ANNA-MARIA OBIEDZINSKI, Plaintiff, v. TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF TEWKSBURY, LOUIS DIMARE, JESSE LANDON, PETER MELICK, ROBERT BECKER, JAMES BARBERIO, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002426-22 On Appeal From: Superior Court of New Jersey Law Division – Hunterdon County Docket No. HNT-L-391-20 Judgment Entered: Granting Defendants' Motion for Summary Judgment and Dismissing Plaintiff's Complaint With Prejudice Sat Below: Hon. Haekyoung Suh, J.S.C.

BRIEF OF PLAINTIFF/APPELLANT ANNA-MARIA OBIEDZINSKI

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I. PRELIMINARY STATEMENT (Pa1-34).

In this matter, Plaintiff Anna-Maria Obiedzinski ("Plaintiff"), the municipal tax assessor of Defendant Tewksbury Township[1] since December 2007, filed a one-count Complaint under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq*. ("CEPA"). (Pa1-33). In her Complaint, Plaintiff alleges that she has been subjected to repeated acts of retaliation as a result of disclosing and objecting to a range of conduct and activities by Defendants that she reasonably believed were unlawful or in violation of regulations promulgated pursuant to law.

Defendants failed to take Plaintiff's deposition during discovery. After the discovery end date, Defendants filed a Motion for Summary Judgment ("Motion"), initially arguing on the merits that the record does not establish a prima facie case under CEPA and Plaintiff's claims are barred on statute of limitations grounds. In support of her opposition, Plaintiff submitted an extensive and detailed Certification testifying to the retaliation she has suffered from Defendants in violation of CEPA, giving rise to genuine issues of material fact for a jury to determine.

Defendants filed a letter Reply Brief which was not supported by any certifications of any fact witnesses, rendering Plaintiff's Certification undisputed. Defendants' Reply Brief did contain, for the very first time after more than two years

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[1] Defendants include the Township of Tewksbury, Hunterdon County ("Defendant Tewksbury," "Township"), Township Committee of the Township of Tewksbury, Louis DiMare, Jesse Landon, Peter Melick, Robert Becker, and James Barberio (collectively "Defendants").

of litigation (including a motion to dismiss Plaintiff's Complaint at the pleadings stage), a legal contention that Plaintiff is barred from raising a CEPA claim as a tenured municipal tax assessor, which purportedly is not the type of employee CEPA is designed to protect. The motion judge granted Defendants' Motion on this basis alone by misinterpreting Casamasino v. City of Jersey City, 304 N.J. Super 226 (App. Div. 1997), rev'd, 158 N.J. 333 (1999), and Feldman v. Hunterdon Radiological Associates, 187 N.J. 228, 241 (2006), as determining that ***as a class of workers***, "***tax assessors***, because of their statutory protections, are not members of a vulnerable class of persons that CEPA is designed to protected." (Pa51).

A cursory reading of Supreme Court jurisprudence on this issue, including D'Annunzio v. Prudential Insurance Co. of America, 192 N.J. 110 (2007), Lippman v. Ethicon, 222 N.J. 362 (2015), Feldman itself and, critically, Stomel v. City of Camden, 192 N.J. 137 (2007) (determining a tenured municipal public defender ***was*** an "employee" of Camden under CEPA), draws the immediate conclusion that the motion judge not only committed reversible error in her holding, but conducted the opposite analysis of what is required when the issue is "whether a professional person is an 'employee' under CEPA's definition." D'Annunzio, 192 N.J. at 118. Specifically, "courts ***must*** look to the goals underlying CEPA and ***focus not on labels but on the reality of plaintiff's relationship with the party against whom the CEPA claim is advanced***." Feldman, 187 N.J. at 228 (emphasis added). In

D'Annunzio, the Supreme Court established a 12-factor test with three overarching considerations to engage in this exact analysis under CEPA. 192 N.J. at 122-23.

Here, by granting summary judgment on the basis that "tax assessors are outside the scope of CEPA," (Pa52), the motion judge relied entirely on Plaintiff's "label[]" of municipal tax assessor, Feldman, 187 N.J. at 228, and wholly failed to apply ***any*** of "[t]he considerations that ***must*** come into play." D'Annunzio, 192 N.J. at 122. The motion judge not only disregarded clear mandates by the Supreme Court but set a dangerous precedent by *per se* excluding an entire class of employees from CEPA, which is "social legislation" that contains "no exceptions to th[e] generic definition of" "employee," N.J.S.A. 34:19-2(b). Lippman, 222 N.J. at 379.

Plaintiff respectfully submits reversal is warranted because, given the factual realities of Plaintiff's work-relationship with Defendants and the unlawful retaliation she has received, the factors and considerations set forth in D'Annunzio overwhelmingly favor the conclusion that Plaintiff is an "employee" that is entitled to CEPA protections. At a minimum, Plaintiff respectfully submits that remand is warranted for the Law Division—or a jury—to engage in the required factual analysis whether Plaintiff was an "employee" under CEPA.

II. PROCEDUAL HISTORY[2] (Pa1-34, Pa51-53, Pa486).

Plaintiff filed a one-count Complaint in the Law Division, Hunterdon County, on October 19, 2020, against Defendants Township of Tewksbury, Hunterdon County, Township Committee of the Township of Tewksbury, Louis DiMare, Jesse Landon, Peter Melick, Robert Becker, and James Barberio alleging retaliation in violation of CEPA (Pa1-33).

Defendants filed an Answer to Plaintiff's Complaint on December 2, 2020, and on February 16, 2021, filed a Motion to Dismiss Plaintiff's Complaint (Pa486). ***Defendants made no argument that Plaintiff, as a municipal tax assessor, was purportedly barred from raising a CEPA claim.*** Plaintiff opposed Defendants' motion, and on July 7, 2021, oral argument was held before the Honorable Michael F. O'Neill, who denied Defendants' motion.

Despite a discovery period of approximately 16 months that ended on April 26, 2022, ***Defendants did not take Plaintiff's deposition***, nor did they conduct any discovery related to the issue of Plaintiff's rights to file a CEPA claim as a municipal tax assessor.

On January 6, 2023, Defendants filed their Motion for Summary Judgment, ***which again did not argue that Plaintiff is barred from bringing a CEPA claim as***

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[2] Pa Plaintiff/Appellant's Appendix in Support of Appeal.
1T Oral Argument on Defendants' Motion for Summary Judgment (March 31, 2023).

a municipal tax assessor. Plaintiff filed her opposition on February 21, 2023. In support of her opposition, Plaintiff submitted a Certification averring critical facts surrounding the whistleblowing conduct she engaged in and the retaliation she suffered as a result. (Pa213-32).

On March 27, 2023, Defendants filed a letter Reply Brief to the Trial Court—Defendants did not submit any certifications by any of the Defendants, rendering the facts set forth in Plaintiff's Certification uncontested and undisputed.[3] In their Reply Brief, Defendants ***asserted for the first time in the lawsuit*** that the Appellate Division's ruling in Casamasino v. City of Jersey City, 304 N.J. Super 226 (App. Div. 1997), rev'd, 158 N.J. 333 (1999), ***barred all New Jersey tax assessors from raising CEPA claims as a matter of law***. Because Defendants raised this argument for the first time in their reply brief in support of their Motion for Summary Judgment, ***Plaintiff was not given any opportunity to brief this issue prior to oral argument***.

On March 31, 2023, just four days after Defendants raised for the first time

[3] By failing to proffer any opposing certifications or affidavits on behalf of Defendants, and instead merely relying on arguments of counsel in their letter brief, Plaintiff's certification is in fact unopposed while counsel's arguments are inadmissible. Because Plaintiff's allegations in her Certification were the only testimonial evidence before the motion judge, the judge was required to view them in the most favorable light and accept them as true. Meade v. Twp. of Livingston, 249 N.J. 310, 327 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). This alone should have given the Trial Court the basis for denying Defendants' Motion for Summary Judgment.

the argument that Plaintiff is categorically barred as a matter of law from raising a CEPA claim, the Honorable Haekyoung Suh, J.S.C., had oral argument via Zoom on the Motion.

On April 10, 2023, the motion judge issued an Order and written opinion granting Defendants' Motion and dismissing Plaintiff's complaint with prejudice, solely based on the erroneous determination that because "***plaintiff is a tax assessor*** who enjoys the statutorily created job security afforded under N.J.S.A. 54:1-35.31 and N.J.S.A. 40A:9-165, ***plaintiff is barred from bringing a CEPA claim***." (Pa52). The motion judge erroneously interpreted the Appellate Division's opinion in Casamasino as creating a bright-line rule exempting all municipal tax assessors in New Jersey from CEPA protection. (Pa52); see also (Pa44) ("the court is constrained to follow Casamasino").

However, Casamasino never set forth such a *per se* rule, and ***the Supreme Court requires the opposite of its trial courts***—specifically, "courts ***must*** look to the goals underlying CEPA and ***focus not on labels but on the reality of plaintiff's relationship with the party against whom the CEPA claim is advanced***." Feldman, 187 N.J. at 228. While the motion judge acknowledged that the Supreme Court cited Casamasino while discussing "a general approach for determining protections under CEPA, specifically looking at the goals underlying CEPA and ***focusing on the reality of the plaintiff's relationship with the defendant***," (Pa51 (citing Feldman,

187 N.J. at 240)), the motion judge wholly failed to examine the work relationship between Plaintiff and Defendants, which was rife with retaliation in direct violation of New Jersey statutes that are designed to protect municipal tax assessors, including but not limited to N.J.S.A. 40A:9-165, 54:1-35.31.[4]

On April 18, 2023, Plaintiff filed a Notice of Motion to Appeal Judge Suh's Order. Plaintiff seeks reversal of Judge Suh's April 10, 2023 Order granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's Complaint with prejudice, as the record establishes more than sufficient evidence for a jury to find retaliation in violation of CEPA, a statutory remedy that Plaintiff is afforded under the circumstances.

III. FACTUAL BACKGROUND (Pa34, Pa44, Pa51-52, Pa213, Pa215-16).

A. Background. (Pa213, 215-16).

Plaintiff commenced employment as the Tax Assessor for Defendant Tewksbury Township in December 2007. (Pa213 (Cert. of Anna-Maria Obiedzinski, ("OB Cert.") ¶ 3)).[5] As a municipal tax assessor, Plaintiff is a public officer, and her duties are imposed and defined by New Jersey law. Id. ¶ 7.

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[4] See infra, at pp. 10, 39-44.

[5] Plaintiff filed her Certification in support of her opposition to Defendants' Motion for Summary Judgment. Since Defendants' failed to take Plaintiff's deposition in this matter and further failed to proffer any certifications by fact witnesses, the facts averred in Plaintiff's Certification are undisputed.

As Tax Assessor for Defendant Tewksbury Township, Plaintiff's duties include approving or denying farmland assessment applications. Id. ¶ 5. Pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1, *et seq.* (the "Farmland Act"), and the regulations promulgated therefrom, N.J.A.C. 18:15, *et seq.*, real property in New Jersey qualifies as farmland—and is thus subject to significant tax breaks—when the property has been devoted to agricultural use for at least two consecutive years prior to the year of the assessment or inspection of the property. (Pa215-16 (OB Cert. ¶ 11); N.J.A.C. 18:15-3.1. ***Land that qualifies as farmland must be inspected at least once every three years to ensure it still qualifies under the Act.*** Id. ¶ 12; see also N.J.A.C. 18:15-2.13.

Shortly after Plaintiff was hired, she was surprised to learn Defendant Tewksbury Township had no inspector and no farmland inspection program in place. Id. ¶ 13. This fact was troubling—and placed Defendant Tewksbury in immediate risk of violating laws and regulations such as N.J.A.C. 18:15-2.13—given the Township has more than 500 qualified farm properties. Id. ¶ 10.

B. Plaintiff Uncovered Missing Farmland Applications and Delinquent Farm Inspections, Which Is a Violation of State Law, and Immediately Complained to Her Supervisor. (Pa63-67, Pa214).

Soon after Plaintiff was hired, she was alarmed to discover that there were "missing" farmland applications and documentation. (Pa214 (OB Cert. ¶ 14)); (Pa63-64). Based on her years of experience as a seasoned tax assessor, Plaintiff

found it unusual that these legally required documents were not in the tax assessor's office. Id. ¶ 15; see also N.J.A.C. 18:15-2.6(b), 3.3(a). Accordingly, on or about February 5, 2008, Plaintiff sent a letter to Tom Efstathiou, the then-current Tax Administrator for Defendant Tewksbury Township, notifying him of the "missing" applications. Id. ¶ 15.

Thus began Plaintiff's years-long quest disclosing, objecting to, and sounding the alarm about Defendants' repeated failures to meet their legal obligations under the Farmland Act. In an October 3, 2008 letter to Township CFO Judy McGrory, Plaintiff disclosed that the State had begun auditing farmland applications and it was critical that farmland inspections commence. Id. ¶ 16; (Pa65-67). Plaintiff informed Ms. McGrory she was creating a spreadsheet listing the properties to be inspected to proffer to "the State that Tewksbury is complying with Farmland law." (Pa66).

After Plaintiff repeatedly disclosed and objected to missing farmland applications and potential violations of law, in or around 2009, Defendant Tewksbury Township finally implemented a farmland inspection program. (Pa217 (OB Cert. ¶ 18)). From 2009 through 2014, Plaintiff inspected hundreds of properties outside of her office hours. Ibid. Defendant Tewksbury Township compensated Plaintiff for performing each of these inspections. Ibid. Plaintiff earned approximately $3,000 per year performing these inspections outside of her office hours. Ibid.

However, as a result of Plaintiff's complaints of missing applications and Defendants' initial failure to have a farmland inspection program, Defendants targeted Plaintiff and initiated a retaliatory campaign against her.

C. Defendants Landon, DiMare, and Becker Committed a Series of Retaliatory Acts Against Plaintiff for Reporting Unlawful and Unethical Conduct.

1. Defendants Eliminated Plaintiff's Position as Joint Tax Assessor for Both Defendant Tewksbury Township and the Town of Clinton. (Pa59-62, Pa76-77, Pa219).

One of Defendants' initial acts of retaliation against Plaintiff occurred in the summer of 2012 when Defendant Tewksbury Township eliminated Plaintiff's position as Joint Tax Assessor with the Town of Clinton. (Pa219 (OB Cert. ¶ 26)); (Pa76-77). Plaintiff had been serving as a joint tax assessor for both Tewksbury and Clinton since 2007 as part of an interlocal services agreement. (Pa215 (OB Cert. ¶ 6)); (Pa59-62). When it was time to renew their agreement, the Town of Clinton wanted Plaintiff to continue performing inspections for them and Plaintiff sought the same. (Pa215 (OB Cert. ¶ 26)). However, Defendant Landon, Administrator of Defendant Tewksbury Township, refused to allow this arrangement, leading to the end of the interlocal services agreement. Ibid.

As a result of this retaliation by Defendant Landon against Plaintiff, Defendant Tewksbury caused Plaintiff's salary to decrease by $16,000. Ibid. ***At or around the same time, Plaintiff also lost three office hours for Defendant Tewksbury Township.*** Ibid. Defendant Tewksbury Township's refusal to maintain

Plaintiff's compensation violated N.J.S.A. 40A:9-165, which prohibits a municipal governing body from reducing a Tax Assessor's salary even if the salary is commensurate with a reduction in office hours. Id. ¶ 27. This was just the start of a series of retaliatory acts by Defendants against Plaintiff which violated the New Jersey statutes designed to protect tax assessors' independence and freedom from political pressure.

2. Defendants Targeted Plaintiff for Refusing to Succumb to Political Pressure and Negotiate a Settlement on Defendant Becker's Tax Appeal. (Pa217, Pa68-75, Pa161-62, Pa159-60).

Initially, Plaintiff did not receive any opposition to the farmland inspection program she created and operated. (Pa217 (OB Cert. ¶ 19)). However, on or about August 15, 2011, Defendant DiMare, who was the Mayor Defendant Tewksbury at the time, sent Plaintiff an e-mail complaining about the $25 farmland inspection fee, questioning Plaintiff's authority as Tax Assessor to charge this fee, and warning her about inspecting a particular individual's property. Id. ¶ 19; (Pa68-69). Thereafter, Defendant DiMare continued to interfere with Plaintiff's duties as the Township's tax assessor and ignored the law's prohibition of exerting political pressure on municipal tax assessors. See, e.g., id. ¶¶ 20-26.

Another example of the unlawful political pressure Plaintiff suffered occurred in 2013, when Plaintiff assessed the property of Defendant Becker, a member of Tewksbury's Township Committee. Id. ¶ 20. Defendant Becker did not agree with

the assessment Plaintiff provided and appealed her decision to the Hunterdon County Board of Taxation. Ibid. Defendant Becker wanted Plaintiff to negotiate or settle his assessment prior to the Board's decision on his appeal, but Plaintiff refused to negotiate. Ibid. Soon thereafter, Defendant DiMare, the sitting Mayor, inappropriately, illegally, and unethically inserted himself into the situation by pressuring Plaintiff to contact Defendant Becker and his wife to settle their tax appeal. Ibid. Plaintiff refused and reminded Defendant DiMare that such issues should be directed to the Hunterdon County Board of Taxation, and not to Plaintiff. Ibid. Plaintiff reasonably believed Defendant DiMare was unlawfully asking Plaintiff to assist him potential tax fraud scheme—at a minimum, Defendants were again unlawfully exerting political pressure upon Plaintiff. Id. ¶ 21.

Fearing retaliation, Plaintiff documented her conversation with Defendant DiMare, particularly noting that Defendant DiMare had urged Plaintiff to work with Defendant Becker to settle their tax appeal. Id. ¶ 2; (Pa70-71). Plaintiff also reached out to Tewksbury Township officials and complained that Defendants Becker and DiMare—two sitting members on the governing body of the Township—were unlawfully interfering with Plaintiff's duties as Tax Assessor and were using their political influence to pressure Plaintiff into improperly "negotiating down" Defendant Becker and his wife's tax assessment. Id. ¶ 23. Defendant Landon, Administrator for Defendant Tewksbury Township, was also worried about

Defendant DiMare's misconduct, as evidenced by his lengthy memorandum which concluded, "The gist of the conversation about the call was that it was inappropriate and interfered with [Plaintiff's] duty as Tax Assessor and the action is prohibited by statute." Id. ¶ 22; (Pa72-73).

In direct retaliation of Plaintiff's complaints of the unlawful political pressure she was facing, Defendant DiMare distributed a series of scathing e-mails regarding Plaintiff to Defendant Tewksbury Township officials. In a May 9, 2013 e-mail, Defendant DiMare called Plaintiff's complaints a "missive" and downplayed her concerns as "personnel issues." He wrote:

> ***I want the full TC to be aware of [Plaintiff] Ann Marie's missive*** so I am sending this reply to each fellow TC member for consideration and their discussion on May 14. I believe they may need to treat this as some sort of complaint either about me, her scheduling or compensation and ***I believe they need to conduct an inquiry into the reason for her memo***.
>
> . . . .
>
> ***Who she sent this to and why she did not send me a copy are questions I would also like answered so that I can take appropriate action if necessary outside of any governmental inquiry.***

Id. ¶ 24; (Pa74-75).

Seven minutes later, Defendant DiMare sent a second e-mail to Defendant Landon, this time ridiculing and undermining Plaintiff's written complaint:

> By the way, tell her to use spell check and to get my name correctly, it looks rather unprofessional to have misspellings on documents she circulates and some people take offense when their name is not spelled correctly.

(Pa161-62).

Defendant DiMare continued his unlawful conduct against Plaintiff by questioning her "sentiment" and "motivation" and calling for "appropriate action" to be taken against her. (Pa74-75, Pa159-60). It is clear from Defendant DiMare's e-mails that Plaintiff had a target on her back and Defendant DiMare would continue to retaliate against Plaintiff for her complaints of unlawful and unethical conduct, all of which is supported by the record.

3. Defendants Ended Plaintiff's Farmland Inspection Program and Unlawfully Decreased Her Pay. (Pa217, Pa78-96).

From 2009 through 2014, Plaintiff inspected hundreds of real properties pursuant to the successful farmland inspection program that Plaintiff instituted.[6] (Pa217 (OB Cert. ¶ 18)). However, on or about June 1, 2015, Defendant Tewksbury Township CFO Marie Kenia e-mailed Plaintiff that the Township Committee members would no longer pay Plaintiff for conducting farmland inspections, effectively ending the farmland inspection program. Id. ¶ 29; (Pa78-79).

[6] Because Defendants limited her work hours, Plaintiff conducted these inspections outside of her normal work hours. Plaintiff was paid through the fees that Defendant Tewksbury Township collected from taxpayers seeking a farmland designation. This $25 fee per inspection was collected pursuant to State law. Id. ¶ 18.

Defendants put Plaintiff in the impossible position of being the Township's tax assessor without the means to complete the requisite number of inspections per year as required by law. Plaintiff's inspection program was self-sufficient as the taxpayers paid a $25 inspection fee. Indeed, at the time she informed Plaintiff that her program was ending, Ms. Kenia nevertheless distributed notices to taxpayers about the $25 fee. Id. ¶ 30. Plaintiff told Ms. Kenia that it was not right for taxpayers to pay for a service they would no longer receive. Ibid.

Thereafter, Plaintiff confronted Defendant Landon and told him that disbanding the farmland inspection program was illegal and unethical because Defendant Tewksbury Township had just collected inspection fees from taxpayers amounting to thousands of dollars. Id. ¶ 31. Plaintiff told Defendant Landon that she believed the real reason they were disbanding the farmland inspection program was so that Defendants could use this money for their own purposes. Ibid. Plaintiff was thus disclosing to her direct supervisor that Defendant Tewksbury Township was conducting an illegal money grab in violation of laws including N.J.S.A. 54:4-23.13, and that the conduct was fraudulent and/or criminal. In response, Defendant Landon replied, "***Just show me how to do it***," referring to the farmland inspections and thus confirming Defendants' intention to unlawfully prevent Plaintiff from performing the inspections as she was required to do by law. Id. ¶ 32.

There was no reason for Defendants to terminate the farmland inspection program other than to retaliate against Plaintiff for her refusal to give in to political pressure and for complaining about their blatant violations of the Farmland Act. ***Defendants' elimination of the program further cost Plaintiff $3,000 in annual income which she regularly earned by performing farmland inspections outside of her office hours.*** Id. ¶¶ 33, 18.

Plaintiff continued to disclose and object to Defendants' failure to follow the Farmland Act as result of eliminating the inspection program. On June 1, 2015, Plaintiff wrote to Ms. Kenia and Defendant Landon, "I am concerned that an inspector has not been named to do the farmland inspections," and "I look forward to speaking with you and Jesse to formulate a farmland inspection program to cover the inspections that we have already collected inspection fees from the taxpayer/farmer and that are statutorily required." Id. ¶ 34; (Pa78-79).

One month later, on July 20, 2015, Plaintiff sent another e-mail to Ms. Kenia reinforcing her commitment to the farmland inspection program and reminding her of their statutory obligations. Id. at ¶ 35; (Pa80-82). Specifically, Plaintiff wrote, "***Completing farmland inspections is not only a statutory requirement, but also ethically necessary as the Township has already accepted the $25 dollar fee from these taxpayers for the inspection***." Ibid. Plaintiff presented options for how to proceed with the farmland inspections, ***including reinstating Plaintiff into the***

position she had done for the past six years and have her continue to inspect the properties.[7] Id. ¶ 22; (Pa80-82). Plaintiff further memorialized the retaliation she had been suffering, stating, "I am devastated that you have perceived my inability to perform farmland inspections as a ***lack of teamwork***. As per our conversation on July 15, 2015, this misperception has impacted my annual merit increase." Ibid.

Following the elimination of Defendant Tewksbury Township's farmland inspection program, Plaintiff conducted inspections whenever possible during the course of her limited 14-hour workweek. Id. ¶ 38. Because Defendants allocated only 14 hours of work per week to Plaintiff, it was impossible for Plaintiff to come close to inspecting one-third of all the farmland properties per year as required by law. Id. ¶ 37. Thus, Defendant Tewksbury Township was on the verge of blatantly violating State law.

On February 22, 2017, Plaintiff sent an interoffice memo to Defendant Landon and Ms. Kenia notifying them of the more than 400 inspections that needed to take place in the Township. Id. ¶ 41; (Pa85-86). Plaintiff again warned Defendants they were collecting money unlawfully for inspections that never took place. Ibid. Defendant Landon and Ms. Kenia never responded to Plaintiff's e-mail, so on March

[7] Further, in May 2016, Plaintiff wrote in her performance evaluation that her goal was to get Defendants to increase her work hours so that she could conduct these farmland inspections as required under State law. Ms. Kenia wrote in Plaintiff's evaluation, "***I support Anne Marie's goal***." Id. ¶ 36; (Pa83-84).

8, 2017, Plaintiff sent a second e-mail outlining the outstanding farmland inspections. Id. ¶ 42; (Pa87-89). Plaintiff then followed up several months later with e-mails stating that as the tax assessor for Defendant Tewksbury, Plaintiff was the only official authorized to process the assessments, so they needed to provide her with the necessary hours to conduct the inspections or hire an inspector. Id. ¶ 42; (Pa90-91).

On September 14, 2017, in response to Plaintiff's e-mails alerting Defendants of their failure to conduct farmland inspections, John Eskilson, an Administrator for Defendant Tewksbury Township, informed Plaintiff that no action has been taken on her request, and that support for granting her request appears nonexistent. Id. ¶ 43; (Pa90-91). Clearly, Defendants simply ignored Plaintiff's disclosures and objections to Defendants' failure to comply with State law and perform the requisite number of inspections. Plaintiff wrote another e-mail in June 2018 pleading for Defendant Tewksbury to reinstate the farmland inspection program and reiterating her desire to continue to her farmland inspection duties as the tax assessor. Id. ¶ 44; (Pa92-96). By ignoring Plaintiff's pleas once again, Defendants made it clear they did not want Plaintiff to conduct the requisite number of farmland inspections as required by law and ignored her warnings that they were violating State law by collecting thousands of dollars in inspection fees and failing to conduct them.

4. Defendant Becker Lashed Out Against Plaintiff at a Closed-Door Meeting in Clear Retaliation of Her Refusal to Negotiate

His 2013 Tax Appeal and Persistent Complaints About Farmland Inspections. (Pa225, Pa97-100).

On or about September 11, 2018, Defendant Tewksbury Township held a closed-door meeting to disparage Plaintiff and her performance. (Pa225 (OB Cert. ¶ 50)). Specifically, Defendant Becker attacked Plaintiff and falsely claimed that she failed to send denial letters to residents whose farmland applications were denied. Ibid. This criticism was baseless as Plaintiff provided all denial letters she sent to residents from 2017 through 2019. Ibid.; (Pa97-98).

After Plaintiff denied Defendant Becker's false allegation, Defendant Becker—with no apprehension that a sitting member of a governing entity is legally prohibited from using his office for political gain—began discussing Plaintiff's refusal to negotiate a settlement on his 2013 property assessment. (Pa225 (OB Cert. ¶ 50)); see supra, at pp. 11-14. Defendant Becker berated Plaintiff for her professional decision not to negotiate on property tax assessments. Defendant Becker's attacks were personal and clearly in direct retaliation for her previous complaints about political pressure and interference, violations of State law, and retaliation. Id. ¶ 52. Defendant Becker's attacks were also a clear indicator that Defendants were continuing to retaliate against Plaintiff for her refusal to participate in the unlawful act of giving in to political pressure as a tax assessor in 2013. Id. ¶¶ 51-52.

In response to Defendant Becker's attacks, Plaintiff sent an e-mail on September 12, 2018, to Roberta Brassard, the Municipal Clerk of Defendant Tewksbury Township, and Township Attorney Francis P. Linnus, Esq. Id. ¶ 53; (Pa99-100). In the e-mail, Plaintiff complained Defendant Becker was attacking her in direct retaliation for her refusal to negotiate on his 2013 appeal. Ibid.

Plaintiff also sent an interoffice memo to Mr. Linnus and Mr. Porto notifying them of Defendant Becker's conduct.[8] Id. ¶ 54. Here, Plaintiff complained to her superiors about conduct that Plaintiff reasonably believed violated State law and ethics and was in direct retaliation for her professional decision—as the municipal tax assessor—refusing to negotiate Defendant Becker's 2013 appeal. Id. ¶¶ 51-53.

Even though Plaintiff reported this retaliation, there is no evidence in the record that Defendants conducted any investigation into Defendant Becker's conduct or that Becker suffered any consequences for his improper actions, except he was told to recuse himself from future conversations with Plaintiff. Id. ¶ 56.

D. As Defendant Tewksbury Township Prepared for a Township-Wide Revaluation, Defendants DiMare and Becker Continued Interfering with

[8] Defendant Becker's conduct was so out of the line and retaliatory that several months later, Plaintiff learned that Defendant Tewksbury Township Councilwoman Dana Desiderio, who was present at the September 12, 2018 meeting, told one of Plaintiff's co-workers that Ms. Desiderio believed Defendant Becker spoke to Plaintiff in an inappropriate and hostile manner. Id. ¶ 55. Shockingly, even though Ms. Desiderio served on Defendant Tewksbury Township Committee, she told Plaintiff she was unaware that Plaintiff had lodged a complaint against Defendant Becker or that Plaintiff wrote a memo complaining about Defendant Becker on September 12, 2018. Accordingly, on April 17, 2019, Plaintiff asked the Acting Clerk to put a copy of her memo in the personnel file. Ibid. Finally, Ms. Desiderio also told Plaintiff that she was filing her own ethics charge against Defendant Becker for his improper conduct toward her. Ibid.

Plaintiff's Duties in Violation of State Law. (Pa101-20, Pa226-27).

On May 21, 2018, the Hunterdon County Board of Taxation notified Defendant Tewksbury Township that it needed to conduct a ***township-wide*** revaluation of all its properties. (Pa226-27 (OB Cert. ¶ 58)); (Pa101-02). This meant that ***every property*** in the Township needed to be reassessed, not just those designated as farmland. The Hunterdon County Board of Taxation required Defendant Tewksbury Township to complete this revaluation in 2019 for assessments in tax year 2020. Ibid.

Plaintiff participated in several meetings with Defendants to discuss this huge undertaking and explained to them that due to the magnitude of this revaluation, Plaintiff could not do the inspections on her own, especially in light of Defendants' refusal to give her more than 14 office hours per week. Id. ¶ 59. Plaintiff informed Defendants they needed to hire an outside company to meet the requisite number of assessments as required by the revaluation. Ibid. Defendant Tewksbury Township then put the township-wide revaluation out to bid.

In or around April 2019, Defendant Tewksbury Township awarded the contract to Appraisal Systems, Inc. ("ASI"), a private company. Id. ¶¶ 59-60; (Pa103-16). Pursuant to the contract, ASI was to begin its revaluation work in June 2019 and complete the revaluation with informal hearings to be heard in November/December 2019. Id. at ¶ 60; (Pa103-16). As tax assessor, Plaintiff's role

was to review and certify ASI's assessments. Id. ¶ 61. Due to the sheer size of the revaluation and Plaintiff's limited hours, she knew additional work outside of her normal working hours were necessary. Therefore, Plaintiff rightly requested and received a stipend of $16,000 for this work. Ibid.

Meanwhile on or about July 10, 2019, Defendant Becker—***a sitting member on Defendant Tewksbury Township Committee***—called Plaintiff and said he was concerned about ASI's inspection of the property owned by Defendant DiMare, ***another sitting member on Defendant Tewksbury Township Committee***. Id. ¶ 62; (Pa117-20). Defendant Becker's conduct crossed the line as he sought to improperly influence Plaintiff and her certification of ASI's work.

Clearly, Defendant Becker was unable to stop himself from illegally interfering with Plaintiff's duties as Tax Assessor and sought to use his political muscle for his own financial benefit. Thus, when Defendant Becker applied to have his property designated as farmland in October 2019, Plaintiff asked Hunterdon County's Tax Board Administrator, Tony Porto, to come with her on the inspection. Id. ¶ 65. Plaintiff was concerned about going out to Defendant Becker's property by herself because Defendant Becker had been retaliating against her ever since Plaintiff refused to negotiate a settlement on his 2013 appeal. Ibid.

Plaintiff concluded and Mr. Porto agreed that Defendant Becker's property did not qualify as farmland pursuant to State law. Ibid. Approximately 10 months

after Plaintiff denied Defendant Becker's farmland application, Defendants sought to remove Plaintiff from office. Ibid.

E. Defendants Scapegoated Plaintiff for the Performance Failures of ASI, an Outside Contractor, in Blatant Retaliation of Plaintiff's Complaints. (Pa121-25, Pa163-64, Pa229).

On or about November 12, 2019, Defendant Tewksbury Township held a meeting to discuss the status of the revaluation. (Pa229 (OB Cert. ¶ 66)). At the meeting, the ASI project manager specifically told Defendants they would not meet their deadline to complete the revaluation. Defendant Becker and others on the Council acknowledged this fact and that ASI's delay would likely cause Defendant Tewksbury Township to incur additional costs. Id. ¶ 66; (Pa121-23). As a result of ASI's request, Defendants agreed to an extension in time, making ASI's new deadline in or around the end of January 2020. Id. ¶ 66.

Even though Plaintiff had nothing to do with ASI needing or requesting an extension of time to complete their revaluation, Defendants used ASI's shortcomings as the perfect opportunity to scapegoat Plaintiff and move for her removal from the tax assessor position. Id. ¶ 67. Defendants further retaliated against Plaintiff by ***refusing to compensate her for the additional 70 hours of work she completed in January 2020 in the amount of $3,827.60***. Id. ¶ 70; (Pa163-64). Plaintiff e-mailed Defendant Barberio on February 19, 2020, protesting Defendants' conduct against her as "unacceptable" and contending the additional hours were

critical because Plaintiff was in the office fielding questions from taxpayers about their new assessments and certifying ASI's work. Id. ¶ 71; (Pa124-25). Defendants' refusal to pay Plaintiff her duly earned compensation was yet another retaliatory adverse employment action.

F. Defendants Sought to Remove Plaintiff from Her Tax Assessor Position, Using Clearly Pretextual Reasons that were Subsequently Rejected By the New Jersey Division of Taxation. (Pa126-28, Pa131-58, Pa228, Pa230-31).

On or about August 3, 2020, Defendant Barberio sent Plaintiff a "notice of disciplinary action" to "be referred to the Director of the Division of Taxation in support of a Complaint for [Plaintiff's] Removal from Office." (Pa230 (OB Cert. ¶ 73)); (Pa126-28). The notice charged Plaintiff with failing to "***investigate properties with a Farmland Assessment to confirm that they continued to qualify for the reduced tax rate***," ibid. (emphasis added), the exact issue Defendants had unlawfully prevented Plaintiff from performing despite her numerous objections. The notice additionally accused Plaintiff of failing to give notice of delays in completing the revaluation according to the contract, even though Defendants had full knowledge of the delays and their cause when it was addressed at the November 12, 2019 meeting held by Defendant Tewksbury. Ibid. Clearly, Defendants' effort to remove Plaintiff, a tenured employee of Defendant Tewksbury Township with no performance or disciplinary infractions in her 13-year career, was outrageous and a complete sham, and the only explanation is Defendants were once again retaliating

against and targeting Plaintiff.

Even more revealing of Defendants' motivation to unlawfully remove Plaintiff is that contemporaneous with the disciplinary notice, ***Defendants sent Plaintiff a separation agreement asking her to resign and waive her right to sue in court for wrongful termination, in exchange for a severance pay of $3,000.00***. Id. ¶ 75; (Pa131-38). Plaintiff refused to sign the agreement and carried on her duties in the normal course. Ibid. Because of Plaintiff's refusal to resign from her position and succumb to Defendants' baseless allegations, on or about September 5, 2020, Defendants filed a complaint with the New Jersey Division of Taxation seeking a hearing to support Plaintiff's removal for cause. Id. ¶ 77; (Pa139-47). Defendants' harassment and intimidation continued as they sent two additional letters to the Division of Taxation—one on November 13, 2020 (purporting to proffer further evidence to support Plaintiff's removal from office), id. ¶ 77; (Pa148-50)—and another on December 4, 2020 (requesting the status of their complaint against Plaintiff and purporting "[t]he work in the Township is not getting done, to the detriment of taxpayers"), id. ¶ 77; (Pa151-52).

On January 29, 2021, John J. Ficara, the Acting Director of the New Jersey Division of Taxation, issued a three-page memorandum ***denying*** Defendants' application to remove Plaintiff from her tax assessor position, and ***rejecting each one of Defendants' pretextual reasons for seeking Plaintiff's removal***. Id. ¶ 79;

(Pa153-55).

The record demonstrates that for years, Plaintiff had been warning Defendants of their failure to make the requisite number of farmland inspections as required by law. Again and again, Plaintiff complained that there were not enough inspections and not enough resources to complete the inspections, particularly as a result of Defendants' inexplicable elimination of Plaintiff's farmland inspection program. That is why it was of no surprise that on or about August 15, 2019, a State audit found this huge backlog. (Pa228 (OB. Cert. ¶ 63)). Defendants used their own failures and violations of law as a pretextual excuse to seek Plaintiff's removal from her tax assessor position with the Township.

Although the Acting Director rejected Defendants pretextual reasons for removing her from office, Plaintiff continues to be subjected to additional harassment and retaliation. For example, Defendants are settling cases on their own and removing Plaintiff from the process. This is in clear violation of Section 302.03 of the Handbook of Tax Assessors that states "Final accountability for all assessments responsibilities in a municipality is with the assessor." Id. ¶ 78; (Pa157-58). A Tax Assessor is required by law to handle all assessments but now Defendants are doing an end-run around Plaintiff in retaliation for her previous complaints. Defendants continue to retaliate against Plaintiff for her persistence and refusal to succumb to relentless, unethical political pressure.

IV. ARGUMENT

A. This Court Must Review the Grant of Summary Judgment *de novo*, and Give No Deference to the Trial Court's Conclusions. (Raised Below – Pa34-52).

This Court reviews a lower court's ruling on a Motion for Summary Judgment *de novo*. Hitesman v. Bridgeway, 218 N.J. 8, 26 (2014). Accordingly, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Summary judgment is appropriate when "there is no genuine issue of material fact challenged and . . . the moving party is entitled to judgment as a matter of law." R. 4:46-2. Thus, a reviewing court must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Notably, "summary judgment is . . . rarely appropriate" in "[e]mployment discrimination cases," because the paramount question of why an employer took an adverse employment action against a plaintiff employee "is clearly a factual question." Marzano v. Comput. Sci. Corp., 91 F.3d 497, 509 (3d Cir. 1996) (citation omitted). "The 'judge's function is not himself or herself to weigh the evidence and determine the truth of the matter but to determine

whether there is a genuine issue for trial.'" Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

Credibility determinations are left to the jury, not the motion judge. Ibid. "It is ordinarily improper to grant summary judgment when a party's state of mind, intent, motive or credibility is in issue." In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013). "Indeed, '[t]he cases are legion that caution against the use of summary judgment to decide a case that turns on the intent and credibility of the parties.'" Ibid. (citation omitted). "Thus, it is clear that questions of a party's state of mind, knowledge, intent or motive should not generally be decided on a summary judgment motion." Id. at 267.

B. CEPA Generally.

"CEPA is remedial legislation entitled to liberal construction, with the purposes of protecting whistleblowers from retaliation by employers and discouraging employers from engaging in illegal or unethical activities." Lippman, 222 N.J. at 378; Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994); Kolb v. Burns, 320 N.J. Super. 467, 477 (App. Div. 1999) (CEPA is a civil rights statute and is remedial in nature and, therefore, it is "to be construed liberally to achieve its important social goal"). CEPA's purpose, as pronounced by the New Jersey Supreme Court, "is to protect and encourage employees to report illegal or

unethical workplace activities and to discourage . . . employers from engaging in such conduct." Lippman, 222 N.J. at 378.

CEPA provides that:

> ***An employer shall not take any retaliatory action against an employee because the employee does any of the following:***
>
> ***a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer,*** or another employer, with whom there is a business relationship, ***that the employee reasonably believes:***
>
> 1. ***is in violation of a law, or a rule or regulation promulgated pursuant to law,*** including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
> 2. ***is fraudulent*** or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity.
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving

deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. ***Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:***

1. ***is in violation of a law, or a rule or regulation promulgated pursuant to law,*** including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
2. ***is fraudulent*** or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or
3. is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19-3 (emphasis added).

CEPA's goal "is 'not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct

that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety, or welfare.'" Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003). The Court has held that an employee is additionally protected from retaliation under CEPA for disclosing or complaining about the unlawful misconduct of "co-employees." Higgins v. Pascack Valley Hosp., 158 N.J. 404, 410 (1999).

C. The Trial Court Erred in Holding Municipal Tax Assessors—and Potentially All Tenured Employees—Are Excluded *Per Se* from Raising a Claim Under CEPA, Without Conducting Any Factual Analysis into the Reality of the Work Relationship. (Pa34-52).

1. Whether a Plaintiff Is an "Employee" Under CEPA Requires a Factual Analysis into the Reality of the Work Relationship—the Motion Judge Erred in Failing to Conduct this Inquiry.

The motion judge erred in holding Plaintiff was barred from raising a CEPA claim given her "label" or job title of municipal tax assessor and without examining the nature of Plaintiff's relationship with Defendants and whether Plaintiff was an "employee" of Defendants, as defined by CEPA. Lippman v. Ethicon, Inc., 222 N.J. 362, 379 (2015) (emphasis added) ("***urging courts to examine nature of plaintiff's relationship with party against whom CEPA claims are advanced rather than relying on labels***") (citing Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 241 (2006)).

> An "employee" is [defined by CEPA as] "***any***[9] ***individual*** who performs services for and ***under the control and***

[9] See also Lippman, 222 N.J. at 381 (emphasis added) (providing emphasis to this subsection's use of "any" and stating "***our case law has extended the reach of that definition, not restricted it***" (citation omitted)).

> ***direction of an employer for wages*** or other remuneration." N.J.S.A. 34:19-2(b). ***There are no exceptions to that generic definition contained in the Act***. Moreover, ***our case law has taken an inclusive approach in determining who constitutes an employee for purposes of invoking the protection provided through this remedial legislation***. See D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 126-27 (2007) (extending CEPA protection, in furtherance of its remedial goals, to independent contractors through application of multi-factor test); ***see also Stomel v. City of Camden, 192 N.J. 137, 154-55 (2007) (applying D'Annunzio test in extending CEPA protection to legal professional serving as public defender)*** . . . .

Lippman, 222 N.J. at 379 (emphasis added).

In D'Annunzio, the Supreme Court "held that ***to resolve a summary judgment motion in a CEPA case based on whether an individual qualifies as an employee***, ***the trial court must consider the following factors***," Kaye v. Rosefielde, 432 N.J. Super. 421, 493, rev'd on other grounds, 223 N.J. 218 (App. Div. 2013) (emphasis added):

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation--supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

192 N.J. at 123.

This test, also known as "the Pukowsky[10] test," "focuses on three overarching considerations that are important when examining a contractor's relationship with an employer for purposes of CEPA applicability." Stomel, 192 N.J. at 154 (citing D'Annunzio, 192 N.J at 123) (hereinafter the "first," "second" or "third" "consideration"). Specifically, courts

> ***must look beyond the label attached to the relationship. The considerations that must come into play are three:*** (1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue.[11]

D'Annunzio, 192 N.J at 120 (citing Lowe v. Zarghami, 158 N.J. 606, 615-18 (1999) (emphasis added)). Expanding on and clarifying the second consideration, the Supreme Court stated:

> [T]he test includes consideration of the worker's economic dependence on the employer's work, but does not insist on the same financial indicia one might expect to be present in the case of ***a traditional employee, such as the payment of wages, income tax deductions, or provision of benefits and leave time. Workers who perform their duties***

---

10 Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998).

11 The Supreme Court has repeatedly emphasized a number of questions which flow from the third consideration. See id. at 123-24 (emphasis added) ("Is the work continuous and directly required for the employer's business to be carried out, as opposed to intermittent and peripheral? Is the professional routinely or regularly at the disposal of the employer to perform a portion of the employer's work, as opposed to being available to the public for professional services on his or her own terms? Do the "professional" services include a duty to perform routine or administrative activities? ***If so, an employer-employee relationship more likely has been established***."); Stomel, 192 N.J. at 155 ("Those questions . . . have relevance in the instant matter . . . .").

> ***independently may nevertheless require CEPA's protection against retaliatory action when they speak against or refuse to participate in illegal or otherwise wrongful actions by their employer. Such individuals should benefit from CEPA's remedies***. ***Moreover, CEPA's deterrent function would be undermined if such individuals were declared ineligible for its protection***. The public at large benefits from a less restricted approach to who may sue under CEPA as an employee of a business enterprise. ***It is unlikely to us that the Legislature meant to sanction a restricted approach to CEPA's reach***.

Id. at 124 (emphasis added). The Court provided the following as to the balancing of the first consideration against the other two:

> The Pukowsky test focuses heavily on work-relationship features that relate to the employer's right to control the non-traditional employee, and allows for recognition that the requisite "control" over a professional or skilled person claiming protection under social legislation may be different from the control that is exerted over a traditional employee. An employer cannot be expected to exert control over the provision of specialized services that are beyond the employe's ability. ***Yet, the work may be an essential aspect of the employer's regular business***.

Id. at 123 (emphasis added).

The wealth of factors, considerations, and flexibility repeatedly provided by CEPA's definition of "employee," and the Court's interpretation of same, underscores the policy "***that certain social legislation, such as CEPA and LAD, is designed to reach those not traditionally considered an employee under the common law 'right to control' test, such as professionals or those retained to perform specialized services***." Hargrove v. Sleepy's, LLC, 220 N.J. 289 (2015)

(emphasis added) (citing D'Annunzio, 192 N.J. at 122).

Here, the motion judge wholly failed to examine any of these factors or considerations, despite granting summary judgment to Defendants on the single basis that Plaintiff does not qualify as an "employee" under CEPA. The motion judge did the exact opposite of what was required under Lippman and Feldman by "relying on [Plaintiff's] label[]" of municipal tax assessor and failing to examine the factors set forth in D'Annunzio.

2. When Viewed in the Most Favorable Light to Plaintiff—Especially as Defendants Failed to Proffer Any Evidence of Their Own—the Record Establishes (or Creates a Jury Question) that Plaintiff Is an "Employee" Under CEPA and Is Entitled to CEPA Protection. (Pa51, Pa214, Pa216-21, Pa223).

Applying the factors set forth in D'Annunzio to the facts in the record, it is imminently clear that Plaintiff meets CEPA's definition of "employee" and is therefore entitled to CEPA protection. The Supreme Court's application of the D'Annunzio factors in Stomel is instructive, particularly because the plaintiff in Stomel was a public official who could only be "removed 'for good cause shown and after a public hearing,'" 192 N.J. at 147 (quoting N.J.S.A. 2B:24-4(e)), but nevertheless the plaintiff was afforded CEPA protection by the Court. Contra (Pa51 (motion judge in the instant matter determining Plaintiff was not an "employee" under CEPA because "tax assessors enjoy tenure and can only be removed from their position by the Director of the Division of Taxation")).

In Stomel, the plaintiff served as the municipal public defender for the City of Camden and "testified as a witness for the United States Government in the political corruption trial of Camden's municipal prosecutor." Id. at 141. Three days after testifying, the plaintiff was terminated from his public defender position by the mayor of Camden and subsequently filed suit alleging, in part, retaliation in violation of CEPA. Ibid.

The Supreme Court addressed whether "the trial court erred when it concluded that Stomel was not an 'employee' for purposes of bringing a CEPA claim against the City." Id. at 154. "Viewing the facts identified by the panel below through the prism of the test that we described at length in D'Annunzio," the Supreme Court ultimately "agree[d]" with the Appellate Division "that summary judgment should not have been granted to [the] defendants on whether Stomel was an employee for purposes of advancing his CEPA claim." Id. at 155. In so doing, the Court engaged in an extensive factual inquiry surrounding the plaintiff's work relationship with Camden, with particular focus on the "third consideration" and the appropriate manner in which the "Appellate Division below recognized that a traditional right-to-control test should not be the exclusive determiner of whether a professional is an employee for CEPA purposes. Id. at 154-56.

Here, the facts established in the record demonstrate that ***all*** of the D'Annunzio factors and ***all*** of the "considerations" yield heavily in Plaintiff's favor,

making her an "employee" under CEPA. For starters, while the plaintiff in Stomel received 1099 forms from Camden as a contractual, non-traditional employee who nevertheless received CEPA protection, 192 N.J. at 155, Plaintiff here receives W-2 paychecks which include deductions into her retirement pension as well as social security taxes paid by Defendant Tewksbury—thus, D'Annunzio factors (6) (method of payment), (10) (whether the worker accrues retirement benefits), (11) (whether the "employer" pays social security taxes), and the "second consideration" ("the worker's economic dependence on the work relationship," D'Annunzio, 192 N.J at 120),[12] immediately indicate Plaintiff is a traditional employee even more-so than the plaintiff in Stomel.

Next, Plaintiff has been the tax assessor of Defendant Tewksbury since 2007 and has held the position continuously and without any "annual leave"; therefore, factors (5) and (8) also immediately favor Plaintiff. Defendant Tewksbury provides Plaintiff with an office and requires "office hours," also clearly yielding factor (4) in Plaintiff's favor. Factor (3) ("the skill required in performing the services," Model Jury Charge (Civil) § 5.10H(A)), also favors Plaintiff immediately—as the tax assessor of Defendant Tewksbury, Plaintiff has been subject to: an "examination[as an] applicant for certification as tax assessor" among other qualifications set forth in

[12] See also supra, pp. 34 (quoting D'Annunzio, 192 N.J at 124) (identifying a "traditional employee" as one that receives "the payment of wages, income tax deductions, or provision of benefits and leave time").

N.J.S.A. 54:1-35.25; continuing education and training requirements, N.J.S.A. 54:1-35.25b; and a multitude of complex "considerations . . . in valuing land," N.J.S.A. 54:4-23.7.

Factor (9) (whether the work is an integral part of the business of the "employer"), and the "third consideration" ("the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue," D'Annunzio, 192 N.J at 120), additionally fall swiftly in Plaintiff's favor. Defendant Tewksbury is required by law to perform the on-site inspections of each of the real properties "at least once every three years," N.J.A.C. 18:15-2.13, and it was Plaintiff as the tax assessor charged with independently[13] performing the inspections and valuing of the land, N.J.S.A. 54:4-23.7. These facts clearly support Plaintiff's case under factor (9) and the "third consideration." See Stomel, 192 N.J. at 137 (supporting the lower panel's analysis that as Camden's public defender, the plaintiff was "required [to] exercise independent professional judgment for his clients without City supervision. . . . Accordingly, the panel engaged in an analysis that appropriately looked at the City's integration of Stomel's work").

Further, applying the questions that flow from the "third consideration,"[14] Plaintiff's work for Defendant Tewksbury has been continuous since 2007, and her

[13] See Carlson v. City of Hackensack, 410 N.J. Super. 491, 500 (App. Div. 2009).

[14] See also supra, pp. 33 n.11 (quoting D'Annunzio, 192 N.J at 123-24).

work has been directly required of Defendant Tewksbury per N.J.A.C. 18:15-2.13. Plaintiff has routinely and regularly been at the disposal of Defendant Tewksbury pursuant to her office hours as the tax assessor. Finally, the "professional" services performed by Plaintiff include a duty to perform the routine or administrative activities of performing the farmland inspections, valuing the land, and attending her regular office hours, among other tasks. On these bases alone, the Supreme Court has provided "an employer-employee relationship more likely has been established." D'Annunzio, 192 N.J at 123-24.

Finally, the record contains clear and undisputed evidence in which D'Annunzio factors (1) (and, relatedly, the "first consideration"), (2), (7), and (12) clearly favor Plaintiff, as Defendants repeatedly engaged in retaliation and subjected Plaintiff to adverse employment actions,[15] and thereby exerted immense control over Plaintiff and her job performance and duties, in violation of both CEPA and the laws governing the independence that New Jersey tax assessors are supposed to be afforded. Put differently, Plaintiff was not an "independent assessor" as noted by the motion judge, (Pa51), but rather was at the mercy of Defendants' unilateral decision

[15] While factor (7) explicitly reads "the manner of termination of the work relationship," D'Annunzio, 192 N.J. at 123, CEPA specifically prohibits "retaliatory action," which it broadly defines as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). Thus, Plaintiff respectfully submits the manner of the retaliatory actions she faced from Defendants should be considered for purposes of factor (7).

making that adversely altered her job functions and stripped her of compensation.

Specifically, Defendants subjected Plaintiff to at least four instances of adverse employment actions in direct contravention of the exact statutes designed to preserve the independence of tax assessors, such as N.J.S.A. 40A:9-165 (prohibiting a municipality from reducing a tax assessor's salary), N.J.S.A. 54:4-23.13 ("the assessor shall enter an assessment"), N.J.A.C. 18:15-14.5 (tax assessor is "required" to make the assessment), and N.J.S.A. 54:1-35.31 (once tenured, the tax assessor "shall not be removed therefrom for political reasons").

First, Defendants eliminated the farmland inspection program that Plaintiff created and implemented from 2009 to 2014. Defendants' sudden and retaliatory cancellation of the program dramatically altered the terms of Plaintiff's employment and diminished her authority as the tax assessor. (Pa219-220 (OB Cert. ¶ 29)). As a result, Defendants caused Plaintiff to lose approximately $3,000 in annual income which she earned by performing on-site farmland inspections outside of her office hours, in direct violation of N.J.S.A. 40A:9-165. Id. ¶¶ 33, 18. Plaintiff tried to get these hours back as noted by the numerous e-mails in the record asking her superiors, including Defendant Landon and Defendant Tewksbury Township CFO Marie Kenia, for these hours. Plaintiff's e-mails fell on deaf ears as Defendants refused and outright rejected Plaintiff's requests. Id. ¶¶ 42-44.

Even worse, Defendants' elimination of Plaintiff's program set Plaintiff and

the Township up for failure—specifically, the implementation of Plaintiff's program in 2009 brought the Township into compliance with N.J.A.C. 18:15-2.13(b), which requires an on-site farmland inspection for each property in the municipality once every three years. Indeed, the material facts of this matter began in 2008, when Plaintiff first became the Township's tax assessor and quickly realized the Township was violating State laws and regulations including but not limited to N.J.A.C. 18:15-2.13(b). Id. ¶¶ 15-16.

Once Defendants eliminated Plaintiff's successful program in 2015, Plaintiff was no longer able to complete the requisite number of inspections within her newly allotted work hours, which were reduced by Defendants as a result of their elimination of the program. Id. ¶¶ 33, 37-38. It is unequivocal and undisputed that by eliminating Plaintiff's farmland inspection program, Defendants severely altered Plaintiff's ability to perform her essential job function as the Township's tax assessor to such an extent that Plaintiff and the Township could no longer comply with N.J.A.C. 18:15-2.13(b). Ibid. Indeed, Defendants usurped Plaintiff's ability to perform the work, which had been functionally integrated into Defendant Tewksbury because it is required to perform timely inspections of its 500 farmland properties. The Township's failure is corroborated by the fact that it was audited and subject to revaluation in 2018 because of ***its*** failure to comply with statutes and regulations including N.J.A.C. 18:15-2.13(b). Id. ¶ 58. Thus, Defendants' retaliatory

elimination of Plaintiff's program directly altered her employment with Defendants—specifically her ability to timely complete the requisite number of inspections on behalf of the Township as required by law—and moreover caused a reduction of Plaintiff's annual salary by approximately $3,000.

Second, when Plaintiff was hired, she was hired as a Joint Tax Assessor pursuant to an interlocal services agreement between Defendant Tewksbury Township and the Town of Clinton. Id. ¶ 3. However, in 2012, Defendant Landon refused to continue this arrangement which again dramatically altered the terms of Plaintiff's employment. Id. ¶ 26. Plaintiff had no control or say over Defendants' unilateral action which resulted in Plaintiff losing $16,000 in her annual salary and three of Plaintiff's weekly office hours. Ibid. It is undisputed that Plaintiff sought additional work hours to make up this loss in income, but Defendant Landon never added back the hours or pay that Plaintiff lost. Ibid. These facts demonstrate that Defendants set the rules of Plaintiff's work, and that Plaintiff reported to someone higher in the organization and had no ability to influence the organization.

Third, Defendants Becker and DiMare routinely interfered with Plaintiff's duties as Tax Assessor, requested political favors, pressured her to negotiate on assessments and seeking information on political colleagues. Id. ¶¶ 20-21. Although Plaintiff repeatedly complained in writing about their political interference, Defendants failed to act and ultimately sought to remove her from her position, the

ultimate form of retaliation, among the other adverse employment actions Defendants subjected upon Plaintiff. Id. ¶¶ 20-25. These facts—which are once again not disputed by any competent evidence in the record—are a quintessential example of how "the reality of [Plaintiff's] relationship with the party against whom the CEPA claim is advanced"[16] is dramatically different from the "label[]"[17] Plaintiff possesses as Defendants' "tax assessor, [who] unlike other municipal employees, must be independent and free from municipal interference and political pressure." Casamasino, 304 N.J. Super. at 234, rev'd on other grounds, 158 N.J. 333. The evidence in the record overwhelmingly demonstrates that Plaintiff did not enjoy the privileges provided by statute to tax assessors in New Jersey, rendering this matter readily distinguishable from Casamasino.

Fourth, during Defendant Tewksbury's township-wide revaluation, although Plaintiff spent a significant amount of time fielding questions from taxpayers about their new assessments, Defendants refused to pay Plaintiff for 70 hours of completed work in January 2020, causing Plaintiff to lose $3,827.60. (Pa124). Plaintiff was unable to influence Defendants' denial of this income, notwithstanding the statutory salary protections cited by the motion judge. (Pa49; Pa49 n.2 (citing and quoting N.J.S.A. 40A:9-165)). Defendants' undisputed decision to withhold Plaintiff's

[16] D'Annunzio, 192 N.J. at 121 (quoting Feldman, 187 N.J. at 241).

[17] Ibid.

"[s]alar[y], wages or compensation fixed and determined by ordinance" is a blatant violation of N.J.S.A. 40A:9-165 and clear adverse employment action. See Maimone v. City of Atl. City, 188 N.J. 221, 235-36 (2006) ("Under [CEPA's] definition [of 'Retaliatory action,' N.J.S.A. 34:19-2(e)], ***any reduction in an employee's compensation*** is considered to be an 'adverse . . . action . . . in the terms and conditions of employment.'" (emphasis added)).

The retaliatory actions Plaintiff suffered from Defendants make clear that Defendants exerted an enormous amount of control over Plaintiff, causing decreases or reductions in salary in compensation in addition to altering the terms of Plaintiff's job and her ability to perform her duties as the tax assessor. Thus, in addition to factor (1) and the "first consideration," Defendants clearly assumed a supervisory role over Plaintiff (factor (2)), engaged in repeated acts of retaliation over Plaintiff in violation of CEPA (factor (7)), and had the intent to control, retaliate against, and attempt to run Plaintiff out of her position (factor (12)).

Notably, the "first consideration" and facts surrounding Plaintiff's work relationship with Defendants under factors (1), (2), and (12) were ***not*** present in Stomel, where the public defender plaintiff "exercise[d] independent professional judgment for his clients without City supervision," 192 N.J. at 155, "through the means of his private law firm," id. at 156, yet the plaintiff was determined to be an employee under CEPA based largely on the "third consideration," id. at 154-56.

Here, all three of the considerations weigh heavily in Plaintiff's favor, as there are numerous facts supporting that she was in fact a "traditional employee" subject to control, supervision, and paychecks as a 16-year continuous employee performing tasks integral to the Township pursuant to New Jersey law. It is therefore clear the motion judge erred in failing to determine that Plaintiff was an "employee" entitled to protections under CEPA.

3. The Motion Judge Erred in Holding Casamasino, a Case Wholly Distinguishable Case from the Instant Matter, Created a Bright Line Rule Prohibiting All Municipal Tax Assessors from Bringing CEPA Claims. (Pa52).

The motion judge failed to apply or consider any of the D'Annunzio factors, and instead erroneously concluded that she did not need to do so under Casamasino and Feldman's summary of that decision. In her opinion, the motion judge erroneously stated, "[O]ur higher courts have continuously upheld the Casamasino decision in finding tax assessors are outside the scope of CEPA and cannot bring valid CEPA claims against their employers." (Pa52). ***The Supreme Court opinions citing Casamasino have reached the opposite conclusion***. Lippman v. Ethicon, Inc., 222 N.J. 362, 379 (2015) (emphasis added) ("***urging courts to examine nature of plaintiff's relationship with party against whom CEPA claims are advanced rather than relying on labels***") (citing Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 241 (2006)). Thus, the motion judge misinterpreted Feldman's summary of Casamasino, and relied on Plaintiff's label as tax assessor in lieu of engaging in

the required factual analysis to Plaintiff's work-relationship with Defendants. Respectfully, this was reversible error.

Indeed, applying the required factual analysis, it is readily apparent the facts surrounding the plaintiff's tax assessor position in Casamasino is readily distinguishable from Plaintiff's experience as the tax assessor of Defendant Tewksbury. The plaintiff in Casamasino was the municipal tax assessor for Jersey City. 304 N.J. Super. at 230. When his initial four-year term expired, the plaintiff continued to serve as tax assessor even though he was not formally reappointed. Id. at 230-31. When the new mayor took office, he told the plaintiff that he was not being reappointed and was directed to vacate his office. Id. at 231. The plaintiff sued, alleging in part that the mayor's action was in retaliation in violation of CEPA for the plaintiff voicing criticism of the new mayor's proposed tax plan at a city council meeting. Ibid.

After reviewing the facts that were specific to its case, the panel determined "***the Jersey City tax assessor*** is outside of CEPA's scope." Id. at 242. Critically, the plaintiff in Casamasino did not dispute that he "enjoy[ed] a unique, independent status as tax assessor due to his statutorily created job security," id. at 242, nor was there any allegation that Jersey City was preventing the plaintiff from performing his essential job functions as tax assessor or that Jersey City and its officials engaged in conduct violative of tax assessment laws. Furthermore, the plaintiff in Casamasino

did not face the numerous acts of retaliation and adverse employment action established in the record of the instant case. See, e.g., supra, at pp. 40-44. On the contrary, the plaintiff in Casamasino based his CEPA claim solely on one city council meeting where the plaintiff criticized the mayor's tax plan. The court questioned whether this one act even qualified as "exposing or objecting to 'the corrupt, illegal, fraudulent, or harmful activity' of an employer encompassed by" CEPA, id. at 242, whereas the instant record contains numerous instances of Plaintiff engaging in conduct protected by CEPA. It is therefore clear that under Stomel and D'Annunzio, Plaintiff's position as Defendant Tewksbury's tax assessor is materially distinguishable from the plaintiff in Casamasino's Jersey City tax assessor position.

Clearly, the trial court's holding that all tax assessors are exempt from CEPA violates court precedent. CEPA does not restrict categories of employees who can raise a claim and courts must undergo a factual determination in every case. Absent any evidence that the motion judge applied the D'Annunzio factors, or any other factual analysis is reversible error.

* * *

Thus, Plaintiff respectfully submits that, because the factors and considerations set forth in D'Annunzio are highly fact-sensitive, Plaintiff respectfully submits this Court should remand for a jury to determine Plaintiff's

CEPA claim, including whether Plaintiff was an "employee" under CEPA. See Estate of Kotsovska, ex rel. Kotsovska v. Liebman, 221 N.J. 568, 576 (2015) (affirming a jury verdict and "endors[ing] [D'Annunzio's] framework for use in ascertaining a worker's employment status for purposes of determining whether the Compensation Act's exclusive remedy provision applies"). Alternatively, remand is warranted for the motion judge to engage in the appropriate analysis.

V. CONCLUSION

Based upon the foregoing, it is respectfully requested that this Honorable Court reverse the trial court's Order granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

By: /s/ ***Matthew A. Luber, Esq.***
Matthew A. Luber, Esq.
Attorney for Plaintiff/Appellant

Dated: October 26, 2023

ANNA-MARIE OBIEDZINSKI, Plaintiff/Appellant, vs. TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF TEWKSBURY, LOUIS DIMARE, JESSE LANDON, PETER MELICK, ROBERT BECKER, JAMES BARBERIO, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants/Appellees.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002426-22 CIVIL ACTION ON APPEAL FROM TRIAL COURT'S FINAL ORDER DATED April 10, 2023 AWARDING JUDGMENT IN FAVOR OF DEFENDANTS/APPELLEES AND DISMISSING PLAINTIFF/APPELLANT'S COMPLAINT SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUNTERDON COUNTY DOCKET NO. HNT-L-391-20 Sat Below: Hon. Haekyoung Suh, J.S.C.

BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

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PRELIMINARY STATEMENT

Defendants/Appellees, Township of Tewksbury, Hunterdon County, Township Committee of the Township of Tewksbury, Louis DiMare, Jesse Landon, Peter Melick, Robert Becker and James Barberio ("Defendants"), submit this memorandum of law in opposition to plaintiff/appellant Anna-Marie Obiedzinski's ("Plaintiff's") appeal of the Trial Court's dismissal of her complaint with prejudice.

The Trial Court correctly grounded its decision upon binding precedent in determining that Plaintiff, a municipal tax assessor who occupies a unique, independent role and benefits from statutory job security, is not entitled to assert a retaliation claim under the Conscientious Employee Protection Act, N.J.S.A. §§34:19-1 et seq. ("CEPA") against Defendants. Casamasino v. Jersey City, 304 N.J. Super. 226 (App. Div. 1997), rev'd on other grounds, 158 N.J. 333 (1999). Specifically, in Casamasino, the Appellate Division panel determined that a tax assessor was precluded from asserting a CEPA retaliation claim against a mayor who chose not to reappoint him. This decision rested on the premise that the tax assessor possessed a "unique, independent status" largely stemming from statutory safeguards against retaliation. Consequently, the panel found CEPA inapplicable because the tax assessor did not fall within the category of employees who would reasonably fear retaliation for speaking out against their employer. 304 N.J. Super. at 242. The Casamasino decision has been favorably cited by the New Jersey

Supreme Court and by another Appellate Division panel denying a CEPA claim to a similarly-situated professional, a tax collector. In sum, Casamasino is good, precedential law barring Plaintiff's CEPA claim against Defendants and it was appropriate for the Trial Court to rely upon Casamasino in dismissing Plaintiff's CEPA claim with prejudice.

Based upon the foregoing, Plaintiff's CEPA claim is hopelessly inviable, and this Court must affirm the Trial Court's order dismissing Plaintiff's complaint.

PROCEDURAL HISTORY

On October 19, 2020, Plaintiff filed a one-count Complaint against the Defendants asserting retaliation under CEPA. (Pa1-33). On December 2, 2020, Defendants filed their Answer to the Complaint on February 16, 2021 (Da843). At that time, Defendants pled, as an affirmative defense, that Plaintiff's Complaint failed to state a claim for relief. (Da859).

On February 16, 2021, Defendants filed a motion to dismiss Plaintiff's Complaint on the grounds that her CEPA claim was time-barred. (Pa486). On July 7, 2020, the Trial Court denied the motion to dismiss. (Pa498).

Approximately sixteen months later and after the conclusion of discovery, Defendants filed a motion for summary judgment. (Pa251). Plaintiff filed an extensive opposition to the summary judgment motion. (Pa53, Pa187, Pa213). In connection with the summary judgment motion, Defendants argued that Plaintiff was barred from asserting a CEPA claim against Defendants based upon the Appellate Division's decision in Casamasino v. Jersey City, 304 N.J. Super. 226 (App. Div. 1997), rev'd on other grounds, 158 N.J. 333 (1999).

On March 31, 2023, the parties participated in oral argument before the Honorable Haekyoung Suh, J.S.C. On April 10, 2023, Judge Suh issued an Order and well-reasoned Opinion dismissing Plaintiff's Complaint. (Pa34). The Court appropriately relied upon Casamasino, in concluding that because "[P]laintiff is a

tax assessor who enjoys statutorily created job security afforded under N.J.S.A. 54:1-35.31 and N.J.S.A. 40A:9-165, [P]laintiff is barred from bringing a CEPA claims." (Pa52); (Pa44) ("the court is constrained to follow Casamasino.").

STATEMENT OF FACTS

Plaintiff's Cause of Action

This matter concerns Plaintiff's efforts to hold Defendants liable for perceived retaliation under CEPA. Plaintiff's CEPA claim is premised upon the unsupported and fanciful notion that Plaintiff was targeted for retaliation because she uncovered a multi-year, farmland tax assessment fraud scheme implicating officials at the highest level of the Township of Tewksbury's municipal government. (Pa269). Plaintiff nonetheless asserts that over the course of nearly twelve (12) years she repeatedly and defiantly voiced her concerns about a fraudulent tax scheme. Ibid.

In her Complaint, Plaintiff alleged that she was "subjected to intentional, repeated, and unlawful retaliation for objecting to Defendants' unlawful attempts to engage in a fraudulent tax scheme and, worse, cover it up." (Pa2). She further alleges that "Defendants have repeatedly attempted to have their unqualified properties designated as 'farmland,' allowing them to take improper property tax breaks and shifting that tax burden to other county residents. Plaintiff, a tax assessor for Defendant Tewksbury Township, has been an unwavering roadblock to Defendants' efforts to utilize political influence and abuse their powers to illicitly obtain favorable tax treatment for themselves (or their friends)." Ibid.

More specifically, in support of her CEPA claim, Plaintiff alleged:

a. Plaintiff sent a letter to Defendant Landon regarding "missing" applications for designated farmland properties within Tewksbury

Township in February of 2008 which "paved the way for a series of retaliatory actions aimed toward plaintiff." See Pa10 at ¶¶51-52.

b. On May 1, 2013, Defendant DiMare advised plaintiff to contact Defendant Becker and his wife regarding their property tax assessment appeal, which plaintiff characterized as a request to "assist in a scheme to commit potential tax fraud." See Pa11 at ¶62.

c. In 2013, Defendant DiMare, allegedly "became incensed about the farmland inspection program [and] directed his anger and retaliation toward plaintiff." See ibid. at ¶57.

d. In 2013, Defendant Landon "retaliated by ensuring that plaintiff's position would be eliminated altogether" as Clinton Joint Tax Assessor. See Pa14 at ¶68.

e. Prior to June of 2015, plaintiff requested to extend her hours and Defendant Landon reduced the hours and pay of the "Tewksbury Township Office of the Tax Assessor." See ibid. at ¶71.

f. On June 1, 2015, plaintiff believed she experienced "retaliation" by being alerted that Tewksbury Township Committee members no longer wanted to pay plaintiff for farmland inspections. See Pa14-15 at ¶¶72-73.

g. On July 20, 2015, Plaintiff emailed Marie Kenia regarding how to proceed with farmland inspections, which plaintiff claims "intensified" defendants' desire to force plaintiff out of work. See Pa15 at ¶75.

h. In 2017, plaintiff began arranging for revaluations in Tewksbury and defendants "immediately retaliated and attempted to push plaintiff out of office or set her up for an unlawful termination." See Pa16 at ¶83.

i. On September 11, 2018, plaintiff alleges that Tewksbury held a closed session meeting "to disparage plaintiff and criticize her performance in secret." See ibid. at ¶86. Plaintiff further asserts that Defendant Becker "attacked" plaintiff's procedures, which was "retaliation for plaintiff's complaints and objections" made in May of 2013. See Pa16-17 at ¶87.

j. On July 10, 2019, plaintiff asserts that Defendant Becker called plaintiff

> to express concern about Appraisal Systems, Inc.'s ("ASI") inspection of Defendant DiMare's property, which plaintiff believes was undue influencing. See Pa18 at ¶98.

Plaintiff Purportedly Flags Issues with Farmland Applications

Plaintiff copied Defendant Landon on a February 5, 2008 memorandum addressed to Tom Efstathiou, Tax Administrator, regarding missing farmland applications relating to fifteen farmland properties in the Township. (Pa307). Plaintiff's concern is "that all Tewksbury files are not in this office":

> In my letter dated 12/27/2007, I expressed my concerns that the farmland forms were being brought to me piecemeal. On January 17th, 2008 Mr. Whitt notified me that he had found more files in the Peapack office and that these files were the remainder of the files in his possession. I called him on January 23, 2008 to inform him that I had reviewed all the farmland forms in the office and had approximately 60 missing. He brought the bulk of the missing FA1 forms into my office on January 25, 2008 however a few are still missing and I have noted them below. I did ask about the tracking list however he couldn't locate it. My concern remains that all Tewksbury files are not in this office.
>
> [Ibid.]

Plaintiff did not raise any concerns regarding tax fraud in her February 2008 memorandum. Id.

In a memorandum dated October 3, 2008, Plaintiff requested the assistance of a temporary employee to assist her with Tax Assessor records, which were purportedly disorganized:

Basement Filing:

> The Assessor's records in the basement are miss-filed or not filed. I am requesting either a temp or a college student home for winter break be hired to complete the organization of the basement files. I believe approximately two weeks worth of work under my direction would be needed. This will be beneficial when defending appeals and processing added assessments. When we have completed our reevaluation we will be able to dispose of information but that can only be done if we know where it is.
>
> [Pa309].

Plaintiff did not raise any concerns regarding tax fraud in her October 2008 memorandum. Id.

Plaintiff's Position as Tax Assessor for the Township

Plaintiff was hired as the Tax Assessor for the Township in December 2007 pursuant to Township Resolution No. 171-207 for an initial four-year term. (Pa312). Plaintiff was reappointed as Tax Assessor after her initial appointment, has tenure and remains employed by the Township as the Tax Assessor. (Pa314); (Pa316-317).

Plaintiff has not been demoted or reassigned from her position as the Township's Tax Assessor. (Pa316-317). Plaintiff has not been deprived of any benefits related to her position as the Township's Tax Assessor.

Plaintiff's Position as Joint Tax Assessor for the Township and Clinton

Plaintiff was assigned as Joint Tax Assessor for the Township and the Town of Clinton ("Clinton") on or about December 3, 2007 pursuant to a certain Interlocal

Services Agreement Joint Municipal Tax Assessor between the Township and Clinton dated October 23, 2007 (the "ISA"). (Pa369-371). Under the ISA, Plaintiff was to work 21 hours per week providing services to the Township and Clinton. (Pa369 at Sec. 2). Per the terms of the ISA, the Township was responsible for two-thirds (2/3) of Plaintiff's salary and Clinton was responsible for the remaining one-third (1/3). (Pa370 at Sec. 10).

Clinton exercised its right to terminate the ISA upon 60 days' notice to the Township pursuant to Section 14 of the ISA. (Pa373); (Pa371).

Plaintiff experienced a reduction in her total pay after Clinton discontinued the Joint Tax Assessor position because Plaintiff was no longer providing assessment services to two towns – she was no longer the Joint Assessor – and Clinton was no longer paying its one-third (1/3) share of the salary for a Joint Tax Assessor. Accordingly, Plaintiff's combined office hours and pay were reduced by approximately one-third (1/3). (Pa375).

Plaintiff was aware of the reduction in total pay due to Clinton's decision and sought to have her hours increased to 18 hours along with a related increase in salary. (Pa377); (Pa379-385).

Plaintiff still works 14 hours per week as Tax Assessor for the Township. (Pa316-317).

Plaintiff's 2013 Conversation with Defendant DiMare regarding Defendant Becker's Property Taxes

Plaintiff alleged that on or about May 1, 2013, Defendant DiMare contacted Plaintiff in connection with Defendant Becker's property tax appeal and, more specifically, Defendant Becker's concern that Plaintiff had not devoted sufficient time to answering his questions regarding his appeal. (Pa386); (Pa388); (Pa390). Plaintiff acknowledged that Defendant DiMare did not attempt to influence Plaintiff in any way. Ibid.

Plaintiff Considers Additional Employment with Township

By letter dated April 5, 2017, Plaintiff applied for the position of Township Administrator. (Pa392-395).

In 2018, Plaintiff sought the opinion of the State of New Jersey, Department of Community Affairs, Local Finance Board (the "Board") regarding whether she could assume the position of Qualified Purchasing Agent for the Township without running afoul of the Local Government Ethics Law (the "Ethics Law") given her position as Tax Assessor. (Pa397-398). The Board concluded that the Ethics Law did not prohibit her from serving as Qualified Purchasing Agent. Id.

Alleged Comments about Plaintiff During Council Meeting

Plaintiff took issue with the way Defendant Becker spoke to her during council meetings dated June 12, 2018 and September 11, 2018. Plaintiff's handwritten notes indicate that she was upset with how Defendant Becker

"aggressively questioned" her and "personally attack[ed] the way [she] conduct [*sic*] the business of the Tax Assessor office" in connection with Plaintiff's request for additional office hours and pay. (Pa400); (Pa402) (Defendant Becker "barreded [*sic*] [her] with questions . . . appearing to have personal issues with [her] and [her] job as Tewksbury Tax Assessor").

Plaintiff believed that Defendant Becker has a personal issue with her arising from his 2013 tax appeal. (Pa400) ("My perception is that this treatment is a retaliation of Councilman Becker's 2013 appeal"); (Pa402)(Defendant Becker "acknowledge[d] his appeal and how [Plaintiff] did not negotiate").

Appraisal Agreement

Pursuant to a certain agreement dated March 27, 2019, the Township retained ASI to assist Plaintiff with the Township's 2020 property revaluation efforts, which encompassed inspection of farmland property as required by state statute (the "ASI Contract"). (Pa404-416) (titled "Farmland Inspections"). Plaintiff recommended ASI to the Township in 2008. (Pa310).

The Township's Petition to Remove Plaintiff as Assessor

On August 3, 2020, the Township served Plaintiff with a Notice of Disciplinary action, a draft complaint for removal of Plaintiff from the office of Tax Assessor for cause, and a proposed Severance Agreement and Release (the "Severance"). (Pa418-426). By letter dated September 2, 2020, the Township

submitted a complaint to the State of New Jersey, Department of the Treasury, Division of Taxation, Office of the Director (the "State"), seeking Plaintiff's removal as Tax Assessor for good cause pursuant to N.J.S.A. § 54:1-35.31. (Pa428-435).

By letter dated October 28, 2020, the Township submitted a First Supplement to the Complaint for Removal providing additional information supporting its complaint for Plaintiff's removal from the Tax Assessor position. (Pa428);(Pa437); (Pa440). By letter dated November 13, 2020, the Township submitted a Second Supplement to the Complaint for Removal highlighting an additional basis for Plaintiff's removal. (Pa437-438).

The Township's efforts to remove Plaintiff from the position of Tax Assessor were primarily based upon the following conduct:

a. Plaintiff failed to meet the terms of a liquidated damages provision in a property revaluation contract between the Township and Appraisal Systems, Inc. ("ASI") because Plaintiff failed to notify ASI of its delinquency in meeting the terms of the contract, which notice would have permitted the Township to deduct liquidated damages from its final payment to ASI.

b. At the time of the complaint, Plaintiff had failed to inspect all farmland assessed properties within the Township pursuant to the three-year cycle required under N.J.S.A. § 54:4-23.13.

c. Plaintiff provided flawed advice to taxpayers concerning the evidence to be used at their property tax assessment appeal hearings.

d. Plaintiff failed to maintain 200' notice lists relating to zoning applications.

(Pa428-435); (Pa437-438); (Pa440-442).

By letter dated January 29, 2021, the State found that Plaintiff's conduct did not warrant removal because it did not "rise to the level of conduct within our understanding of 'good cause' for removal pursuant to N.J.S.A. 54:1-35.31." (Pa440-442).

Farmland Inspections

Defendants did not impede Plaintiff from completing farmland inspections from the date of her appointment through the present. Plaintiff has conducted farmland inspections, sometimes with the assistance of ASI. (Pa444-447) (demonstrating progress on statutorily required farmland inspections from 2008-2017).

Plaintiff did not report any alleged unlawful activity on the part of Defendants to any supervisory-level officials within the Township or any law enforcement or regulatory authorities.

Plaintiff's Certification in Opposition to Summary Judgment

In opposition to Defendants' motion for summary judgment, Plaintiff submitted a certification in which she certified that she repeatedly and defiantly spoke out against Defendants over the course of a twelve year period. See e.g. (Pa216 at ¶¶15-16 (raising her concerns over missing farmland applications); Pa217 at ¶17 ("I believe Defendants ignored my pleas over the years for additional

resources to conduct farmland inspections because without such a program, Defendant Tewksbury Township could escape accountability); Pa17 at ¶18 (crediting herself with "rais[ing] the alarm about missing farmland applications and potential violations of the law"); Pa218 at ¶¶21-24 (Plaintiff purportedly reported an uncomfortable conversation with the Mayor to other township officials); Pa220 at ¶30 ("Due to the decision to end the farmland inspection program, I spoke to Ms. Kenia and raised my concern that it was not right for taxpayers to pay for a service that they would not receive."); Pa218 at ¶31 ("After I heard this distressing news, I was in shock. I went to Defendant Landon and complained that it was wrong to end the farmland inspection program. . . ."); Pa221 at ¶34 ("Despite Defendants' retaliatory motive, I still wanted to make sure Defendant Tewksbury Township was in compliance with State law and free from fraudulent farmland assessments. Therefore, on June 15, 2015, I sent an e-mail to Ms. Kenia and Defendant Landon stating my concern that Defendant Tewksbury Township still did not have someone conducting farmland inspections."); Pa223 at ¶41 ("On or about February 22, 2017, I sent a letter to Defendant Landon and Ms. Kenia notifying them of outstanding farmland inspections from 2015-2017"); Pa223 at ¶42 ("Defendant Landon and Ms. Kenia never responded to my e-mail, so on March 8, 2017, I sent them a second e-mail outlining the outstanding farmland inspections."); Pa223 at ¶44 ("Similar to what had occurred two years prior in 2015, I wrote another e-mail in June 2018

asking for Defendant Tewksbury Township to reinstate the farmland inspection program as required under Farmland Assessment Act and providing several options for how to do so."); Pa225 at ¶53 ("One day later, on September 12, 2018, I sent an e-mail to Roberta Brassard, the Municipal Clerk of Defendant Tewksbury Township, and to Township Attorney Francis P. Linnus, Esq., complaining about Defendant Becker's retaliation against me at the September 11 and June 12, 2018 Township Committee meetings."); Pa225 at ¶54 ("Following the closed meeting, I also sent an interoffice memo to Mr. Linnus and HCTBA Mr. Porto notifying them of Defendant Becker's conduct."); Pa228 at ¶63 ("On numerous occasions, I warned Defendants there were not enough inspections, and not enough resources to complete the inspections. I asked the auditor to put in her audit report that the elimination of the self-funded farmland program caused less than one-third of all farmland to be inspected annually—I was seeking for the Defendant Township Committee to bring back the farmland inspection program to make the Township compliant with the Farmland Assessment Act.")).

LEGAL ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT BECAUSE, UNDER WELL-ESTABLISHED PRECEDENT, PLAINTIFF IS BARRED FROM ASSERTING A CEPA CLAIM BY VIRTUE OF HER STATUS AS A TAX ASSESSOR BENEFITTING FROM STATUTORY JOB SECURITY. [Pa34-Pa52].

The Trial Court correctly interpreted and applied the Appellate Division's precedential Casamasino decision to bar Plaintiff's CEPA claim against Defendants.

CEPA protects, from retaliation, employees who blow the whistle on their employer by reporting unlawful activity, providing information or testimony in connection with an investigation or inquiry into a violation of the law, or otherwise refusing to participate in an activity that the employee "reasonably believes" violates the law or public policy or is fraudulent. N.J.S.A. § 34:19-3. The Supreme Court has described the overarching purpose of CEPA as follows:

> [CEPA] protects "whistle blowers," "who, believing that the public interest overrides the interest of the organization he [or she] serves, publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent or harmful activity.
>
> [Abbamont v. Piscataway Township Board of Education, 138 N.J. 405, 417 (1994) (quoting Ralph Nader et al., Whistleblowing: The Report of the Conference on Professional Responsibility vii (Ralph Nader et al., eds., 1972)].

CEPA does not universally apply to all employees, however. CEPA encompasses employees "who perform[ ] services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. § 34:19-2. CEPA does not provide recourse for individuals who do not meet the definition of an "employee." CEPA only seeks to "overcome the victimization of employees and to protect those who are especially vulnerable in the workplace from the improper and unlawful exercise of authority of employers." Abbamont, 138 N.J. at 418 (emphasis added).

The municipal tax assessor position is primarily a creature of statute. The duties and responsibilities of a tax assessor are set forth in various statutory provisions. See e.g. N.J.S.A. § 40A:9-148.1 ("A municipal tax assessor shall hold a tax assessor certificate provided for in P.L.1967, c. 44 (C. 54:1-35.25 et seq.) and shall have the duty of assessing property for the purpose of general taxation."); N.J.S.A. § 54:4-23 ("The assessor shall ascertain the names of the owners of all real property situate in his taxing district, and after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October 1 next preceding the date on which the assessor shall complete his assessments, as hereinafter required; provided, however, that in determining the full and fair value of land which is being assessed and taxed under the Farmland Assessment Act of 1964, chapter 48, laws of 1964 [C.54:4-23.1 et seq.], the assessor

shall consider only those indicia of value which such land has for agricultural or horticultural use as provided by said act. . . ."); N.J.S.A. § 54:4-23.3a(c). Moreover, the State annually issues a Tax Assessor Handbook reminding tax assessors of their duties and responsibilities. (Da36).

Under New Jersey law, tax assessors, unlike many other professionals, are afforded significant statutory protections against retaliation by municipalities. For example, municipalities cannot reduce a tax assessor's salary during her term:

> Salaries, wages or compensation fixed and determined by ordinance may, from time to time, be increased, decreased or altered by ordinance. No such ordinance shall reduce the salary of, or deny without good cause an increase in salary given to all other municipal officers and employees to, any tax assessor, chief financial officer, tax collector or municipal clerk during the term for which he shall have been appointed.
>
> [See e.g. N.J.S.A. § 40A:9-165 (prohibiting reduction in salary during term)].

Moreover, tenured tax assessors, like Plaintiff, cannot be removed from their position by a municipality:

> Any person has tenure and holds his or her position as municipal tax assessor during good behavior and efficiency and compliance with requirements for continuing education, and is not subject to removal, except for good cause shown at a proper hearing before the Director, notwithstanding the fact that such person was appointed for a fixed term of years, if he or she holds a tax assessor certificate and serves four or more consecutive years as a municipal tax assessor and is reappointed.

[N.J.A.C. § 18:17-3.2 (addressing tenure)].

Under no circumstances, may a municipality summarily dismiss a tenured tax assessor from her position. Only the State, County Tax Board or Superior Court can remove a tenured tax assessor, depending upon the circumstances. See N.J.A.C. § 18:17-3.2; N.J.S.A. 54:1-36 (Director of the Division of Taxation can remove a tax assessor if she "willfully or intentionally fail[s], neglect[s] or refuse[s] to comply with the constitution and laws relating to the assessment and collection of taxes); N.J.S.A. § 54:1-37 ("An assessor who shall willfully or intentionally fail, neglect or refuse to comply with the constitution and laws of this State relating to the assessment and collection of taxes shall be subject to removal from office by the Superior Court in an action brought therein by the Director of the Division of Taxation."); N.J.S.A. § 54:4-37 ("In case of the failure of an assessor to file his assessment list and duplicate the county board of taxation may summarily remove him from office, and itself make or cause to be made and filed the assessment list and duplicate.").

In reality, municipalities exercise minimal dominion in matters pertaining to tax assessors due to the statutory safeguards afforded to assessors:

> [A]ssessors can carry out their responsibilities free from political pressure and secure in the knowledge that, if they perform their responsibilities as assessors honestly and completely, they need not fear reprisals nor retaliation from municipal officials.

> [Ass'n of Mun. Assessors of N.J. v. Mullica Twp., 225 N.J. Super. 475, 481-82 (Law Div. 1988)(emphasis added)].

It is within this protective statutory framework that the Appellate Division disallowed CEPA claims brought by tax assessors rooted in alleged retaliatory actions. Specifically, in Casamasino v. Jersey City, the Appellate Division concluded that a tax assessor could not bring a CEPA claim against a mayor who failed to reappoint him because the tax assessor was not a protected employee under CEPA. 304 N.J. Super. 226 (App. Div. 1997), rev'd on other grounds, 158 N.J. 333 (1999). In dismissing the claim, the Appellate Division focused upon the issues of control and employment protection, and the purposes underlying CEPA, reasoning that "[p]laintiff can hardly argue that he is the type of employee who harbored 'deep-rooted fear . . . that his . . . livelihood [would] be taken away' if he [spoke] out against his employer's 'activities, policies or practices.'" Id. at 242 (citation omitted). This is because, as explained above, a municipal tax assessor occupies a unique position with significant, statutorily created protections and "job security":

> Plaintiff is the tax assessor of Jersey City; as such he has tenure and can be removed only by the Director of the Division of Taxation or "by the Superior Court in an action brought therein by the Director of the Division of Taxation." The fact that plaintiff might feel vulnerable in his position as tax assessor is immaterial. Plaintiff enjoys a unique, independent status as tax assessor due to his statutorily created job security. Indeed, plaintiff was not so intimidated by the mayor that he was unable to stand up at the city council meeting on January 25, 1993 and articulate

> his opposition to the mayor's tax plan. Nor was he so daunted by the mayor's alleged threats that he was rendered incapable of seeking and obtaining prompt judicial relief. Hence, we conclude that the Jersey City tax assessor is outside of CEPA's scope.
>
> [Ibid. (citations omitted and emphasis added)].

The rationale laid out in the Casamasino case is dispositive as to Plaintiff's CEPA claim. Much like the plaintiff in Casamasino, Plaintiff serves as a municipal tax assessor, with its attendant statutory duties and responsibilities, and is afforded identical statutory protections. Furthermore, she holds a tenured position, the tenure having been established when the Township renewed her contract after the initial four-year term. (Pa314); (Pa316-317). This renewal occurred during the period in which the defendants were allegedly engaging in retaliatory actions against her. (Pa314); (Pa316-317). Because she was a tenured tax assessor, Tewksbury could not summarily remove her from her position, it could not reduce her salary, and it could not alter her statutory duties and responsibilities. N.J.S.A. § 40A:9-165; N.J.A.C. § 18:17-3.2. Tewksbury lacks the type of control over Plaintiff that it would be able to exercise with respect to a traditional employee.

Further underscoring the application of Casamasino is the substance of Plaintiff's detailed certification in which she certifies that she defiantly voiced her concerns about Defendants' alleged unlawful conduct over several years, demonstrating a lack of fear for her livelihood. See (Pa216 at ¶¶15-16 (raising her

concerns over missing farmland applications); Pa217 at ¶17 ("I believe Defendants ignored my pleas over the years for additional resources to conduct farmland inspections because without such a program, Defendant Tewksbury Township could escape accountability); Pa17 at ¶18 (crediting herself with "rais[ing] the alarm about missing farmland applications and potential violations of the law"); Pa218 at ¶¶21-24 (Plaintiff purportedly reported an uncomfortable conversation with the Mayor to multiple township officials); Pa220 at ¶30 ("Due to the decision to end the farmland inspection program, I spoke to Ms. Kenia and raised my concern that it was not right for taxpayers to pay for a service that they would not receive."); Pa218 at ¶31 ("After I heard this distressing news, I was in shock. I went to Defendant Landon and complained that it was wrong to end the farmland inspection program. . . ."); Pa221 at ¶34 ("Despite Defendants' retaliatory motive, I still wanted to make sure Defendant Tewksbury Township was in compliance with State law and free from fraudulent farmland assessments. Therefore, on June 15, 2015, I sent an e-mail to Ms. Kenia and Defendant Landon stating my concern that Defendant Tewksbury Township still did not have someone conducting farmland inspections."); Pa223 at ¶41 ("On or about February 22, 2017, I sent a letter to Defendant Landon and Ms. Kenia notifying them of outstanding farmland inspections from 2015-2017"); Pa223 at ¶42 ("Defendant Landon and Ms. Kenia never responded to my e-mail, so on March 8, 2017, I sent them a second e-mail outlining the outstanding farmland

inspections."); Pa223 at ¶44 ("Similar to what had occurred two years prior in 2015, I wrote another e-mail in June 2018 asking for Defendant Tewksbury Township to reinstate the farmland inspection program as required under Farmland Assessment Act and providing several options for how to do so."); Pa225 at ¶53 ("One day later, on September 12, 2018, I sent an e-mail to Roberta Brassard, the Municipal Clerk of Defendant Tewksbury Township, and to Township Attorney Francis P. Linnus, Esq., complaining about Defendant Becker's retaliation against me at the September 11 and June 12, 2018 Township Committee meetings."); Pa225 at ¶54 ("Following the closed meeting, I also sent an interoffice memo to Mr. Linnus and HCTBA Mr. Porto notifying them of Defendant Becker's conduct."); Pa228 at ¶63 ("On numerous occasions, I warned Defendants there were not enough inspections, and not enough resources to complete the inspections. I asked the auditor to put in her audit report that the elimination of the self-funded farmland program caused less than one-third of all farmland to be inspected annually—I was seeking for the Defendant Township Committee to bring back the farmland inspection program to make the Township compliant with the Farmland Assessment Act.")).

Given that Plaintiff could freely express her objections, however meritless, without facing the risk of job termination, salary reduction, or loss of tenure, she falls outside the scope of employees protected by CEPA. The Appellate Division in Casamasino, in dismissing the tax assessor's CEPA claim, partially relied upon that

plaintiff's multiple, vocal protests against the mayor to demonstrate that he did not fear retaliation, much like Plaintiff in this case. Casamasino, 304 N.J. Super. at 242. ("Indeed, plaintiff was not so intimidated by the mayor that he was unable to stand up at the city council meeting on January 25, 1993 and articulate his opposition to the mayor's tax plan. Nor was he so daunted by the mayor's alleged threats that he was rendered incapable of seeking and obtaining prompt judicial relief").

The Appellate Division's decision to deny CEPA protections to tax assessors is well-reasoned. As explained above, they are not standard employees. Once tenured, they cannot be removed from their position, their salary cannot be reduced, and their statutory duties and responsibilities remain constant. The State and County Board of Taxation largely oversee tax assessors and can remove them under limited circumstances. If a tax assessor believes that a local municipality has improperly reduced her wages or otherwise interfered with her job responsibilities, she can initiate an action pursuant to the statutes affording her anti-retaliation protections. See e.g., Carlson v. City of Hackensack, 410 N.J. Super. 491, 494 (App. Div. 2009) (adjudicating a complaint in lieu of prerogative writs filed by a tax assessor seeking an order declaring that a municipality's reduction of his salary and elimination of health benefits violated N.J.S.A. § 40A:9-146, N.J.S.A. § 40A:9-165 and N.J.S.A. § 40A:9-146.4); Association of Municipal Assessors v. Mullica, 225 N.J. Super. 475 (Law Div. 1988) (adjudicating tax assessor's claim that municipality violated

N.J.S.A. § 40A:9-165 by providing him a significantly smaller salary increase than other municipal employees). Many other types of employees do not benefit from similar statutes; for those individuals, CEPA may be their only recourse for employer retaliation. Thus, a tax assessor is denied recourse under CEPA because she can avail herself of remedies afforded by tax-assessor specific statutes and regulations.

Plaintiff raises several arguments in an effort to discount the Trial Court's reliance upon the Casamasino decision, all of which are unavailing: (i) Casamasino is not a binding, precedential decision barring all tax assessors from asserting CEPA claims; and (ii) the Trial Court erred in failing to analyze whether Plaintiff was an "employee" for purposes of CEPA protections.

First, Plaintiff lacks a credible foundation for asserting that Casamasino fails to establish a definitive rule prohibiting tax assessors, such as Plaintiff, from asserting CEPA claims. The plain language of the decision speaks for itself; New Jersey tax assessors benefit from statutory protections that are otherwise unavailable to many other individuals and those protections remove tax assessors from CEPA's scope. Casamasino, 304 N.J. Super. at 242.

In addition the plain language of the decision, Casamasino has been cited favorably by the New Jersey Supreme Court and in analogous matters on appeal to the Appellate Division. See e.g., Feldman v. Hunterdon Radiological Assocs., 187

N.J. 228, 241 (2006); Glavan v. City of Irvington, No. A-2211-06T2, 2008 N.J. Super. Unpub. LEXIS 3011, at *17-18 (Super. Ct. App. Div. July 25, 2008) (citing Casamasino in upholding dismissal of CEPA claim asserted by tax collector) (Da790).

By way of illustration, in Feldman, the Supreme Court acknowledged the Appellate Division's determination that the plaintiff in Casamasino benefitted from the statutory protections available to him in his capacity as a tax assessor and, therefore, could not maintain a CEPA claim against his employer. 187 N.J. at 241. Likewise, in Glavan, the Appellate Division panel acknowledged the Casamasino panel's determination that the plaintiff tax assessor occupied "a unique, independent status" with "statutorily created job security" and fell beyond the scope of CEPA's protection." 2008 N.J. Super. Unpub. LEXIS 3011, at *17-18 (Da794). The Appellate Division panel in Glavan applied the reasoning in Casamasino to reject a CEPA claim brought by a tax collector. Municipal tax collectors, like municipal tax assessors, enjoy salary safeguards pursuant to N.J.S.A. § 40A:9-165 and are immune from removal by a municipality once they achieve tenure, as outlined in N.J.A.C. § 18:17-3.2. Consequently, much like tax assessors, tenured tax collectors cannot harbor legitimate concerns about job security when expressing dissent against municipal officials. Thus, they are unable to invoke the protections of CEPA.

Importantly, neither Feldman nor Glavan, nor any subsequent legal opinion, has curtailed the scope or diminished the significance of the Casamasino decision.

Plaintiff points to a factually inapposite case in an ineffective attempt to prove that Casamasino fails to create a bright-line rule barring tax assessor CEPA claims. Specifically, Plaintiff relies upon Stomel v. City of Camden, 192 N.J. 137 (2007). In Stomel, the Supreme Court found that a tenured municipal public defender, who could only be "removed 'for good cause shown and after a public hearing,'" was permitted to assert a CEPA retaliation claim against his employer notwithstanding his statutory protections. Id. at 147. As a threshold matter, Stomel does not concern a municipal tax assessor or reference Casamasino. Therefore, Stomel does not affect Casamasino's holding. Setting aside that fatal defect in Plaintiff's argument, the key factual/legal distinction between the public defender in Stomel and the tax assessor in this case and Casamasino, is that the municipality could remove the public defender in Stomel from his office, whereas a municipality cannot remove a tenured tax assessor from their position. Specifically, the statute at issue in Stomel affords the municipality the discretion to determine what constitutes "good cause" for removal purposes:

> In addition to any other means provided by law for the removal from office of a public official, a municipal public defender may be removed by the governing body of a municipality for good cause shown and after a public hearing, and upon due notice and an opportunity to be heard. Failure to reappoint a municipal public defender for

> a second or subsequent term does not constitute a "removal from office" within the meaning of this subsection.
>
> [N.J.S.A. § 2B:24-4(e).]

Stated differently, a public defender is under the dominion and control of his municipality, whereas Plaintiff and other tax assessors are not. Tax assessors like Plaintiff are insulated from municipal retaliation and do not risk adverse employment consequences by speaking out against municipal officials.

Of all the arguments Plaintiff raises on appeal, the argument that Casamasino is inapplicable or somehow limited in scope is perhaps the most disingenuous. The incredulity of Plaintiff and Plaintiff's counsel in response to the Trial Court's interpretation and application of Casamasino is feigned at best. Plaintiff and her counsel have undoubtedly been aware of the Casamasino decision since the time they commenced the underlying case. Underscoring this point is the fact that the Casamasino decision is referenced in the annual municipal tax assessor handbook which Plaintiff and her counsel repeatedly cite in her Complaint:

> The assessor occupies a unique position within the framework of local government. Assessors, though selected and appointed by municipal officials, are public officers whose duties are imposed by and defined in State law. When assessing property for taxation, the assessor performs a governmental function as an agent of the Legislature. The position of assessor takes on a judicial quality in determining taxability and assessments of property. In discharging these duties, an assessor is not subject to the control of a municipality. The intent is that

> assessors, like judges, should be free to perform their duties without fear of local retaliation and should be immune from pressure and harassment. However, the assessor is subject to certain local requirements and to supervision at both the County and State levels of government.
>
> **REFERENCES:**
> **Carlson v. Hackensack, 410 N.J. Super. 491 (App. Div. 2009).**
> **Kaman v. Montague Twp. Comm., 158 N.J. 371 (1999).**
> **Casamasino v. City of Jersey City, 158 N.J. 333 (1999).**
> **Jeffers v. City of Jersey City, 8 N.J. Tax 313 (Law Div. 1986) affirmed**
> **by 214 N.J. Super. 584 (App. Div. 1987).**
> **Horner v. Ocean Twp. Comm., 175 N.J. Super. 533 (App. Div. 1980).**
> **Unreported Law Division case: Paterson v. Rooney Jr., Docket No. L2266-**
> **72 P.W., decided June 20, 1973.**
> **Arace v. Town of Irvington, 75 N.J. Super. 258 (Law Div. 1962).**
> **Ream v. Kuhlman, 112 N.J. Super. 175 (App. Div. 1970) cert. denied**
> **by Ream v. Council of Evesham, 59 N.J. 267 (1971).**
>
> (Da94) (emphasis added).

Tax assessors, Plaintiff included, understand that they are unique, independent professionals and the Casamasino decision confirms that independence for all tax assessors, whether they work for Tewksbury, Jersey City or any other municipality. If Casamasino were a narrow decision limited to its facts, it would not be cited in the statewide tax assessor handbook to underscore the unique independence of municipal tax assessors. Consequently, Plaintiff cannot credibly claim to be

blindsided by the Trial Court's reliance upon Casamasino in dismissing her CEPA claim.

Of particular note is the fact that Plaintiff is not asking this panel to overturn Casamasino. Plaintiff does not argue that the logic or reasoning of Casamasino is flawed. As such, Plaintiff has waived any challenge to the rationale of Casamasino.

Second, equally unavailing is Plaintiff's argument that the Trial Court was required to engage in a multi-factor analysis under Feldman v. Hunterdon Radiological Associates, 187 N.J. 228, 241 (2006), D'Annunzio v. Prudential Insurance Co. of America, 192 N.J. 110 (2007) and Lippman v. Ethicon, 222 N.J. 362 (2015) to determine whether Plaintiff is "an 'employee' under CEPA's definition." D'Annunzio, 192 N.J. at 118. That argument fails as the Trial Court was not required to engage the aforementioned analysis because that analysis had already been performed in Casamasino. The Appellate Division in Casamasino determined that New Jersey municipal tax assessors were not the type of employees falling within the scope of CEPA due to their statutory protections. The Trial Court was not required to re-engage in that analysis. Plaintiff and the plaintiff in Casamasino occupy the same exact position. They perform the same functions and benefit from the same statutory, anti-retaliation provisions. Plaintiff does not, and cannot, argue that she holds a different office or benefits from less protections than the plaintiff in Casamasino. Plaintiff does not draw any valid factual distinction

between her case and Casamasino. Her only assertion is that she challenges the concept of her independence from Tewksbury, whereas the plaintiff in Casamasino did not expressly make that argument. (Pb46) ("Critically, the plaintiff in Casamasino did not dispute that he 'enjoy[ed]' a unique, independent status as tax assessor due to his statutorily created job security, nor was there any allegation that Jersey City was presenting the plaintiff from performing his essential job functions as tax assessor or that Jersey City and its officials engaged in conduct violative of tax assessment laws."). Plaintiff's subjective beliefs and "dispute" regarding her independent status do not alter the text of the statutory and regulatory provisions affording her job security and independence from Tewksbury.

The undisputed fact of the matter is that Plaintiff is endowed with significant protections against municipal retaliation that are not afforded to other, more vulnerable employees. She occupies a unique position in that she cannot be removed from office by a municipality. She is insulated from retaliation by municipal officials. Consequently, CEPA is not meant to protect her. The entire purpose of CEPA was to "protect those who are especially vulnerable in the workplace from the improper and unlawful exercise of authority of employers." Abbamont, 138 N.J. at 418. Plaintiff is not an "especially vulnerable" employee who fears for her livelihood when she speaks out. Therefore, an analysis as to whether Plaintiff falls

within CEPA's scope would have been an entirely unnecessary and futile intellectual exercise.

In light of the foregoing, the Appellate Division must affirm the Trial Court's dismissal of Plaintiff's CEPA claim with prejudice.

CONCLUSION

The Trial Court properly dismissed Plaintiff's Complaint and CEPA claim. It is respectfully submitted that this Court affirm the Trial Court's order dismissing Plaintiff's Complaint and CEPA claim with prejudice.

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Defendants/Appellees

/s/ Franklin Barbosa, Jr.
John E. Ursin, Esq.
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Dated: November 27, 2023

ANNA-MARIA OBIEDZINSKI, Plaintiff, v. TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF TEWKSBURY, LOUIS DIMARE, JESSE LANDON, PETER MELICK, ROBERT BECKER, JAMES BARBERIO, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002426-22 On Appeal From: Superior Court of New Jersey Law Division – Hunterdon County Docket No. HNT-L-391-20 Judgment Entered: Granting Defendants' Motion for Summary Judgment and Dismissing Plaintiff's Complaint With Prejudice Sat Below: Hon. Haekyoung Suh, J.S.C.

REPLY BRIEF OF PLAINTIFF/APPELLANT ANNA-MARIA OBIEDZINSKI

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff/Appellant ("Plaintiff") relies upon and incorporates the Statement of Facts and Procedural History as set forth in Plaintiff's Brief in Support of Appeal filed on October 26, 2023.[1]

II. ARGUMENT

A. Casamasino Did not Create a Bright Line Rule; Defendants Fail to Follow Prevailing Caselaw Requiring a Fact-Intensive Inquiry to Determine Whether Plaintiff is an "Employee" under CEPA. (Pa217-21)

Defendants' contention that Casamasino v. City of Jersey City, 304 N.J. Super. 226 (App. Div. 1997), rev'd, 158 N.J. 333 (1999) created a bright line rule that tax assessors cannot bring a CEPA claim is clearly erroneous. (Db30).

Decades of legal precedent and prevailing case law require a trial court to engage in a case-by-case, factual analysis to determine if an individual is an "employee" under CEPA. D'Annunzio v. Prudential Insurance Co. of America, 192 N.J. 110, 121 (2007). CEPA's definition of "employee" is a "generic definition." Lippman v. Ethicon, 222 N.J. 362, 379 (2015). Whether it is a shareholder-director,

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[1] Pa - Plaintiffs' Appendix
Pb - Plaintiffs' Brief in Support of Appeal
Db - Defendants' Brief on Appeal
Da - Defendants' Appendix on Appeal
COMF - Plaintiffs' Counterstatement of Material Facts to Defendants' Statement of Material Undisputed Facts. (Pa187)
1T - Trial Court's Order and Opinion on Defendants' Motion for Summary Judgment (Pa34)

public defender, independent contractor, or tax assessor, New Jersey courts focus on each individual employee's actual relationship with their employer, rather than the employee's job title or job description to determine if they are entitled to CEPA's protection. Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228 (2006). This is an "inclusive approach" that is not defined by "only those with certain job functions." Lippman, 222 N.J. at 381. Accordingly, it is far from dispositive—in fact, it is immaterial—that Plaintiff and the plaintiff in Casamasino share the "label" of tax assessor. See id. at 228 ("courts ***must*** look to the goals underlying CEPA and ***focus not on labels but on the reality of plaintiff's relationship with the party against whom the CEPA claim is advanced***"). It is telling that Defendants to do not even attempt to apply ***any*** of the 12-factor test or the "considerations that ***must*** come into play." D'Annunzio, 192 N.J. at 122.

An appropriate reading of Casamasino—like all binding opinions under D'Annunzio and its progeny that determine whether a CEPA claimant is an "employee" under the statute—is narrowly tailored to the facts of that matter.[2] Under

[2] Defendants argue that Casamasino is not a "narrow decision limited to its facts" because the case is cited in the annual municipal tax assessor's handbook. (Db28-29). This claim is wildly misleading, as there is absolutely no statement in the handbook providing that tax assessors are barred from raising CEPA claims. The Supreme Court's decision, which reversed this Court in Casamasino, is string cited in the handbook—alongside seven other opinions—only for the proposition that tax assessors are supposed to be "free to perform their duties without fear of local retaliation," and "immune from pressure and harassment." (Da93-94). The fact that Defendants repeatedly violated such statutory protections and clear mandates of public policy in their treatment of Plaintiff not only renders Casamasino wholly distinguishable, but Plaintiff's repeated objections to Defendants' acts of pressure, harassment, and retaliation against her were in fact additional instances of Plaintiff engaging in protected conduct under CEPA.

the circumstances of the plaintiff's employment as the tax assessor of Jersey City, this Court held, "***[W]e conclude that the Jersey City tax assessor*** is outside of CEPA's scope." Casamasino, 304 N.J. Super. at 242.[3] As the Appellate Division recently confirmed, whether a claimant is an employee under CEPA is a "highly fact-sensitive inquiry" that "should not be decided based on unopposed submissions by defendants on a motion for summary judgment." Nanavati v. Cape Reg'l Med. Ctr., No. A-4111-17T3, 2020 N.J. Super. Unpub. LEXIS 952, *21 (App. Div. May 19, 2020) (citing D'Annunzio, 19 N.J. at 114, 120-21).

In opposition to Defendants' Motion before the trial court, Plaintiff proffered her certification with supporting documents demonstrating the political pressure, interference, and retaliation she suffered in her position as Defendant Tewksbury Township's tax assessor. (Pa217-21). Given Defendants' failure to take Plaintiff's—or anyone else's—deposition, and their failure to submit a certification by any fact witness, Plaintiff's certification is unrebutted, and unequivocally demonstrates that ***all*** of the factors and overarching considerations set forth in D'Annunzio render the conclusion that Plaintiff is an "employee" under CEPA. Since the plaintiff in Casamasino did not suffer any of the retaliation, political pressure, or interference experienced here—nor did Jersey City assert any control over the plaintiff's duties,

[3] Notably, ***Casamasino was decided years before*** Feldman, D'Annunzio, and Lippman, the seminal Supreme Court cases that lay the foundation for how courts are to engage in the fact-intensive inquiry required to determine whether a claimant is an "employee" under CEPA.

a fact that was not disputed—the cases are plainly distinguishable. Plaintiff respectfully submits she has filed a very straightforward appeal in which the trial court initially erred to engage in the appropriate factual analysis, and further failed to find that under the evidence submitted to the court, Plaintiff was clearly an "employee" within CEPA's purview and jurisprudence.

B. Defendants' Argument that Casamasino Creates a Bright Line Rule Would Effectively Ban All Municipal Employees from Raising CEPA Claims. (Pa217-21, Pa223-31)

Defendants advance a flawed argument that two statutes—N.J.S.A. 54:1-35.31 and N.J.S.A. 40A:9-165—provide Plaintiff and other tax assessors with "job security," insulating them from retaliation in the workplace. (Db18). The argument is meritless, *first*, because Defendants routinely ignored and violated the statutes protecting tax assessors such as Plaintiff from political pressure, interference, and retaliation. See Pa217-21 (OB Cert. ¶¶ 20-29, 31-33, 37), Pa223-31 (OB Cert. ¶¶ 41-46, 50-58, 61-79).

Second, N.J.S.A. 40A:9-165 ***pertains to all municipal employees***, such as police officers, EMT's, lifeguards, secretaries, code inspectors, and the like:

> Salaries, wages or compensation fixed and determined by ordinance may, from time to time, be increased, decreased or altered by ordinance. No such ordinance shall reduce the salary of or deny without good cause an increase in salary ***given to all other municipal officers and employees*** to, ***any tax assessor***, ***chief financial officer***, ***tax collector*** or ***municipal clerk*** during the term for which he shall have been appointed.

(emphasis added). By arguing that this "statutory protection" insulates tax assessors from retaliation and thus are not "employees" under CEPA, Defendants open the door to other parties making the same claim, prohibiting large swaths of employees from receiving protection under CEPA. Such an application of this provision would turn D'Annunzio and its progeny on their heads, and drastically undermine CEPA's remedial purpose "to be construed liberally to achieve its important social goal." Kolb v. Burns, N.J. Super 467, 477 (App. Div. 1999); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 231 (1994).

Instead, courts analyzing whether a nontraditional employee is entitled to CEPA protection routinely evaluate each employee's situation on a case-by-case basis. See Fredericks v. Twp. of Weehawken, Civ. No. 2:11-05363, 2012 LEXIS 163396 (D.N.J. Nov. 15, 2012) (allowing plaintiff tax collector to raise a CEPA claim based on a violation of N.J.S.A 40A:9-165); Stomel v. City of Camden, 192 N.J. 137 (2007) (applying D'Annunzio test in extending CEPA protection to lawyer serving as public defender); Messina v. Borough of Fair Lawn, No. A-4214-09T2, 2011 N.J. Super. Unpub. LEXIS 1851 (App. Div. July 11, 2011) (remanding case for new trial to identify actions done to retaliate against plaintiff-police sergeant); Scouler v. City of Camden, 332 N.J. Super. 69 (App. Div. 2000) (career civil service employee allowed to raise a CEPA claim); T.D. v. Borough of Tinton Falls, No. A-5535-13T1, 2015 N.J. Super. Unpub. LEXIS 2641 (App. Div. Nov. 17, 2015)

(allowing plaintiff police officer to bring CEPA claim against defendant police department).[4]

Third, even though N.J.S.A. 54:1-35.31 states Defendants can only terminate Plaintiff after a "good cause" hearing before the Division of Taxation, Plaintiff was not insulated from retaliation. Defendants still targeted Plaintiff and repeatedly stripped her of compensation, work hours, and the ability to perform her job as required by law. Defendants also, of course, moved for Plaintiff's termination for reasons that were wholly rejected by the Division of Taxation, demonstrating both retaliation by Defendants against Plaintiff and pretext. Moreover, the language in N.J.S.A. 54:1-35.31 is no different than any other civil servant statue requiring a hearing and "good cause" to terminate a civil service employee. Nevertheless, courts have allowed those plaintiffs to move forward with their CEPA claims. See supra, at pp. 5 (citing Stomel, Fredericks, T.D., Scouler, and Messina).

[4] Searching for an opinion that cites favorably to Casamasino, Defendants point to Glavan v. City of Irvington, No. A-2211-06T2, 2008 N.J. Super. Unpub. LEXIS 3011, *5 (App. Div. July 25, 2008), a matter in which the plaintiff filed suit under "CEPA, the LAD, her constitutional rights, negligently and intentionally inflicted emotional distress upon her, and breached the implied covenant of good faith and fair dealing in her employment contract." While granting summary judgment to the defendants, "the judge noted initially that [the] plaintiff elected 'not to proceed in any CEPA claims,' therefore he granted that aspect of [the defendants] motions"—this Court agreed "that [the] plaintiff had abandoned any claim of a CEPA violation." Id. at *12-13, *13 n.5. Clearly, the plaintiff in Glavan was unable to demonstrate any credible evidence that she suffered retaliation or political pressure in her position as a tax assessor, thereby allowing the trial court and this Court to rely in part on Casamasino. Thus, Glavan and Casamasino are wholly distinguishable from the instant matter, where Plaintiff repeatedly engaged in protected conduct and Defendants ignored Plaintiff's right to perform her job without interference or pollical pressure. Put simply, Defendants violated the statutory protections designed to protect New Jersey tax assessors, and asserted control over Plaintiff to such an extent that she was clearly an employee under D'Annunzio, triggering CEPA protections to Plaintiff.

C. Plaintiff's Numerous Complaints of Unlawful Conduct by the Defendants, and the Retaliation and Interference She Suffered Therefrom, Demonstrates she is an "Employee" under CEPA.

Defendants claim that Plaintiff somehow "falls outside the scope of employees protected by CEPA because she complained numerous times about Defendants' fraudulent conduct and therefore did not have a "fear of her livelihood." (Db21-23). This argument has no factual or legal basis, and is clearly meritless.

The Court needs to look no further than Lippman, 222 N.J. 362, to see that the number of times someone complains about fraudulent and unethical conduct is irrelevant. In Lippman, the Supreme Court determined that a watchdog employee, ***a person who reports misconduct daily as part of his job duties***, qualifies as an "employee" for purposes of CEPA, id. at 388, then clearly Plaintiff's reports of misconduct by Defendants over the course of several years in the instant matter is not disqualifying.

While Defendants go through great lengths to convince the Court that Plaintiff's numerous complaints about fraudulent conduct somehow support their view that Plaintiff "could freely express her objections," the record shows the opposite. Throughout her many years as Defendant Tewksbury Township's tax assessor, Plaintiff was concerned about her job security and faced numerous consequences (financial and otherwise) for voicing her concerns. If Defendants are questioning the veracity of Plaintiff's "fear," they should have taken her deposition

and asked her about this ***before*** the close of discovery. Instead, Defendants proffer an argument with no basis of fact or law, and ask the Court to make a factual finding as a matter of law.

III. CONCLUSION

Based upon the foregoing, it is respectfully requested that this Honorable Court reverse the trial court's Order granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

By: /s/ *Matthew A. Luber, Esq.*
Matthew A. Luber, Esq.
Attorney for Plaintiff/Appellant

Dated: December 19, 2023