding discovery as per plaintiffs' counsel's certification and admissions on the record. Pa57,¶13; Pa62,¶19; Pa165-173; 2T5-9 to 2T5-24.

Judge Conlon found that vacation of the dismissal orders and reinstatement of the case would be entirely prejudicial and result in "unjustifiable delay." Pa206. The case, as of July 19, 2024, had been afforded 862 days of discovery, and vacating the dismissal Orders/reinstatement would as the discovery period had ended, full and complete discovery had still not been provided as of the date of oral argument, an additional 224 days **after** the

discovery end date. Pa206; 2T11-3 to 2T11-12; 2T25-7 to 2T25-8; T27-1 to 2T27-12. The judge findings that defendants would be prejudiced and suffer unjustifiable expense are clearly supported by arguments of defendants' counsel, the extensive motion history illustrating plaintiffs' longstanding refusal to comply with discovery rules/orders, and plaintiffs' ongoing non-compliance with the subject May 2, 2024 Order. 2T26-18 to 2T27-12; 2T31-25 to 2T34-12; 2T36-17 to 2T37-19; 2T40-8 to 2T40-24; Pa 34-35; Pa131- ¶5-9, ¶11; Pa132, ¶ 15-16; Pa176 LCV20233684446; LCV20223383712 LCV20224090249, LCV2023420982, LCV20232254277, LCV20233494346; LCV20233691243, LCV2024920664. The judge was also aware that if the case were to be reinstated that defendants could still file a motion to dismiss the complaint pursuant to R. 4:23-2 as plaintiffs were had still not complied with the court's May 2, 2024 order. Pa206, 2T34-4 to 2T34:12.

Judge Conlon, cognizant of the court's obligation of taking action necessary to obtain notice compliance pursuant to R. 4:23-5(a)(1) or (2), posted a clerk's notice to the attorney of record to provide an affidavit of notice on plaintiffs of the dismissal and pending motion; called the attorney of record and left a message when they did not receive proof of service of the 4:23-5(a)(1) notification; filed a clerk's notice on requiring counsel and plaintiffs to appear in person at oral argument; and called the attorney of record again on the day of

oral argument when counsel did not appear. 1T9-3 to 1T9-13; 2T12-23 to 2T13-18; 2T18-11 to 2T18-13. The court inquired and confirmed that up until the substitution of attorney was filed on January 15, 2025, Joseph C. Zisa, Jr., Esq., a practicing attorney, with access to his active eCourts account, was not checking and/or ignoring the court's notices. Pa50; 2T6-23 to 2T7-9; 2T8-20 to 24; 2T2T46-12 to 2T46-23; 2T46-25 to 2T47-17. Plaintiffs' counsel agreed with Judge Conlon's finding that adjourning the motion or the filing an Order to Show Cause to ensure compliance with the notification requirement would be a "moot issue" because the attorney of record, Mr. Zisa, would have not received it and/or ignored and/or not responded as was the case with the other court notices posted by the court. Pa85-86; 2T13-19 to 2T13-22; 2T17-17 to 2T18-7; 2T43-14 to 2T44-14.

Judge Conlon did not abuse her discretion in making these factual findings, all of which were based on sound, abundant, undisputed and credible evidence documented via counsel certifications, exhibits and the representations of counsel at oral argument. The abuse of discretion standard requires Appellate courts to "generously sustain the trial court's decision, provided it is supported by credible evidence in the record." State v. Brown, 236 N.J. 497, 521-522 (2019).

B. **Judge Kelly A. Conlon's Decision Is Consistent With Applicable, Supported and Established Statues and Case Law.**

Absent rational explanation and/or impermissible departure from established policies, a trial court's ruling "may be disturbed only if it is so wholly insupportable as to result in a denial of justice." See Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523, 528 (App. Div. 1996). A courts decision regarding to vacate a final judgment or order "will be left undisturbed 'unless if represents a clear abuse of discretion." Hous. Auth. of Morristown v. Little, 135, N.J. 274, 283 (1994). Judge Conlon's decision, consistent and in accordance with applicable statutes and case law, is not subject to reversal.

Although not argued on the record below, plaintiffs' counsel asserts that the court abused its discretion in refusing to vacate the dismissal orders because "their office did not have access to eCourt notices" and "fairness and due process require notice and an opportunity to be heard." Pb9. This is not entirely true as Joseph C. Zisa, Jr., Esq., one of the firm's named partners, had access to his active eCourts account but failed to check his court notification emails and/or ignored the eight eCourts notifications issued between June 4, 2024 and September 27, 2024, the return date of the motion to dismiss with prejudice. Pa54-55,¶3-7; Pa85-86; Pa178 LCV202403866, LCV20241437403, LCV20241596364, LCV20241604621, LCV20242296964, LCV20242395361, LCV20242414701, LCV20242414725; 2T6-23 to 2T7-9; 2T8-20 to 24; 2T2T46-12 to 2T46-23; 2T46-25 to 2T47-17.; 2T6-23 to 2T7-9; 2T8-20 to 24;

2T2T46-12 to 2T46-23; 2T46-25 to 2T47-17. Further, the order of May 2, 2024; June 20, 2024 and September 27, 2026 were all "deemed served on all parties" when uploaded to eCourts. Pa38-39; Pa41-42; Pa48-40. Notably, plaintiffs' counsel has not certified or represented on the record that his clients had no knowledge of Judge O'Dwyer's May 2, 2024 Court Order/Instructions compelling discovery or the consequences of failing to abide by same. Pa53-64. Regardless, it is clear that plaintiffs did have notice on or about January 8, 2025 from their attorney that their complaint was dismissed with prejudice due to outstanding court ordered discovery, and discovery needed to be produced. Pa57,¶13; Pa62,¶19; 2T5-9 to 2T5-24. Despite this notice, plaintiffs still failed to comply with the court's order and provide the outstanding discovery before the return date of the motion of February 28, 2025. 2T11-4 to 2T11-12. Finally, plaintiffs' had the opportunity to be heard at oral argument for the motion to vacate the dismissal orders and reinstate the complaint. 2T5-3 to 2T5-7.

Plaintiffs further assert that Judge Conlon abused her discretion in denying their motion as they did not have the benefit of the protections pursuant to R. 4:23-5(a)(2) & (3) before their Complaint was dismissed with prejudice. Pb10. Rule 4:23-5(a)(2) requires that a motion to dismiss with prejudice shall be granted unless a motion to vacate the prior order has been filed and either the demanded and fully responsive discovery has been provided or extraordinary

circumstances have been demonstrated. See also, Leon v. Parthiv Realty Co., Inc., 360 N.J. Super. 153, 155-156 (App. Div. 2003). Rule 4:23-5(a)(3) states that if the attorney for the delinquent party fails to serve the client with original Order of dismissal without prejudice, fails to file and serve an affidavit of notification or fails to appear on the return date of the motion to dismiss with prejudice, "the court shall, unless exceptional circumstances are demonstrated, proceed by Order to Show Cause **or take other such appropriate action as may be necessary to obtain compliance with the requirements of this rule**." R. 4:23-5(a)(3) (emphasis added). The courts have held that such an action "may be as simple as having a law clerk call the attorney for the delinquent party when the court does not receive the affidavit…seven days prior to the return date." A&M Farm & Garden Center v. American Sprinkler Mechanical LLC, 423 N.J. Super. 528, (App.Div.2012). Determining the "appropriate action as may be necessary to obtain compliance" to the rule "**is a matter within the discretion of the motion judge**, giving due consideration to the circumstances of the case and the goal of the rule to compel discovery responses." (emphasis added) Id.

As set forth on the record at oral argument of the motion to dismiss plaintiffs' complaint with prejudice on September 27, 2024, Judge Conlon was well aware of the court's obligations pursuant to R. 4:23-5(a)(3) and the holding in Thabo v. Z Transportation, 452 N.J. Super. 359 (App. Div. 2017). 1T9-3 to

1T9-13. Prior to the deciding defendants motion to dismiss plaintiffs' complaint with prejudice, Judge Kelly Conlon posted a clerk's notice via eCourts to counsel of record, Joseph C. Zisa, Jr., Esq., a named partner with access to an active eCourts account, requiring plaintiffs' attorney to file and serve an affidavit prior to the motion reciting that plaintiffs were previously served under R. 4:23-5(a)(1) and an additional notification as prescribed by Appendix II-B of the pendency of the motion to dismiss. Pa86. The judge also posted a clerk's notice for plaintiffs' counsel to appear for oral argument in person, with the plaintiffs. Pa85. In addition to the notices ignored by plaintiffs' counsel, Judge Conlon also called and left messages for plaintiffs' counsel prior to the failure to file the affidavit of notification and again when counsel failed to appear for oral argument. 2T12-23 to 2T13-18; 2T18-11 to 2T18-13. The eCourts notifications of defendants' motions to dismiss with and without prejudice, the order dismissing plaintiff's complaint without prejudice, two court notices regarding the motion to dismiss with prejudice and voicemails went unchecked and or were ignored.

Judge Conlon's actions were not only appropriate as necessary to obtain compliance, but any further actions to do so would have been futile. Plaintiffs' counsel admitted that, at the time of the motion to dismiss with prejudice that they had not filed the substitution of attorney and Judge Conlon "wouldn't have

known this at that point that it was Nick Mattera handling [this case]." 2T15-1 to 2T15-6. 2T8-21 to 2T8-25; 2T46-17 to 2T46-23. Mr. Mattera had not filed the appropriate substitution of attorney, did not have access to Mr. Zisa's eCourts notifications, and apparently had not instituted any procedures to have court notifications forwarded to any member of the firm. Id. Even after being warned by the Presiding Judge of Bergen County to attend to the "obviously neglected" matter and an order compelling discovery would be ordered, no one at plaintiffs' counsel's firm made any efforts to obtain the **court ordered** discovery or even review the court docket before January 8, 2025. Pa57,¶13; Pa62,¶19; 2T5-9 to 2T5-13. Judge Conlon correctly found that any further efforts, such as an Order to Show Cause or adjournment of the motion, would have been disregarded or ignored like the prior notices. 2T13-19 to 2T13-22; 2T17-17 to 2T18-7; 2T43-14 to 2T44-5. Given the well-documented history of motions to dismiss, compel and extend discovery to obtain outstanding discovery/depositions throughout the litigation, plaintiffs' failure to comply with a prior order compelling depositions and failure to comply with the court's order/warnings of May 2, 2024 and subsequent court notices, it was reasonable to conclude counsel's failure to oppose, file an affidavit and/or appear was due to the ongoing and presumably deliberate refusal of plaintiffs to comply with the discovery rules. Pa 34-35; Pa57,¶12; Pa131,¶5-9,¶11; Pa132,¶15-16; Pa172-

173, T6-14 to T7-21; Pa176, LCV20223383712 LCV20224090249, LCV2023420982, LCV20232254277, LCV20233494346, LCV20233691243, LCV2024920664; 2T20-20 to 2T223-22.

Judge Conlon also set forth the statutory and legal basis for her decision to deny plaintiffs' motion. Pa203-206. Judge Conlon correctly considered Rules 4:23-5(a)(1), (2) and (3); 49-2, 4; 4:50-1 and 1:1-2 and applied her factual findings. Pa203-206; 1T9-3 to 1T9-13; 2T27-17 to 2T30-13. The judge cites factors she considered to determine whether plaintiffs' attorney's error, misconduct or incompetence constituted exceptional circumstances set forth in Jansson v. Farleigh Dickison University, 198 N.J. Super. 190, 196 (App. Div. 1985), Judge Conlon clearly considered all the factors, the extensive delay, underlying reason, fault of the litigant, and prejudice to the other party. Pa205-206; Pa57,¶12; Pa131,¶5-9,¶11; Pa132,¶15-16; Pa172-173, T6-14 to T7-21; Pa176. Judge Conlon considered plaintiffs' counsel's admission that the case "fell through the cracks" due to "lack of due diligence" and "neglect" Pa205; 2T5-12 to 2T5-21; 2T8-17 to 2T8-19. Judge Conlon also considered U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449 (2012), which holds that relief under 4:50-1(f) is available only when "truly exceptional circumstances are present" and "excusable neglect" may be granted when attributable to "an honest mistake and reasonable prudence." Guillaume, supra, 209 at 468. With regard

delay, Judge Conlon cites Orner v. Liu, 419 N.J. Super. 431 (App. Div. 2011), which holds that motions under R. 4:50-1 must be brought within a "reasonable time" which may be less than one year after the entry of judgement. Orner v Liu, 419, supra at 437.

Plaintiffs' rely on hand-picked portions of A&M Farm & Garden Center v. American Sprinkler Mechanical LLC, 423 N.J. Super. 528, 534 (App. Div. 2012) which is distinguishable on several grounds which were briefed and presented at oral argument. A & M was enacted prior to institution of electronic filing. Unlike the case at bar, the A&M plaintiff's complaint was dismissed for failure to provide discovery that was not court-ordered, and was provided **prior** to plaintiffs' motion to vacate dismissal Orders and reinstate the Complaint. A&M Farm, Supra. 423 N.J. Super at 533-534; 2T24-8 to 2T24-13; 2T25-2 to 2T25-8. Further the A&M Farm court found that plaintiff was not "automatically entitled" due to a failure to comply with all the procedural requirements of the Rule. Id at 536.

This principle is reiterated in Leon v. Parthiv Realty Co., Inc., 360 N.J. Super. 153 (App. Div. 2003) and Feinsod v. Noon, 272 N.J. Super. 248 (App. Div. 1994). While these cases were decided prior to e-filing and the institution of some of the provisions in subsection (3), R. 4:23-5(a)(2) did require the delinquent party file and serve an affidavit of notice to the client prior to the

return date of the motion to dismiss with prejudice, and the attorney's in person appearance at the motion. Feinsod, Supra, 272 N.J. Super. at 251. Feinsod held that a delinquent party is not entitled to vacation of a dismissal Order because due to counsel's failure to comply with the procedural requirements; the delinquent party "must satisfy the requirements of R. 4:50 to be entitled to such relief;" and R. 4:50 does not entitle a party to an order vacating judgment upon a showing there was some error in the proceedings resulting in the entry of judgment." Id at 251-252. The Leon court held "If we allowed counsel's non-appearance on the return date of the motion to frustrate the intent of the rule, there would be no means by which the rule could be enforced." Leon, Supra 360 N.J. Super. at 155.

Judge Conlon, aware of R. 4:23-(5)(a)(3) requirements and that fully responsive discovery had not been provided, did not abuse her discretion in deciding decision to deny plaintiffs' motion.

Plaintiffs also rely on the unreported case Chen v. Pep Boys, Dk. No. A-5123-18T2 (App. Div. July 13, 2020). Pa223-225. Aside from being unreported, plaintiffs' reliance is misplaced. The trial court erroneously dismissed plaintiff's complaint with prejudice in Chen, without oral argument, even after plaintiff had provided answers, with the exception of two, prior to the return date of the motion. Chen, Supra at pages 3-5. Unlike Judge Conlon, who made

efforts to obtain compliance, the trial court did not take sufficient steps to obtain compliance with the notice rule. Id at 11. Most importantly, unlike Chen, plaintiffs' outstanding discovery was subject to the court's May 2, 2024 court order and required the production of documents, HIPAA authorizations, disability and social security applications and information that were not provided prior to the return date of the motion. Pa136-139, ¶49-64; Pa180-186; 2T11-3 to 2T11-12.

Relying on an unreported case Kim v Magarelli, 2011 N.J. Super. Unpub. LEXIS (App. Div. 2011), plaintiffs assert that R. 4:23-5 requires the attorney for the moving party to consult with the delinquent party before filing a motion to dismiss with or without prejudice, which is not controlling and was not submitted with motion papers or argued below. Pa53-64; Pa188-198; 2T. Notwithstanding the case was decided in 2011, before efiling and several modifications to the Rule, Judge O'Dwyer's May 2, 2024 order allowed defendants to file a motion to dismiss plaintiff's complaint if the discovery was not provided. Pa39. Again, all motions and orders are "deemed served" upon uploading to eCourts. Pa38-39; Pa41-42; Pa48-40.

Accordingly, as Judge Conlon's holdings and rulings were based upon proper, supported and sound evidence, established policies and accepted case law, there was no abuse of discretion and reversal is not warranted.

POINT II
NO ABUSE OF DISCRETION OCCURRED AS VACATION OF THE DISMISSAL ORDERS AND/OR REINSTATMENT OF PLAINTIFFS' COMPLAINT IS NOT WARRANTED UNDER THE APPLICABLE RULES OF COURT OR CASE LAW.

Plaintiffs failed to provide discovery which was requested on February 5, 2024, February 28, 2024 and March 25, 2024 and court ordered on May 2, 2024. Pa47-48; Pa150-151; Pa38-39; Pa171 – 172, T6-14 to T7-21. Despite knowledge that court-ordered discovery was due, plaintiffs did not provide discovery. Pa43-46; Pa165-172. Plaintiffs' complaint was dismissed without prejudice on June 20, 2024 pursuant to R. 4:23-5(a)(1) and R. 4:23-2(b)(3) and with prejudice on September 27, 2024. Pa41-42; Pa48-49. Although properly filed and entered by the court via eCourts, plaintiffs' counsel claims they did not receive the nine court notices filed between June 4, 2024 and September 27, 2024. Pa55-57, ¶7-13. On January 8, 2025, plaintiffs' counsel "found out" that the complaint was dismissed, advised plaintiffs' that their complaint had been dismissed for failure to provide court ordered discovery, and that he would need their "cooperation" to provide the discovery. Pa57, ¶12; 2T5-19 to 2T5-24. Plaintiffs filed a motion to vacate the dismissal orders and reinstate the complaint on January 15, 2025 and oral argument was heard on February 28, 2025. Pa51-52; 2T. Despite having notice of the dismissal for failure to provide court ordered discovery as of January 8, 2025, plaintiffs did not provide the outstanding discovery prior to

(or after) oral argument on February 28 2025. 2T5-19 to 2T5-24; 2T11-4 to 2T11-12.

Plaintiffs now assert that the rules of court and case law provided ample means for the trial court to vacate the dismissal orders. Pb24-43. Defendants submit that plaintiffs' motion was untimely, improper, has no legal or factual support, and was properly denied by Judge Conlon.

A. Plaintiffs Are Not Entitled to Relief Under Rule 4:49-2.

Rule 4:49-2 sets forth the basis for a motion to alter or amend a judgment or **final Order**. A motion for rehearing or reconsideration seeking to alter or amend a final Order **shall be served no later than 20 days after service of the Order**. Id. The orders plaintiffs sought to vacate were entered on June 20, 2024 (Dismissal without prejudice) and September 27, 2024 (Dismissal with prejudice). Pa41-42; Pa48. Plaintiff's motion to vacate/reinstate was filed on January 15, 2025, seven months and five months after the dismissal orders were entered, thus untimely and improper. Pa51-52.

Plaintiffs' counsel's argument that the motion to vacate/reinstate was timely filed within 20 days of "finding out" that the complaint was dismissed on January 8, 2025, is absurd given the "lack of notice" was due to their failure to file a substitution of attorney and a named partner's ignoring notices from his active eCourts account. Id. Equally absurd is the argument that failing to file a

substitution of attorney and/or perform a simple review of the fully accessible court docket during the eight months following Judge O'Dwyer's clear warnings and instructions to provide discovery and give the file attention constitutes "new or additional information" warranting relief under R. 4:49-2.

Again, it is undisputed that two notices regarding defendants' motion to dismiss without prejudice, the order dismissing plaintiffs' complaint without prejudice, two notices regarding defendants' motion to dismiss with prejudice, and two court notices demanding compliance with R. 4:23-5(a)(2) and Appendix IIB were sent to one of the named partners with an active eCourts account but ignored or "not checked." Pa85-86; Pa178 LCV202403866, LCV20241437403, LCV20241596364, LCV20241604621, LCV20242296964, LCV20242395361, LCV20242414701, LCV20242414725; 2T6-23 to 2T7-9; 2T8-20 to 24; 2T2T46-12 to 2T46-23; 2T46-25 to 2T47-17.; 2T6-23 to 2T7-9; 2T8-20 to 24; 2T2T46-12 to 2T46-23; 2T46-25 to 2T47-17. Although another attorney not associated with the firm "discovered" plaintiffs' complaint was dismissed with prejudice after he "happened to look at the case jacket on eCourts…" so to would a review of the case jacket by plaintiffs' own counsel during the eight months after Judge O'Dwyer's order. Pa 165-173; Pa57,¶12. Plaintiffs' counsel's failure to exhibit even the slightest diligence, i.e.. named partner reviewing/not ignoring eCourt notice emails and/or review of the case docket by anyone in the

firm, does not constitute "lack of notice" to overcome the twenty (20) day time limit set forth by R. 4:49-2. To accept this argument promotes total inattention and dilatory actions by attorneys as a way to "avoid" notice which disregards the purpose and intent of R. 4:49-1 and the Rules of Professional Conduct.

B. Plaintiffs Are Not Entitled to Relief Under Rule 4:50-1.

Rule 4:50-1 allows the court from relieving a party from a final judgment or order due to:

> **(a)** mistake, inadvertence, surprise, or excusable neglect;**(b)** newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;**(c)** fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;**(d)** the judgment or order is void;**(e)** the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or**(f)** any other reason justifying relief from the operation of the judgment or order.

Plaintiffs assert that the orders should be vacated under Rule 4:50(a) and (f). Pb24-32.

A motion for relief under Rule 4:50-1 should be granted "sparingly" and only in "exceptional circumstances." See Badalamenti by Badalamenti v. Simpkiss, 422 N.J. Super. 86, 103 (App. Div. 2011). It is the movant's burden to demonstrate the relief sought. Jameson v. Great Atl & Pac. Tea Co., 363 N.J.

Super. 419, 425-26 (App Div. 2003). Plaintiffs are not entitled to relief under these provisions.

"Mistake" as contemplated by the rule, is of the type "which the parties could not have protected themselves from during the litigation. DEG, LLC v. Township of Fairfield, 198 N.J. 242, 263 (2009). Although fact sensitive, excusable neglect is "attributable and honest mistake that is compatible with ***due diligence or reasonable prudence***." Mancini v. EDS, 132 N.J. 330, 335 (1993). The courts have held that no excusable neglect due to lack of notice exists when service is presumptively valid. *See, e.g.* U.S. Bank Nat. Ass'n v. Curcio, 444 N.J. Super. 94, 112-113 (App. Div. 2016).

It is undisputed that defendants requested discovery on February 5, 2024, and followed up for said discovery on February 28, 2024 and March 25, 2024. Pa147-153. While plaintiffs' counsel does not admit or deny receipt or review of the May 2, 2024 Order and/or that plaintiffs, themselves were not aware of the outstanding discovery pursuant to the order, plaintiffs' counsel was entirely aware and represented to the court he understood Judge O'Dwyer's clear and unequivocal warnings to pay attention to the file and that an order compelling discovery would be entered. Pa169, T4-11 to T5-4; Pa171 – 172, T6-14 to T7-21; 2T9-19 to 2T9-24. The order was deemed served when uploaded to eCourts. Pa38-39. Despite this, counsel certified that "absolutely no actions" to obtain

or produce the outstanding discovery. Pa57, ¶12. Plaintiffs' counsel also certifies, despite the multiple notices posted by the court on eCourts, due to his failure to file a substitution of attorney and lack of access to his partner's eCourts account/notifications, he did not have notice of the motions to dismiss with and without prejudice or the courts compliance notices. Pa54-55, ¶6-8. Failing to produce discovery requested on February 5, 2025 after two subsequent reminders; failing to heed the Presiding Judge's warnings/order to produce discovery by a date certain; and subsequently failing to review the court docket of an active case for over 8 months is hardly "mistake, inadvertence, surprise for excusable neglect" attributable to due diligence or reasonable prudence as contemplated by Rule 4:50-1(a). Mancini v. EDS, supra 132 N.J. at 335. Similarly, a named partner's failure to check and/or ignoring eCourt notices; failure to implement procedures/efforts to access and/or have their named partner's email/eCourts account/notices forwarded to other named partners or anyone at the firm is not a mistake that the firm could have easily "protected against." DEG, supra, 198 N.J. at 263

Plaintiffs also assert that vacation of dismissal orders and reinstatement of plaintiffs' complaint is available under R. 4:501-(f). The boundaries of subsection (f) of Rule 4:50-1, referred to as a "catchall," are "as expansive as the need to achieve equity and justice." Court Invest. Co. v. Perillo, 48 N.J. 334,

341 (1966). Relief under this section of the rule is "…available only when 'truly exceptional circumstances are present.'" Hous. Auth of Morristown v. Little, 135 N.J. 274, 286 (1994) (citations omitted). Again, plaintiffs were aware that discovery was requested, outstanding, and court ordered as of May 2, 2024. Pa150-153; Pa165-173. Plaintiffs' counsel's failure to file a substitution of attorney, change the eCourts notification system, administrative errors and failure to "put this file on top of the pile" as ordered by Judge O'Dwyer do not constitute exceptional circumstances as contemplated by this rule. A&M Farm & Garden Center the American Sprinkler Mechanical, LLC, 423 NJ Super. 528, 533-534 (App. Div. 2012).

Vacating the dismissal orders and reinstating plaintiffs' complaint serves no "equity and justice." The defendants have been chasing down discovery from plaintiffs since the institution of this litigation, filing motion after motion, to compel and dismiss. Pa130-137, ¶5-15**.** Plaintiffs' had previously defied a court order to appear for depositions on a date certain. Pa34-36; Pa131,¶7-9**.** Even after Judge O'Dwyer's May 2, 2024 instructions and order, plaintiffs did nothing to produce the discovery requested on February 5, 2024. Pa38-39; Pa150-153; 2T11-6-2T11-12; 2T25-7 to 2T25-8. Plaintiffs' failure to provide the outstanding discovery pursuant to the May 2, 2024 order before the court entertained the motion to vacate/reinstate on February 28, 2025 after being

placed on notice by their attorney in January, 2025 illustrates plaintiffs' pervasive and continuing defiance of the rules of discovery and the court's orders. Discovery rules "further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." Zaccardi v. Becker, 88 N.J. 245, 252 (1982). Reinstating the complaint and/or vacating the dismissal orders while plaintiffs were knowingly in violation of the court's May 2, 2024 order is contrary to R. 4:23-5(a)(1) and (2) designed to promote and require exchange of discovery and promotes defiance and disregard of court orders, not equity or justice. See, Abtrax Pharms. Inc. v. Elkin-Sinn, Inc., 139 N.J. 499, 515 (1995). Doing so also results in unjustifiable delay, undue expense, and further prejudices the defendants who do not have and cannot obtain the discovery. Id.

C. Vacating the Dismissal Orders and/or Reinstating Plaintiffs' Complaint Is Contrary to Rule 1:1-2.

Rule 1:1-2 (a) states that the Court Rules shall be construed to secure "a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." (emphasis added). This rule allows the relaxation of court rules if "adherence would result in an injustice." In the present case, plaintiffs themselves, after being fully put on notice in January, 2025 that their complaint was dismissed with prejudice for failure to provide court ordered discovery failed still had not complied with the court's

May 2, 2024 order. Vacating the dismissal orders and reinstating plaintiff's complaint would not only cause unjustifiable expense and delay, would result in injustice and absolute disregard (not relaxation) of New Jersey Court Rules 4:17-4; 4:18-1; 4:23-2; 4:23-5(a)(1), (a)(2) and (c); 4:49-1 and 4:50-1.

Assuming *arguendo* that plaintiffs were not informed by their attorney that discovery was demanded on February 5, 2024 and again on February 28, 2024 and March 25, 2024; not informed by their attorney that defendants filed a motion to compel and that the judge personally ordered their counsel to pay attention to the file and produce the discovery by May 10, 2024, **plaintiffs were fully aware as of January, 2025, that the court-ordered discovery was due and owing, and still did not produce same prior to the motion return date of February 28, 2025.** 2T5-3 to 2T5-6; 2T5-8 to 2T5-24; 2T11-4 to 2T11-12. While plaintiffs' urge that the court's objective in A&M Farm is to compel discovery rather than dismiss the case, doing so ignores plaintiffs' history of and current failure to produce discovery, defendants efforts and compliance with court rules to compel and obtain discovery throughout the litigation, and the court's duty and responsibility to enforce the rules. Pa 34-35; Pa57,¶12; Pa131,¶5-9,¶11; Pa132,¶15-16; Pa172-173, T6-14 to T7-21; Pa176, LCV20223383712 LCV20224090249, LCV2023420982, LCV20232254277, LCV20233494346, LCV20233691243, LCV2024920664; 2T20-20 to 2T223-

22. Vacating the dismissal orders and reinstating the complaint of the plaintiffs' who were/are in violation of the court's May 2, 2024 order contrary to the multiple rules enacted to promote discovery and fairness would result in an **unjust** determination, has caused and will cause unjustifiable delay and expense which conflicts with the intent of Rule 1:1-2.

POINT III

REINSTATEMENT OF THE COMPLAINT IS IMPROPER AS PLAINTIFFS DID NOT AND HAVE NOT PROVIDED THE OUTSTANDING, COMPELLED DISCOVERY PURSANT TO THE COURT'S MAY 2, 2024 ORDER.

Plaintiffs' assert that "discovery issues" should not have precluded the trial court from granting plaintiffs' motion to vacate. Pb36-43. Claiming the court "inappropriately" emphasized plaintiffs' long standing history failure to comply with discovery rules and orders as same are designed to elicit discovery responses rather than punish a delinquent party, plaintiffs conveniently "ignore" the fact that they failed to provide discovery compelled by a court order. Id.

Plaintiffs' characterization of the violation of the court's May 2, 2024 order as "discovery issues" as opposed to the ongoing, purposeful refusal to provide court-ordered discovery, is distorted. Pb38. Again, plaintiffs had failed to comply with the court order of December 15, 2023, and appear for depositions. Pa34-35; Pa131, ¶8-9; Pa176, LCV20233684446. Pursuant to the order of June 20, 2024, plaintiffs complaint was dismissed "pursuant to R. 4:23-5(a)(1) and/or R. 4:23-2(b)(3) for failure to provide information compelled in

the May 2, 2024 order on or before May 10, 2024." Pa41. It was further ordered that "prior to moving for reinstatement of the complaint plaintiffs must have complied with all the terms of the within order." Id. Plaintiffs' even after having notice of the dismissal, court ordered discovery and need to provide discovery, plaintiffs admit they had not complied with all the terms of the May 2, 2024 order. Pb39; Pa57¶13; Pa62¶19; 2T11-3 to 2T11-12.

In support of their claims, plaintiffs cite Zaccardi, supra, arguing that dismissal with prejudice is reserved where no lesser sanction will erase prejudice to the non-delinquent party or when the litigant was at fault. Pb41. The Zaccardi court also held the "imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrant it, but to deter others tempted to violate the rules absent such a deterrent." Zaccardi, supra 162 N.J. Super. at 332. The sanction of dismissal is "invited" by a party "deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Abtrax Pharms. Inc. v. Elkin-Sinn, Inc., 139 N.J. 499, 515 (1995). A litigant who "deliberately obstructs full discovery" and "willfully violates" the bedrock principle of full disclosure "should not assume that the right to an adjudication on the merits of its claims will survive so blatant an infraction." Abtrax Pharms., supra, 139 N.J. at 523. Like Abtrax Pharms., by their continued refusal to provide the court ordered discovery: HIPAA authorizations, identity of medical

providers, wages and disability/Social Security applications/claims, and other discovery regarding subsequent accidents, plaintiffs are afforded "an unfair advantage at trial" due to defendants' unfamiliarity with the facts of plaintiffs damages, lost wages, treatment, etc. Abtrax Pharms., supra, 139 N.J. at 521; Pa184-186. Prevention of such an unfair advantage is "a basic premise of our discovery rules" warranting upholding the dismissal of plaintiffs' complaint with prejudice. Id. at 522-523.

Plaintiffs' counsel's asserts that plaintiffs are "innocent of any wrongdoing" but fails to acknowledge or explain plaintiffs' documented failure to provide discovery throughout the litigation; failure to comply with the court's December 15, 2023 order to appear for depositions, failure to provide discovery in response to the demands of February 5, 2024, February 28, 2024 and March 25, 2024; and failure to provide the court ordered discovery pursuant to the May 2, 2024. Pb35; Pa34-35; Pa53-64; Pa 131-134, ¶5-28; Pa176, LCV20233684446; 2T. Additionally, after receiving notice of the dismissal/outstanding discovery on or about January 8, 2025, plaintiffs' provided no explanation or excuse for their failure to provide the discovery prior to the return date of the motion. Pa53-64; 2T. On May 2, 2024, Judge O'Dwyer ordered the outstanding discovery be produced within eight (8) days. Pa38-39. Plaintiffs' had almost two months from the alleged time they knew of the

dismissal/outstanding discovery and the return date of the motion on February 28, 2025, but still did not comply with the court's order. Pa57¶13; Pa62¶19; 2T5-3 to 2T5-24; 2T11-4 to 2T11-12. The denial of plaintiffs' motion reinstate the complaint and sanction of dismissal is justified by plaintiffs' clear and continued violation of the May 2, 2024 order and failure to provide complete discovery.

CONCLUSION

Plaintiffs have not shown an abuse of discretion by the Honorable Kelly A. Conlon warranting a reversal of the court's decision below. Plaintiffs, have not otherwise put forth any factual or legal basis to vacate the dismissal orders of June 4, 2024, and September 27, 2024. Plaintiffs' are not entitled to relief under R. 4:49-1 or R. 4:50-1. Relief under R 1:1-2 is untenable as reinstating plaintiffs' complaint while in contempt of a court order would result in insurmountable injustice, prejudice to the defendants, and the utter disregard of Rules 4:17-4; 4:18-1; 4:23-2; 4:23-5(a)(1), (a)(2) and (c); 4:49-1 and 4:50-1. Accordingly, plaintiffs' appeal must be denied.

Respectfully submitted,

Cassandra A. Willock
CASSANDRA A. WILLOCK, ESQ.
Attorney I.D. 038311998

Dated: September 24, 2025

TERRI NEWMAN and ERIC NEWMAN

Plaintiffs/Appellants,

vs.

JOSE CABRERA AND/OR JOHN DOE (HIS NAME BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF); ATEEL TRANS AND/OR "XYZ" CORPORATION'', ITS NAME BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF)

Defendants/Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 2369-24T2

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NUMBER: BER-L-8293-21

CIVIL ACTION:

Sat Below:

HON. KELLY A. CONLON, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS TERRI NEWMAN AND ERIC NEWMAN

MATTERA, MATTERA & ZISA, LLC
470 Chamberlain Avenue, Suite 6
Paterson, New Jersey -7522
(973) 595-6240
Fax: (973) 595-6237
Counsel for Plaintiffs-Appellants

NICHOLAS A. MATTERA. ESQ.,
Attorney I.D. No. 021091981
Of Counsel and On the Brief
E-Mail: nicholas.mattera@gmail.com

Date Submitted: October 8, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Court Rules:

TABLE OF JUDGMENT ORDERS AND RULINGS

PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiffs-Appellants ("Plaintiffs") in reply to the appellate brief submitted on behalf of Defendants-Respondents ("Defendants") which is factually, procedurally and legally misleading.

LEGAL ARGUMENT

I. DEFENDANTS HAVE NOT ESTABLISHED THAT THE TRIAL COURT COMPLIED WITH THE STRINGENT REQUIREMENTS OF *R.* 4:23-5(a)(2)&(3). (201a-206a)

The primary basis for reversal of the denial of motion to vacate the order dismissing Plaintiffs' Complaint with prejudice (Pa48-Pa49) is the trial Court's failure to comply with the requirements of *R.* 4:23-5(a)(2)&(3). *See* Pb10 to Pb23. Defendants make a fruitless attempt to establish that the Court complied with the requirements. Defendants merely say, repeatedly, that prior to dismissing Plaintiffs' Complaint with prejudice, the motion judge had notices sent to the then-attorney of record, Joseph C. Zisa, Jr. Esq. and attempted to call Mr. Zisa, leaving messages. Db8, Db13, Db23, Db26, Db30- Db31.

As discussed in Plaintiff's previous brief, this was insufficient. *See* Pb15- Pb19. It is undisputed that the undersigned, Nicholas A. Mattera, Esq., handled the case after this office merged with Mr. Zisa's office and that the undersigned did not have access to the e-Courts notices.

Defendants make an irrelevant complaint that the undersigned did not

certify as to when the firms merged or when Mr. Zisa became semi-retired. Db9. What is important is that the merger took place and the undersigned took over the handling of this case sometime before January 18, 2024, as evidenced by the undersigned's letter to the Court filed on that day (Pa145) before any of the events relevant to this appeal took place. Also irrelevant is Defendants' reference to the fact that Plaintiffs submitted no certification of Mr. Zisa in support of their motion to vacate the orders of dismissal dated June 20, 2024 and September 27, 2024 ("Motion to Vacate"). Db14 The undersigned's certification in support of the motion presented a complete rendition of the relevant facts. Pa53-Pa64.

Furthermore, Mr. Zisa's old office, to which the Court's telephone calls regarding Defendant's Motion to Dismiss Plaintiffs' Complaint With Prejudice were probably made, was closed. 2T8-7 to 2T8-14.[1] Although this office had call forwarding from Mr. Zisa's phone line, the undersigned never received the call. 2T34-20 to 2T34:23. Telephone records confirm this. Defendants cite *A & M Farm & Garden Center v. American Sprinkler Mechanical LLC*, 423 N.J. Super. 528 (App. Div. 2012) (" *A & M*") for the proposition that "appropriate

[1] "1T" refers to the transcript of motion proceedings that took place on September 27 2024. "2T" referred to motion proceedings that took place on February 28, 2025.

action . . . to obtain compliance with the requirements" of *R.* 4:23-5(a)(2)&(3) "'may be as simple as having a law clerk call the attorney for the delinquent party when the court does not receive the affidavit…seven days prior to the return date.'" Db30, *citing A & M*, 423 N.J. Super. at 538. But they ignore the holding of this Court that merely ***attempting to reach*** the attorney for the delinquent party does not comply with the requirements of the rule. *See Chen v. Pep Boys, Inc.*, 2020 N.J. Super. Unpub. LEXIS 1387 (App. Div. 2020) (Pa223-Pa227) at *13-14.

Defendants' fail to mention or address other steps that should have been taken in light of Plaintiff counsel's failure to appear at the motion to dismiss Plaintiffs' Complaint with prejudice such as adjourning the motion, asking the Defendant to call this office or simply reviewing Defendant's motion papers that included the undersigned's name. *See* Pb16-Pb17; Pa43, Pa47.

Defendants attempt to cast doubt on the fact that the undersigned did not have notice of the motion to dismiss without prejudice and the motion to dismiss with prejudice based on the fact Nicholas A. Mattera, Jr., Esq. participated in the May 2, 2024 hearing before the Hon. John D. O'Dwyer, P.J.cv. Db5, Db11. In so contending, they attempt to mislead this Court by conveniently ignoring the fact that Judge O'Dwyer's chambers called the undersigned at this office, making it possible for Plaintiffs' counsel to appear

at the hearing. 2T9-6 to 2T9-10, 2T14-5 to 2T14-6. If the Court below, having the undersigned name in the motion papers, had done what Judge O'Dwyer did on May 2, 2024 before dismissing the Plaintiffs' Complaint with prejudice, the need for the Motion to Vacate and this appeal would have been avoided.

Defendants also rely on the undersigned's January 18, 2024 letter to the Court in their attempt to show that the undersigned received notice of court proceedings "[d]espite not have filed a substitution of attorney. . .." Db4. The undersigned received notice of the proceeding that was the subject of the letter, not through eCourts, but way of a conversation with defense counsel. Pa192.

Most galling of all, Defendants failed to respond to the fact that defense counsel knew, as evidenced by their motion papers, of the undersigned's involvement in the case. *See* Pb17, Pa43, Pa47, Pa20, Pa40; Pa24. Yet defense counsel, an officer of the Court, stood mute when the motion judge discussed the absence of Plaintiffs' counsel at the hearing on Defendants' motion to dismiss Plaintiffs' Complaint with prejudice. 1T3-13 to 1T4-1.

In short, Defendants fail to demonstrate that the motion judge did everything necessary to comply "salutary scheme of" *R* 4:23-5 which requires "***meticulous attention to its critical prescriptions***. . .[that] afford a measure of protection to the party who is faced with the ultimate litigation disaster of

termination of his cause." *Zimmerman v. United Services Auto. Ass'n.*, 460 N.J. Super. 368, 366-367 (App. Div.1992) (emphasis added).

II. DEFENDANTS FAIL TO SHOW THAT CASES RELIED ON BY PLAINTIFFS ARE INAPPLICABLE TO THIS MATTER. (201a-206a)

Defendants attempt to distinguish *A & M* by pointing out that *A & M* was decided before the institution of electronic filing (Db34) but fail to attribute any significance to this distinction. Nor do they explain why it is significant that Plaintiffs' Complaint in this case was dismissed for violation of a court order unlike the situation in *A & M. Ibid.* Defendants also state that in *A & M*, the discovery in question was produced before the motion to vacate the dismissal order and reinstate the complaint. *Ibid.* Here, too, all relevant discovery was provided prior to the return date of the Motion to Vacate the dismissal and reinstate Plaintiffs' Complaint as discussed below.

Defendants also point out that the *A & M* court stated that the plaintiff was not "'automatically entitled'" to having a dismissal with prejudice vacated due to a failure to comply with requirements of *R.* 4:23-5. Db34 *citing A & M*, 423 N.J. Super. at 536. The *A & M* court, however, did reverse the orders dismissing the complaint with prejudice and denying the motion to vacate under virtually the same circumstances as those that occurred in this case, *i.e.,* counsel for the plaintiff did not appear at the hearing on defendant's motion to

dismiss or oppose the motion because the motion papers were not forwarded to his attention. *Id.* at 533. Therefore Defendants' attempt to distinguish *A & M* is ludicrous because it misses this vital point.

Defendants then states the "principle" that a failure to comply with the requirements of *R.* 4:23-5 does not automatically entitle a party to having a dismissal with prejudice vacated was "reiterated" in *Leon v. Parthiv Realty Co., Inc.*, 360 N.J. Super. 153 (App. Div. 2003) and *Feinsod v. Noon*, 272 N.J. Super. 248 (App. Div. 1994). Db34. These cases are clearly distinguishable because in neither case is there any indication that lack of notice precluded plaintiff's counsel from adhering to the requirements of *R.* 4:23-5(a((2).

Moreover, in attempting to distinguish *Chen v. Pep Boys*, *supra,* Defendants state that unlike the motion judge in this case, "who made efforts to obtain compliance [with the requirements of *R.* 4:23-5], the trial court [in *Chen*] did not take sufficient steps to obtain compliance with the notice rule." Db35-Db36 *citing* 2020 N.J. Super. Unpub. LEXIS 1387 at *11. While the Court below may have made efforts to obtain compliance with the Rule, the Court failed take sufficient steps to do so as in *Chen* as discussed at Pb15 to Pb19 and above. Moreover, in attempting to distinguish *Chen*, Defendants again make the baseless assertion that Plaintiffs did not provide the discovery required by the Court's May 2, 2024 order prior to the return date of the

Motion to Vacate. Db36. As noted above, the discovery relative to noneconomic damages was provided prior to the return date of the Motion to Vacate the dismissal and reinstate Plaintiffs' Complaint. *See* discussion below.

Defendants attempt to distinguish *Kim v. Magarelli*, 2011 N.J. Super. Unpub. LEXIS 2848 (App. Div. 2011) (Pa214-Pa218) by stating that the case was decided before e-filing and modifications of "the Rule." Db36. They fail to explain, however, how the advent of e-filing and changes in "the Rule" impact the holdings in the case.

Most importantly, in attempting to distinguish *A & M*, *Chen* and *Kim*, Defendants ignore the key point of the cases, namely that the requirements of *R.* 4:23-5 must be strictly enforced in order to avoid depriving an innocent plaintiff of a trial on the merits. *See A & M*, 423 N.J. Super. at 535 *quoting Zimmerman*, *supra*, 260 N.J. Super. at 376-377 (on motion to dismiss a complaint with prejudice, a judge must pay "'meticulous attention to the critical prescriptions" of *R.* 4:23-5 to protect an innocent plaintiff from "'the ultimate disaster of termination of his cause'") *Chen,* 2020 N.J. Super. Unpub. LEXIS 1387 at *11 (court was "constrained to reverse" dismissal of a complaint with prejudice because plaintiff's counsel failed to advise plaintiff "that his lawsuit was on the brink of dismissal and the court did not take sufficient steps to obtain compliance"); *Kim,* 2011 N.J. Super. Unpub. LEXIS

2848 at *10 (the "notice rules [of *R.* 4:23-5] reduce the risk of depriving a blameless client of a claim because of an attorney's inattention . . . in a judicial system that prefers resolution of disputes on the merits").

There can be no doubt that the Plaintiffs are blameless. Defendant makes the irrelevant assertion Plaintiffs' counsel has not certified that Plaintiffs were unaware of Judge O'Dwyer's May 2, 2024 order and "Instructions" compelling discovery. The argument is moot because, as Defendants know, Plaintiffs did not know that their Complaint has been dismissed until January 8, 2025. Db23. This is a key point since this appeal centers around the fact that the Court below failed to enforce the provisions of *R.* 4:23-5 which were designed to protect such innocent Plaintiffs.

III. THERE IS NO OUTSTANDING DISCOVERY ISSUES THAT SHOULD PRECLUDE REVERSAL OF THE TRIAL COURT'S FEBRUARY 28, 2025 ORDER. (201a-206a)

Throughout their brief, Defendants have tried to paint a picture that there are multiple important outstanding issues of discovery which are prejudicing the Defendant and will continue to prejudice them. *See* Db12, Db13, Db15-Db16, Db17-Db19, Db23-Db24, Db25-Db26, Db29, Db32, Db37, Db45, Db46-Db49, Db46, Db47. This is not the case.

The June 20, 2024 order dismissing Plaintiffs' Complaint without prejudice was based on Plaintiffs' failure to provide the information compelled

by the May 2, 2024 order entered by Judge O'Dwyer. Pa41-Pa42. The September 27, 2024 order dismissing Plaintiffs' Complaint with prejudice followed from that order. Pa48-Pa49. The May 2, 2025 order compelled Plaintiffs to provide information in the February 5, 2025 letter of Defendant's counsel and expert reports. Pa38-Pa39.Thus, these are the only discovery demands relative to this appeal.

Plaintiffs have provided all discovery related to noneconomic damages requested in the two letters from Defendants counsel dated February 5, 2024 before the return date of the Motion to Vacate including signed HIPAA authorizations and the name of Plaintiff Terri Newman's former primary care physician. *See* Pa88-Pa128, Pa197. Plaintiffs' expert report was served on June 12, 2024, even before Plaintiffs' Complaint was dismissed without prejudice on June 20, 2024. Pa199, Pa41-Pa42.

The only outstanding discovery remaining is the name of the physical therapist who visited Plaintiff Terri Newman on two occasions. Pa90, Pa89. Plaintiff did not have this information and was trying to get it. *Ibid*. Plaintiffs should not be penalized for not providing information that they do not have.

Plaintiffs provided tax and social security disability documents. Pa115-Pa128. Counsel for Defendant contended these documents were insufficient. Pa184-Pa186. These documents relate to Plaintiffs' claim for economic

damages. Therefore, at oral argument on the Motion to Vacate the undersigned represented to the Court that Plaintiffs would waive any economic loss claim as a result of this accident. 2T11-13 to 2T11-19, 2T35-23 to 2T36-2.

Finally, it is egregious for Defendants to assert that they were not given information regarding Plaintiff Terri Newman's two subsequent fall down accidents and that they would be significantly prejudiced without it. Db15. Defense counsel made the same misleading contentions during oral argument on the Motion to Vacate. 2T26-18 to 2T26-25, 2T32-1 to 2T32-7, 2T40-8 to 2T40-15. Defendants fail to tell the Court that such information was never requested in her discovery demands made in defense counsel's February 5, 2024 letters which were at issue in the motions below. Pa90; Pa91. Therefore, the references to subsequent accidents in Defendants' appellate brief are misleading and inappropriate as they were when made to the Court below on the Motion to Vacate. If this matter is restored, Defendants (if they so wish) can get additional discovery unrelated to this Appeal concerning the two subsequent fall down accidents. Therefore, Defendants will not be prejudiced by a restoration of this case.

Since Plaintiffs have complied with virtually all the discovery demands made in defense counsel's February 5, 2024 letters, the motion judge's statement that Plaintiffs have not complied with Judge O'Dwyer's May 2, 2024

order (Pa206) is erroneous and not based on "sound, abundant, undisputed credible evidence" as Defendants assert. Db27. Also, since Plaintiffs have complied with virtually all of Defendants discovery demands, it is outrageous for Defendants to refer to Plaintiffs' response to the demands as "continuing defiance" (Db25), "deliberate refusal" (Db32) and "purposeful refusal" (Db46). Defendants also speak of "[a] litigant who 'deliberately obstructs full discovery ' and 'willfully violates' the bedrock principle of full disclosure. . . ." Db47 *quoting Abtrax Pharms., Inc. v. Elkin-Sinn, Inc.*, 139 N.J. 499, 523 (1995). Defendant likens Plaintiffs to the offending party in *Abtrax Pharms,* Db47-Db48. In *Abtrax,* plaintiff's president and majority stockholder concealed the existence of documents and made false statements under oath. 139 N.J. at 509. Nothing approaching such conduct occurred here and it is atrocious for Defendants to suggest otherwise.

The undersigned trusts the Court will see through this caustic and false smokescreen and conclude that Defendant's assertion that Plaintiffs have not complied with the discovery demands is baseless. Certainly, Defendant does not, and cannot, demonstrate any wrongful intention in any shortcoming in Plaintiffs' discovery responses as the language used by Defendant suggests.

IV. THE FACT THAT DEFENDANT HAS FILED MULTIPLE DISCOVERY MOTIONS IN THE COURSE OF THE LITIGATION OF THE ACTION IS IRRELEVANT TO THE ISSUES ON APPEAL. (201a-206a)

Throughout their brief, Defendants harp on the fact that they filed multiple discovery-related motions in the course litigation of this matter. Db1, Db3, Db14, Db15, Db16, Db17-19 Db22, 24, Db32, Db46. This fact is irrelevant to the issues on appeal which focuses the trial Court's noncompliance with the requirements of *R.* 4:23-5(a)(2) &(3) and the fact that Plaintiffs themselves are innocent of any infraction that led to the dismissal of their Complaint with prejudice.

V. DEFENDANTS FAIL TO DEMONSTRATE THAT THEY WOULD SUFFER APPRECIABLE PREJUDICE IS PLAINTIFFS' COMPLAINT IF RESTORED. (201a-206a)

Defendants claim that they would be prejudiced by the restoration of Plaintiffs' Complaint. Db15, Db25, Db26, Db44 Db49. As discussed in Plaintiffs' initial brief at Pb32, Defendants have not demonstrated that their ability to defend would be hampered in any way. As discussed above, Defendants have gotten virtually all of the discovery that they demanded. Defendants claim that restoration will result in delay and additional expense. Db15, Db25, Db26. Time and expense, however, is part and parcel of all litigation. As stated in Plaintiffs prior brief, any prejudice that Defendants would incur pales in comparison to the innocent Plaintiffs' detriment if their cause of action is lost. Pb32

V. DEFENDANTS FAIL TO DEMONSTRATE THAT THE COURT RULES DID NOT PROVIDE AMPLE MEANS TO SUPPORT PLAINTIFFS' MOTION TO VACATE (201a-206a)

As to *R.* 4:49-2 , Plaintiffs have demonstrated that motion judge erred in concluding that the Motion could not be granted under the Rule because the motion was filed more than 20 days after the entry of the September 27, 2024. Pa204, Pb33-Pb34. As explained in detail in Plaintiffs' previous brief, the Motion to Vacate was timely under filed seven (7) days after the undersigned was made aware of the orders of dismissal on January 8, 2025 (Pa57-Pa58; Pa51-Pa79). While Defendants characterize that argument as "absurd" (Db38), it is respectfully submitted that the argument makes perfect sense, especially in light of *R.* 1:1-2 which mandates that our *Rules of Court* be construed to "secure a just determination." Here, we seek justice for the innocent Plaintiffs.

With this consideration in mind, Defendants' argument that relief under *R.* 4:49-2 is unavailable to Plaintiffs due to lack of diligence on the part of Plaintiffs' ***attorneys,*** but not Plaintiffs themselves, must be rejected. Db38 to Db40. As noted above, since this appeal centers around the fact that the Court below failed to enforce the provisions of *R.* 4:23-5(a)(2)&(3) designed to protect such innocent Plaintiffs, not what Plaintiffs' counsel did or did not do.

As to R. 4:50-1, in arguing the Plaintiffs are not entitled to relief under the Rule, Defendants emphasize what they see as Plaintiff's' failure to comply

with the discovery demands made in defense counsel's February 5, 2024 letters as compelled by Judge O'Dwyer's May 2, 2024 order. Db41-Db42, Db43-Db44. As discussed above, Plaintiffs have produced all the discovery related to noneconomic damages. Moreover, whatever discovery infraction that Plaintiffs' attorneys may have committed does not change the fact that the Court below did not protect the innocent Plaintiffs by enforcing the provisions of *R.* 4:23-5(a)(2)&(3). Defendants' argument conveniently ignores the holding in *Christoph v. Port Auth. Of NY/NJ*, 2010 N.J. Super. Unpub. LEXIS 1339 (App. Div. 2010) (Pa219-Pa222) where the court held that *R.* 4:50-1 required a dismissal with prejudice to be vacated when the requirements of *R.* 4:23-5(a)(2) were not complied with despite infractions by the attorney who had been handling the case. 2010 N.J. Super. Unpub. LEXIS 1339 at *3-4,8-9.

Finally, as to *R.* 1:1-2, in arguing that Plaintiffs are not entitled to relief under the Rule Defendants emphasize that "unjustifiable expenses and delay. . . and absolute disregard" of the court rules will result if Plaintiffs' Complaint was reinstated. Db45. As discussed above, any detriment to Defendants that would result from reinstatement pales in comparison to the innocent Plaintiffs' detriment if their cause of action is lost. As for "disregard" of court rules, this is irrelevant because Plaintiffs themselves are not responsible for such violations. If the Court believes that Plaintiff's counsel disregarded court

rules, monetary sanctions should be imposed such as payments for unjust expense to the Court or defense counsel, but the Complaint of the innocent Plaintiffs should be restored. “[T]he sanction of dismissal with prejudice for a procedural violation must be a recourse of last resort." *Conrad v. Michelle & John, Inc.*, 394 N.J. Super. 1, 11 (App. Div. 2007). Defendants also point to a number of motions to enforce discovery in this actions as a reason to deny relief under *R.* 1:1-2. Db45. This is irrelevant for reasons discussed above.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, through their brief, Defendant have intentionally attempted to muddy the waters by simply attacking this office and making inaccurate and irrelevant assertions. They do not explain how they would prejudiced by the restatement of this case with appropriate sanctions, if necessary, or which it should not be reinstated.

Respectfully submitted,
LAW OFFICES OF MATTERA,
MATTERA & ZISA, LLC
Attorneys for Plaintiffs-Appellants
Terri Newman and Eric Newman

By: /s/ Nicholas A. Mattera
Nicholas A. Mattera, Esq.

Dated: October 8, 2025