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ALLEN J. SATZ,

Plaintiff,

v.

KESHET STARR, ORGANIZATION FOR THE RESOLUTION OF AGUNOT, THE JEWISH LINK, NEAL TURK, AND BEIS MEDRASH OF BERGENFIELD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appellate Docket No. 1-002785-23

Submission Date: August 29, 2024

On Appeal from the Superior Court of New Jersey Law Division: Bergen County

Sat Below: Hon. Peter Geiger

Trial Court Docket No. BER-L-005596-23

OPENING BRIEF OF DEFENDANT-APPELLANTS

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INTRODUCTION

This appeal concerns an important issue of first impression in this Court: whether the protections and purposes of New Jersey's recently enacted anti-Strategic Lawsuit Against Public Participation law—formally titled the Uniform Public Expression Protection Act ("UPEPA")—may be defeated by a litigant's strategically timed decision to voluntarily dismiss his or her speech-suppressive lawsuit in order to avoid liability for attorneys' fees. Specifically, whether voluntary dismissal after the defendant has filed an application for an order to show cause seeking expedited dismissal and prevailing party attorneys' fees under the statute, but before the court has had an opportunity to rule on such application, renders attorneys' fees unavailable.

In the proceedings below, the trial court effectively ruled that they can. If that ruling stands, litigants will have a roadmap to harass those who engage in protected public expression with baseless lawsuits, only to avoid liability and any fees by voluntarily dismissing their claims at any point prior to a merits ruling—even, as here, after the defendants have expended significant resources litigating those meritless claims, and even though the dismissal renders the defendants the prevailing party.

Here, Plaintiff-Respondent Allen Satz commenced this action against The Jewish Link—a community newspaper; Bais Medrash of Bergenfield—a

synagogue; and its then-Rabbi Neal Turk ("Defendants" or "Appellants"), and others, for allegedly obtaining and disseminating a flyer, in hard copy and online, that advocated for Plaintiff to give his wife a "get," or religious divorce, and that contained what he characterized as an unflattering photograph of Plaintiff, and for organizing a protest in front of his parents' house for the same purpose. Those activities unquestionably fell within UPEPA's coverage. Plaintiff nevertheless sought $30 million in damages and an order requiring Defendants to "remove the picture from everywhere."

Defendants then filed a proposed order to show cause seeking dismissal and attorneys' fees under UPEPA. While that application was pending—and seeing the writing on the wall—Plaintiff voluntarily dismissed his action and the court entered the dismissal and closed the case. Defendants then moved to reopen under R.4:50-1(f) for the limited purpose of seeking the attorneys' fees that UPEPA *requires* the court to award to a party that prevails on an order to show cause. Notwithstanding the mandatory language of the statute, the trial court erroneously denied Defendants' motion on the ground that reopening the case to seek fees would be futile because Defendants had failed to adduce sufficient evidence that Plaintiff had engaged in a pattern of abuse of the courts or that the action was frivolous. In doing so, the trial court abused its discretion in two ways.

First, the trial court wholly ignored Defendants' argument that Plaintiff's strategic dismissal of his lawsuit to avoid liability for attorneys' fees—a move that was contrary to UPEPA's statutory purposes and could provide other litigants with a blueprint for how to undermine its protections in the future—was an "exceptional circumstance" justifying relief from the judgment under R.4:50-1(f). The trial court's failure to consider this argument was an abuse of discretion.

Second, the trial court conflated the prevailing party standard for recovering attorneys' fees under UPEPA with the significantly higher frivolous litigation showing required to obtain attorneys' fees under New Jersey's Frivolous Litigation Statute—and denied the motion to reopen on the basis that Defendants had not adduced sufficient evidence of the latter. But the only requirement for a moving party to obtain attorneys' fees under UPEPA is that the moving party "prevails on the order to show cause," N.J. Stat. Ann. § 2A:53A-58, which Defendants did here. The trial court's misapprehension of the applicable legal standard, which formed the basis for its denial of the motion, was an abuse of discretion requiring reversal.

STATEMENT OF FACTS

On October 17, 2023, Plaintiff commenced this action against Defendants, and others, for allegedly obtaining and disseminating a flyer, in hard copy and

online, that advocated for Plaintiff to give his wife a "get," or religious divorce, and that contained what he characterized as an unflattering photograph of Plaintiff, and for organizing a protest in front of his parents' house for the same purpose. *See* Da1–2. Those actions, Plaintiff alleged, caused him to experience emotional stress from being humiliated on social media and witnessing his parents "being shamed." Da3. Although the Complaint failed to expressly set forth causes of action, read in the most favorable fashion to Plaintiff, the Complaint appeared to assert claims for defamation, invasion of privacy, and negligent and/or intentional infliction of emotional distress. *See* Da1–3. Plaintiff sought $30 million in damages and an order requiring Defendants to "remove the picture from everywhere." Da3.

Shortly after being retained by Defendants, counsel for Defendants emailed Plaintiff (representing himself *pro se*) offering to accept service on behalf of Defendants and proposing a uniform response/moving deadline and motion to dismiss schedule putting all defendants—some of whom had been served at different times, and others of whom had not been properly served—on the same reasonable briefing schedule. Da15–16. Counsel did so in part because Defendants could then file a single omnibus motion to dismiss, conserving party and judicial resources. Da15. Plaintiff refused to stipulate to the proposed schedule unless Defendants agreed to various unreasonable demands, such as

effectively agreeing to a mandatory injunction requiring Defendants to retract and remove the photograph at issue during the pendency of the litigation. Da16–17.

PROCEDURAL HISTORY

Shortly after Plaintiff refused to stipulate to a briefing schedule, Defendants filed a motion for extension of time to respond to the Complaint, proposing a schedule that would put all defendants on the same briefing schedule. Da37–38. Plaintiff then filed an opposition to the motion for extension of time and a cross-motion for default judgment. Da39–40.

In their omnibus reply/opposition brief, Defendants argued that entry of default judgment was unwarranted in part because they had a meritorious defense, including because Plaintiff's lawsuit targeted Defendants' protected First Amendment activities—for example, publishing the flyer in The Jewish Link newspaper—and was therefore subject to dismissal under the newly enacted Uniform Public Expression Protection Act (UPEPA), N.J. Stat. Ann. § 2A:53A-49 *et seq.*, colloquially referred to as New Jersey's anti-SLAPP law. *See* Da45. With their reply, Defendants also submitted a Proposed Order to Show Cause "seeking relief . . . pursuant to the Uniform Public Expression Protection Act (UPEPA)," and specifically an order for Plaintiff to show cause "why judgment should not be entered: A. Dismissing the Complaint with

prejudice pursuant to UPEPA; [and] B. Awarding court costs, reasonable attorneys' fees, and reasonable litigation expenses to Defendants related to the order to show cause[.]" Da47–48. Defendants also asked that the Court treat their reply brief and accompanying Proposed Order to Show Cause "as an application for an Order to Show Cause to dismiss under UPEPA." Da45 n.5.

On January 24, 2024, the trial court granted Defendants' motion for extension of time and denied Plaintiff's cross-motion for default judgment. Da51–54. The trial court did not take any action on Defendants' Proposed Order to Show Cause. The same day, Plaintiff filed, and the court entered, a notice of voluntary dismissal. Da58–59. Plaintiff explained in an email to Defendants' counsel that he was "dropping all claims against Mr. Turk, BMOB, and The Jewish Link" because "[i]t is clear once the judge grants orders that have no basis that this will be going nowhere." Da66.

On March 12, 2024, Defendants filed a motion for relief from the trial court's order of dismissal pursuant to R.4:50-1(f). Da60–61. Defendants asked the trial court to vacate the order of dismissal and reopen the case for the limited purpose of considering their forthcoming motion for attorneys' fees under UPEPA. Da62–63.

On April 4, 2024, the trial court heard oral argument on Defendants' motion and denied the motion by oral ruling at the conclusion of the argument.

See T40:6–45:7. It entered a short form order memorializing the denial the same day ("April 4 Order"). Da7–8.

Defendants filed a notice of appeal on May 15, 2024. Da67–69. On May 23, 2024, the Appellate Division Clerk's Office sent Defendants a letter regarding the finality of the order being appealed, providing Defendants until June 7 to either explain the finality of the April 4 Order, withdraw the appeal, or move for leave to file an interlocutory appeal and to file the same as within time. Da71–72.

On June 11, 2024, Defendants filed a motion for leave to file an interlocutory appeal. Da73. Defendants argued that leave should be granted in the interest of justice because, given the trial court's without-prejudice dismissal of the Complaint, its April 4 Order would effectively become unreviewable absent further action from Plaintiff resulting in a final, appealable order. Da78–79. This untenable situation, Defendants argued, would place their ability to seek statutorily authorized attorneys' fees solely in the hands of Plaintiff. Da79. Defendants further argued that their appeal presented novel questions of law, namely, whether a plaintiff can escape liability for attorneys' fees under UPEPA by unilaterally terminating a suit at the eleventh hour. *Id.*

On June 24, 2024, this Court granted Defendants' motion for leave to file an interlocutory appeal. Da102. Defendants now so move.

LEGAL STANDARD

This Court reviews a ruling on a R.4:50-1(f) motion for an abuse of discretion. *Johnson v. Johnson*, 320 N.J. Super. 371, 378, 385 (App. Div. 1999) (reversing denial of motion for relief under R.4:50-1(f)). An abuse of discretion occurs when "the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." *Masone v. Levine*, 382 N.J. Super. 181, 193 (App. Div. 2005). "[I]f a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies the applicable law to the facts, an appellate court need not extend deference." *Johnson*, 320 N.J. Super. at 378; *see also US Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 467 (2012) (deference not appropriate where decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis"). This Court "must adjudicate the controversy in light of the applicable law to avoid a manifest denial of justice." *Johnson*, 320 N.J. Super. at 378.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO REOPEN UNDER R.4:50-1(F). (T40:6–45:7; DA7–8)

A. Plaintiff's strategic dismissal of his lawsuit to avoid attorneys' fees under the anti-SLAPP statute is an exceptional circumstance warranting relief. (T8:3–4, T39:18–25, T39:25–40:2, T8:4–13; T8:14–16)

Plaintiff's voluntary dismissal of his Complaint before the trial court had an opportunity to rule on Defendants' application for an order to show cause under UPEPA is an "exceptional circumstance" warranting relief from the trial court's order of dismissal. Subsection (f) of Rule 4:50-1 permits a court to exercise its discretion to "relieve a party or the party's legal representative from a final judgment or order," R.4:50-1, "whenever necessary to prevent a manifest denial of justice," *Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n*, 74 N.J. 113, 120 (1977). Relief is appropriate when "the circumstances are exceptional and enforcement of the judgment or order would be unjust, oppressive or inequitable." *Johnson*, 320 N.J. Super. at 378. Where exceptional situations warrant relief under R.4:50-1(f), the rule's "boundaries are as expansive as the need to achieve equity and justice." *Nowosleska v. Steele*, 400 N.J. Super. 297, 303 (App. Div. 2008) (quoting *Mancini v. EDS on Behalf of N.J. Auto. Full Ins. Underwriting Ass'n*, 132 N.J. 330, 336 (N.J. 1993)). Courts "focus on equitable considerations" in determining whether relief under R.4:50-1(f) is warranted.

Id.; *see also Manning Eng'g*, 74 N.J. at 120 (rule is "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case").

New Jersey courts have held that relief under R.4:50-1(f) is particularly appropriate when important public policy interests of the state are at stake. In *Manning Engineering*, for example, the New Jersey Supreme Court granted the defendants' motion to reopen a judgment against them in a breach of contract action on the ground that the contract had been awarded to the plaintiff based on an illegal kickback scheme. 74 N.J. at 117–18, 125–26 (crediting "the trial judge's finding that Manning received the park project in return for his faithful service to . . . [the] former Mayor of Jersey City, as a conduit for illegal kickbacks"). The court held that relief under subsection (f) was "warranted because of the public policy to prevent recovery of money damages for breach of an illegal public contract executed by plaintiff as part of a fraudulent scheme." *Id.* at 125. Similarly, in *In re R.D.*, 384 N.J. Super. 61 (App. Div. 2006), this Court affirmed the trial court's order under R.4:50-1(f), granting the State's motion to modify a sex offender's Risk Assessment Score that failed to account for newly discovered evidence of the sex offender's criminal history in another state. *Id.* at 63–64. In granting the State's motion, this Court emphasized that

"a court has the authority under sub-section (f) to reopen a judgment where such relief is necessary to achieve a fair and just result mandated by public policy." *Id.* at 66 (citing *Manning Eng'g*, 74 N.J. at 122). Other decisions of this Court and the New Jersey Supreme Court confirm that protecting the State's public policy interests and effectuating the purpose of state legislation are "exceptional circumstances" warranting relief under subsection (f). *See, e.g.*, *Cmty. Realty Mgmt., Inc. for Wrightstown Arms Apartments v. Harris*, 155 N.J. 212, 238 (1998) (vacating judgment for possession under R.4:50-1(f) and observing that Plaintiff's "conduct . . . is contrary to our public policy embedded in the Anti-Eviction Act and the Landlord Tenant Anti-Reprisal Law," and further that "[t]o permit execution of the warrant of removal in this case would permit a landlord to use the Anti-Eviction Act as a tool for retaliation"); *LVNV Funding, LLC v. Deangelo*, 464 N.J. Super. 103, 110 (App. Div. 2020) (no abuse of discretion where trial court granted relief under subsection (f) based on determination that state "interest in curbing abusive [debt] collection practices outweighed the interest in the finality of judgments").

Similarly here, this Court has an important public policy interest in ensuring that litigants like Plaintiff cannot circumvent UPEPA's protections by voluntarily dismissing their lawsuits at the last minute to avoid liability for attorneys' fees under the statute. As the New Jersey Supreme Court has

emphasized, "[s]o greatly do we in New Jersey cherish our rights of free speech that our Constitution provides even broader protections than the familiar ones found in its federal counterpart." *Borough of Sayreville v. 35 Club L.L.C.*, 208 N.J. 491, 494 (2012); *see also E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin*, 226 N.J. 549, 568 (2016) (observing that "[t]he New Jersey Constitution guarantees a broad affirmative right to free speech"). Indeed, the Supreme Court's decisions, "pronounced in the benevolent light of New Jersey's constitutional commitment to free speech, have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern." *Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 271–72 (1986)

It was against this backdrop that the New Jersey legislature enacted UPEPA in September 2023 to "make[] it much more difficult to use the legal system as a weapon, with the intent to bully individuals into silence."[1] As Governor Phil Murphy emphasized in signing the Act, UPEPA filled a gap in the law that had allowed litigants in New Jersey to file meritless lawsuits and "silence their critics by making it impossible for those with fewer resources to spend the time and money to legally defend themselves."[2] UPEPA sought to

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[1] Press Release, Phil Murphy, Governor, State of New Jersey, Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech (Sept. 7, 2023) [hereinafter UPEPA Press Release], Da9.
[2] *Id.*

address the problem posed by such strategic lawsuits against public participation ("SLAPPs")—which aim to "impose on citizens the expense and burden of defending a lawsuit" based on protected free speech or press activities, and "thus force them to give up their protest," *Turner v. Wong*, 363 N.J. Super. 186, 205 n.3 (App. Div. 2003)—head on, by providing for heightened review and expedited dismissal of SLAPPs.

As relevant here, UPEPA applies to all litigation based on a person's "exercise of the right of freedom of speech or the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern." N.J. Stat. Ann. § 2A:53A-50(b)(3). If a SLAPP is filed, UPEPA permits eligible defendants to file an application for an order to show cause to dismiss the action, *id.* § 2A:53A-51, which the court must resolve on an expedited basis, *id.* § 2A:53A-53. Additionally, while such application is pending, the court may stay all proceedings in the action, including discovery and any pending motions. *Id.* § 2A:53A-52(a)(1). In ruling on an order to show cause, the court "shall dismiss with prejudice" an action where the plaintiff "fail[s] to state a cause of action upon which relief can be granted" or cannot "establish a prima facie case as to each essential element" of any claim. *Id.* § 2A:53A-55(a)(3).

Crucially, UPEPA provides that "[a] voluntary dismissal without

prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of an order to show cause under section 3 of P.L.2023, c. 155 (C.2A:53A-51) *does not affect a moving party's right to obtain a ruling on the order to show cause and seek costs, attorney's fees, and expenses* under section 10 of P.L.2023, c. 155 (C.2A:53A-58)." *Id.* § 2A:53A-55(b) (emphasis added). Here, had this action proceeded in the ordinary course, Plaintiff's voluntary dismissal of his action would not have immunized him from liability for costs, attorneys' fees, and expenses under the statute. But because the trial court entered the dismissal the same day, thus closing the case—but before Defendants had an opportunity to seek relief under UPEPA—Defendants were prevented from seeking the attorneys' fees to which they are entitled under UPEPA.

In doing so, the trial court effectively stripped UPEPA of one of its key deterrent features, leaving Plaintiff free to file the same exact claims against Defendants in the future, with impunity. Indeed, as courts in other jurisdictions have recognized, the fee-shifting provisions in anti-SLAPP legislation serve as important deterrents to the filing of meritless, speech-suppressive lawsuits. *See, e.g.*, *Khan v. Orbis Bus. Intelligence Ltd.*, 292 A.3d 244, 257–58 (D.C. 2023) (recognizing that "[d]iscouraging the filing of meritless lawsuits" was a "reasonable and legitimate policy goal[]" of the D.C. anti-SLAPP statute);

Banerjee v. Cont'l Incorporated, Inc., 2018 WL 4469006, at *6 (D. Nev. Sept. 17, 2018) (unpublished) (commenting that "substantial fee award" under Nevada anti-SLAPP statute "amply serves the deterrence and compensation goals behind the anti-SLAPP statute's fee shifting provision"); *Zwebner v. Coughlin*, 2006 WL 8455423, at *1 (S.D. Cal. Jan. 25, 2006) (unpublished) (noting that under California's anti-SLAPP statute, a "prevailing defendant on a special motion to strike . . . *shall* be entitled to recover his or her attorney's fees and costs[] in order to deter [the] chilling" of free speech rights); *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001) (observing that the California anti-SLAPP statute's "fee-shifting provision was apparently intended to discourage . . . strategic lawsuits against public participation by imposing the litigation costs on the party seeking to" chill such speech).

Because Plaintiff dismissed his complaint before the trial court could rule on Defendants' application for an order to show cause, Plaintiff was effectively able to bypass UPEPA's protections and subject Defendants to the costs and burdens of his meritless lawsuit without facing any of the consequences UPEPA was designed to impose on him for doing so. Whether intentional or not, future SLAPP litigants could employ the same strategy to harass and intimidate unwitting defendants as though UPEPA had never been enacted. For example, a plaintiff could file a SLAPP complaint that he or she knows is completely

meritless solely to harass the defendant. The SLAPP plaintiff could then wait until after the defendant filed a motion to dismiss under UPEPA, allowing the plaintiff to assess the strength of the defendant's arguments in favor of dismissal. To the extent the defendant's arguments in favor of dismissal are weak, the SLAPP plaintiff could choose to maintain the action (despite having lacked any desire or expectation that the lawsuit would succeed in the first instance). If, by contrast, the defendant's arguments in favor of dismissal are strong, the SLAPP plaintiff could choose to voluntarily dismiss the lawsuit. And to the extent the court grants the voluntary dismissal without prejudice before the defendant has an opportunity to seek attorneys' fees—as the trial court did here—the defendant's ability to seek attorneys' fees under UPEPA would be extinguished, and the dismissal unreviewable. At that point, however, the defendant will already have invested considerable time, energy, and resources in finding and retaining counsel and moving for dismissal—the exact burdens UPEPA and similar anti-SLAPP statutes were meant to guard against. *See* Da10 (Senator Joseph Lagana remarking, "This legislation will protect residents against frivolous, ill-intentioned lawsuits and insulate them from the financial hardships these cases can produce.").

Such a result would contravene the essential legislative purpose of UPEPA, which was to make it "more difficult to use the legal system as a

weapon, with the intent to bully individuals into silence." Da9. And it would render a nullity the express provisions in UPEPA that allow a moving party to seek attorneys' fees notwithstanding a plaintiff's voluntary dismissal, *see* N.J. Stat. Ann. §§ 2A:53A-55, 2A:53A-58—an essential provision intended as much to dissuade potential SLAPP plaintiffs from filing suit in the first instance, as to compensate defendants for defending such meritless lawsuits after the fact. *See supra* at 14; *see also Khan*, 292 A.3d at 257 (recognizing that "requiring those who . . . file [meritless lawsuits] to compensate defendants for the costs such lawsuits unquestionably impose on them" has been a "longstanding and widespread practice[] [of anti-SLAPP legislation] throughout the United States"); *Barry v. State Bar of California*, 386 P.3d 788, 794 (Cal. 2017) (explaining court's "understanding of the scope of the anti-SLAPP's fee-shifting provision," which was "apparent[ly]" to "compensat[e] the prevailing defendant for the undue burden of defending against litigation designed to chill the exercise of free speech and petition rights").

Courts in other jurisdictions have reached the same conclusion when confronted with facts similar to those presented here. In *Jacobson v. Clack*, 309 A.3d 571 (D.C. 2024), for example, the plaintiff sued the author of an article that criticized a research paper the plaintiff had written, as well as the publisher of the journal in which the article appeared. *Id.* at 574. In response, the

defendants filed special motions to dismiss under D.C.'s Anti-Strategic Lawsuits Against Public Participation Act ("Anti-SLAPP Act"). *Id.* After the trial court indicated at a hearing that it was likely to grant the motions, the plaintiff voluntarily dismissed the case before the court could issue a decision. *Id.* Afterwards, the defendants moved for attorneys' fees under the Anti-SLAPP Act's fee-shifting provision, which the court granted. *Id.* The plaintiff appealed the attorneys' fees determination, arguing that because he voluntarily dismissed his suit, the defendants did not "prevail" as required to recover attorneys' fees. *Id.*

At a matter of first impression, the D.C. Court of Appeals rejected this argument, holding that the text of the Anti-SLAPP Act, the court's precedents, and the purpose of the statute all supported the conclusion that the plaintiff's voluntary dismissal was not a bar to an award of attorneys' fees under the Act. *See id.* at 577–81. In so holding, the court expressly rejected the plaintiff's "preferred approach," pursuant to which "a plaintiff could engage in harassing and meritless litigation up until the point at which they sense the court might dismiss the case, and then voluntarily dismiss the suit themselves, all while keeping the threat of refiling hanging over the defendants' heads and running up their legal bills." *Id.* at 581. "If [Plaintiff] were correct that a voluntary dismissal nullifies any right to attorneys' fees," the court continued, "then

plaintiffs could inflict the harm the Anti-SLAPP Act was meant to combat—siphoning defendants' money, time, and resources—without recompense." *Id.*

For the same reasons, Plaintiff's procedural machinations seeking to thwart UPEPA review constitute an exceptional circumstance warranting reopening of the judgment. Like the SLAPP plaintiff in *Jacobson*, Plaintiff here voluntarily dismissed his case after he saw the proverbial writing on the wall—the trial court's grant of Defendants' motion for extension of time, in which Defendants previewed their arguments in favor of dismissal under UPEPA. *See* Da45. Indeed, Plaintiff admitted that he was voluntarily dismissing his suit in light of that ruling because, in his view "[i]t is clear once the judge grants orders that have no basis that this will be going nowhere." Da66. And like the SLAPP plaintiff in *Jacobson*, Plaintiff seeks to "insulate [himself] from [an] order[] to pay attorneys' fees" through his voluntary dismissal. 309 A.3d at 577. This Court should not countenance Plaintiff's exploitation of a loophole in the law. To the contrary, it can and should seize this opportunity to close the loophole by reopening the judgment for the limited purpose of allowing Defendants to seek their attorneys' fees under UPEPA. In doing so, the Court will send a strong message that UPEPA can and will continue to play a robust role in upholding New Jersey's strong tradition of "foster[ing] and nurtur[ing] speech on matters of public concern." *Sisler*, 104 N.J. at 271–72.

B. The trial court abused its discretion in failing to consider Defendants' anti-SLAPP statute-based exceptional circumstances argument. (T40:6–45:7; DA7–8)

The trial court abused its discretion in determining that no exceptional circumstances justified relieving Defendants from the order of dismissal. Under R.4:50-1, a court may "relieve a party or the party's legal representative from a final judgment or order," R.4:50-1, to "prevent a manifest denial of justice," *Manning Eng'g*, 74 N.J. at 120. Pursuant to subsection (f) of R.4:50-1, a court may set aside a judgment "in 'exceptional situations,'" *Nowosleska*, 400 N.J. Super. at 303 (quoting *Mancini v. EDS*, 132 N.J. 330, 336 (1993)), as long as the motion is made "within a reasonable time," R.4:50-2.

Here, Plaintiff's voluntary dismissal of his complaint to avoid liability for attorneys' fees under UPEPA was an exceptional circumstance warranting relief from the trial court's order of dismissal. As counsel for Defendants explained at the April 4th motion hearing, failure to grant Defendants' motion would have important consequences for the future viability of UPEPA in countering SLAPP suits like those filed by Plaintiff. *See* T8:3–4 (arguing that failure to reopen judgment and allow Defendants to seek attorneys' fees under UPEPA "would render UPEPA a dead letter."). To hold that Defendants were without a remedy "[on] account of [Plaintiff]'s gamesmanship" and "despite attorney's fees being statutorily authorized," Defendants' counsel argued, "would profoundly subvert

the purpose of the New Jersey anti-SLAPP statute[,] which was to nip in the b[u]d lawsuits like [Plaintiff's], . . . to disincentivize . . . them in the first place." *Id.* at 39:18–25. And it "would provide a roadmap for future litigants on how to circumvent the statute's provisions as well." *Id.* at 39:25–40:2. Defendants' counsel emphasized that "a litigant like [Plaintiff] could file a harassing, meritless lawsuit against the defendant, preview the defendants' arguments for dismissal, . . . and after the defendants had expended considerable time, energy, and stress defending the lawsuit[,] strategically dismiss at the last moment that lawsuit if it turned out that the defendants' arguments in favor of dismissal . . . turned out to be strong enough." *Id.* at 8:4–13. The result, Defendants' counsel explained, would be the "creat[ion] of a perverse incentive for litigants to file lawsuit after meritless lawsuit against a defendant." *Id.* at 8:14–16.

Notwithstanding Defendants' counsel's emphasis on the important public policy implications of a ruling against Defendants and for the future effectiveness of UPEPA more broadly, the trial court denied the motion without even mentioning or considering that argument, reasoning that:

> Defendants make a significant effort to demonstrate to this Court that the filings of the plaintiff here were frivolous, that the filings of the plaintiff in this case, the allegations contained within the body of the Complaint, were baseless and that they had no merit. Defendants are certainly afforded the opportunity and can come to that conclusion.
>
> However, there's nothing before this Court to demonstrate that. While I understand it's been brought to the Court's attention that the plaintiff has

> been the subject of significant litigation and actions as relates to the underlying matrimonial action in Family Court matters, that's not before this Court. And whether or not the plaintiff was successful or unsuccessful in any of his prior applications to a court or motions before a Court is also not before this Court. What was before the Court was a Complaint filed by the plaintiff and the defendant seeking to have additional time to answer.
>
> . . .
>
> And while the defendants share the belief that the case is frivolous for whatever reasons, that's, again, not a matter that was presented to the Court or a basis before the Court for the Court issuing its original decision back on January 24th of this year.
>
> I do not and cannot find and make that leap that defense is asking this Court that this was a frivolous action and only filed by the plaintiff with the purpose to harass the defendant. There's nothing before the Court to indicate that.
>
> So, I'm going to respectfully deny the motion.

Id. at 41:20–42:14; 44:2–15.

From its remarks on the record, it appears that the trial court mistakenly understood Defendants' counsel to be arguing that the "exceptional circumstance" warranting relief from the court's order of dismissal was the meritless nature of Plaintiff's underlying lawsuit and his history of filing frivolous lawsuits against others. Or, alternatively, that Defendants were seeking attorneys' fees under the statute governing frivolous lawsuits. *See, e.g.*, *id.* at 18:3–19:2 ("[Y]ou make this leap that . . . the suit filed by the plaintiff in this matter was, in fact, frivolous; was, in fact, brought with intention to have your client expend resources . . . but where is that demonstrated to the Court?

Despite the other lawsuits he may have filed, despite his other actions in other cases, where is that substantially before the Court that this would even have been ripe for a motion to dismiss given the liberal standard of that requirement that the Court has to adhere to on the case law, court rules?").

But while Defendants' counsel remarked on both the meritless nature of Plaintiff's claims and his track record of filing meritless lawsuits against others, Defendants' counsel made clear that his purpose in doing so "was to situate [Plaintiff]'s behavior in the broader context of what he's done previously and that's because Your Honor's order of dismissal was without prejudice. And . . . to explain . . . the risks that would be entailed." *Id.* at 19:11–16. In other words, the "exceptional circumstance" warranting reopening of the judgment was that it would be profoundly inequitable for Defendants to be rendered without a remedy "[on] account of [Plaintiff]'s gamesmanship" and "despite attorney's fees being statutorily authorized." *Id.* at 39:18–25. Such relief was particularly necessary, Defendants' counsel argued, in light of Plaintiff's demonstrated track record of using the justice system to settle his own personal vendettas. The attorneys' fees Defendants sought to pursue under UPEPA, moreover, are mandatory prevailing party fees—the court "shall" award attorneys' fees and costs "if the moving party prevails on the order to show cause," N.J. Stat. Ann. § 2A:53A-58—not fees for frivolous litigation.

Lest the trial court be left with any doubt that Defendants were asserting the important public policy implications of Plaintiff's conduct and the future viability of UPEPA as an independent "exceptional circumstance" warranting relief, Defendants' counsel reminded the court that "we have demonstrated that there are *two* exceptional circumstances warranting reopening of the judgment." T20:10–12 (emphasis added). Defendants' counsel explained, "[A]s I said before, if this Court were to fail to reopen the judgment, this could potentially give a road map for future litigants about how to circumvent the protections of UPEPA . . . a litigant like [Plaintiff] could file a lawsuit he knows or doesn't even expect to obtain the ultimate relief on because he knows the claims are frivolous, preview the defendants' arguments for dismissal—." *Id.* at 20:21–21:4.

In denying Defendants' motion, the trial court did not once mention—or, apparently, consider—Defendants' argument that Plaintiff's procedural maneuverings to defeat operation of UPEPA was an "exceptional circumstance" warranting relief from the order of dismissal. That was an abuse of discretion. *See In re Commitment of M.M.*, 384 N.J. Super. 313, 333 (App. Div. 2006) ("In this case, the judge did not even consider whether there were exceptional circumstances and good cause warranting extensions of the statutory period. Such a failure to consider the legal standards is an abuse of discretion."); *Stoney*

v. Maple Shade Twp., 426 N.J. Super. 297, 315–16 (App. Div. 2012) (concluding that trial court "abused [its] discretion in denying injunctive relief as to the park because [it] failed to consider all relevant factors.").

C. The trial court committed legal error in denying the motion to reopen based on a misapprehension of the applicable standard for obtaining attorneys' fees. (T40:6–45:7; DA7–8)

The trial court also abused its discretion in denying the motion to reopen based on a misapprehension of the legal standard governing Defendants' right to attorneys' fees. Specifically, the Court conflated the prevailing party standard for obtaining attorneys' fees under UPEPA with the frivolous litigation standard under the fee-shifting provisions of New Jersey's Frivolous Litigation Statute, and on that basis denied Defendants' motion to reopen.

The trial court appeared to be of the view that Defendants would only be entitled to attorneys' fees under UPEPA if they could demonstrate that Plaintiff's lawsuit was frivolous—and since they had not done so, that reopening the case for the limited purpose of seeking fees was futile. That determination was legal error. Under UPEPA, Defendants were only required to demonstrate that they were the prevailing party on the order to show cause in order to recover attorneys' fees. The trial court's apparent misapprehension in that regard is not entitled to any deference by this Court. *See Johnson*, 320 N.J. Super. at 378; *State, ex rel. T.M.*, 412 N.J. Super. 225, 231–32 (App. Div. 2010) (no deference

owed where trial court improperly "imposed a burden upon the State to prove more than probable cause").

Under the Frivolous Litigation Statute, N.J. Stat. Ann. § 2A:15-59.1, by contrast, the court "may" award to the prevailing party in a civil action "all reasonable litigation costs and reasonable attorneys fees, *if* the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, or cross-claim or defense of the nonprevailing person was frivolous." N.J. Stat. Ann. § 2A:15-59.1(a)(1) (emphasis added). "A claim is 'frivolous' . . . if filed or pursued 'in bad faith, solely for the purpose of harassment, delay or malicious injury,' *N.J.S.A.* 2A:15-59.1(b)(1), or if '[t]he nonprevailing party knew, or should have known, that the [claim or defense] was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law,' *N.J.S.A.* 2A:15-59.1(b)(2)." *Ferolito v. Park Hill Ass'n, Inc.*, 408 N.J. Super. 401, 407–08 (App. Div. 2009). The statute requires evidence of bad faith because "clients generally rely on their attorneys to evaluate the basis in law or equity of a claim or defenses, and a client who relies in good faith on the advice of counsel cannot be found to have known that his or her claim or defense was baseless." *Id.* at 408 (cleaned up).

Here, the trial court appeared to be under the misimpression that the

likelihood of Defendants' success on their forthcoming motion for attorneys' fees was predicated on a successful showing that Plaintiff's lawsuit was "frivolous" within the meaning of the Frivolous Litigation Statute, despite the fact that Defendants expressly disclaimed any reliance on the frivolous litigation statute. *See* T 27:10–12 ("[W]e're not moving under the specific statute, New Jersey statute for frivolous–"). Indeed, during the motion hearing, and notwithstanding Defendants' counsel's reminder that "the point is that these are exceptional circumstances warranting reopening of the judgment," *id.* at 27:14–15, the trial court remarked that there was no "court order that, at least in the eyes of this Court, adjudicates whether the matter is frivolous and has no basis for going forward," *id.* at 26:21–24; *see also id.* at 18:9–12 ("There's nothing definitive before the Court that his actions were designed to harass or cause . . . your client financial harm."); *id.* at 44:8–13 ("I do not and cannot find and make that leap that defense is asking this Court that this was a frivolous action and only filed by the plaintiff with the purpose to harass the defendant. I cannot make that leap. There's nothing before the Court to indicate that."). The trial court repeated this line of questioning at other points throughout the hearing.

The trial court also injected into its evaluation of the motion to reopen the standard for evaluating the sufficiency of pleadings on a motion to dismiss—despite Plaintiff already having voluntarily dismissed the suit, rendering

Defendants the prevailing parties. The trial court asked, for example, "Despite the other lawsuits he may have filed, despite his other actions in other cases, where is that substantially before the Court that this would even have been ripe for a motion to dismiss given the liberal standard of that requirement that the Court has to adhere to on the case law, court rules?" *Id.* at 18:21–19:2.

The trial court's "misconception of the applicable law" governing the award of attorneys' fees under UPEPA—even though not, under a correct understanding of the law, dispositive of the ultimate question whether Defendants were entitled to reopening of the judgment under R.4:50-1(f)—was an improper basis for denying Defendants' motion. *Johnson*, 320 N.J. Super. at 378. It was also an abuse of discretion, and the trial court's judgment should accordingly be reversed.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the trial court's denial of their motion to reopen the judgment be reversed.

Dated: August 29, 2024
New York, New York

Respectfully submitted,

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ALLEN J. SATZ,

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V.

KESHET STARR, ORGANIZATION FOR THE RESOLUTION OF AGUNOT, THE JEWISH LINK, NEAL TURK, AND BEIS MEDRASH OF BERGENFIELD,

Defendant - Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002785-23

Civil Action

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, BERGEN COUNTY

LAW DIVISION DOCKET No.
BER-L-5596-23

Sat Below:
Hon. Peter Geiger

RESPONDENT'S REPLY TO APPELLANT'S BRIEF AND APPENDIX TO APPEAL THE RULING FROM APRIL 4, 2024 OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY, DOCKET NO. BER-L-5596-23

Submitted: September 16, 2024

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Preliminary Statement

The appellant seeks to reopen this case under the premise that this case involves matters that are protected under The Uniform Public Expression Protection Act (UPEPA). They seek to reopen this case in an effort to collect legal fees based on New Jersey law that protects free speech. First, this is not a 'UPEPA' case at all. Second, the lower courts were correct in dismissing the appellants motion to reopen the case since there was no evidence at all to show this was a 'UPEPA' case. Rather, it was the appellants opinion, and their opinion only, that it was this type of case. As Judge Geiger put it to the appellants many times, "you're making a big assumption here" (**1T, 8-18**); "we're talking about 'what ifs' to some extent" (**1T, 13-14**); "But, again, you -- you make this leap that the -- the suit filed by the plaintiff in this matter was, in fact, frivolous; was, in fact, brought with intention to have your client expend resources. I understand you're saying that. Saying so doesn't make it so though." (**1T, 18-3**); and "But, counsel, you, again, you're saying needless litigation. That's your position. I understand it. I appreciate it. But what is before the Court demonstrating that this was needless or frivolous litigation at the juncture that the Court process or heard the original motion?" (**1T, 21-12**).

Procedural History

On October 17, 2023, I filed a complaint against Keshet Starr/Organization for Resolution of Agunot (ORA), Neal Turk/Beis Medrash of Bergenfield, and The Jewish Link Newspaper (**Da1**). The law suit was regarding a picture of me that was

taken inside the privacy of my home where there is no visibility to the public that they were using without my consent all over social media, on flyers, in protests, etc. (**Pa1**). I do not know who took this picture or how they obtained it, but I never gave consent to anyone to use this picture. This picture was not the original picture used in the social media posts, flyers, etc. The original picture that was used was a proper looking picture of me (**Pa2**). That picture was purposely changed out for this picture in which I look 'unkempt' to say the least.

On December 7, 2023, a motion was made by the Defendant to extend time to answer the complaint. I objected to that motion on December 16, 2023. On January 2, 2024, the Defendant's made a motion for admission for Pro Hac Vice. On January 2, 2024, the Defendants also made a reply to my objection to an extension of time to answer the claim. Attached to that reply, was the order to show cause (**Da47**). The Defendant failed to follow he correct procedures for filing an order to show cause. The result was that when the defendants uploaded the reply to the motion into JEDS, they uploaded it only as 'reply brief' and did not in any way notify the court that there was an order to show cause there as well (**Pa3**). This made the courts, as well as myself, unaware there was ever an order to show cause filed. On January 24, 2024, before any answer was filed and before any discussion or information was provided by me to the defendant, I voluntarily dropped the case (**Da58**).

On April 4, 2024, we appeared before Hon. Judge Geiger for the Defendants motion to reopen the case based on 'UPEPA'. The judge asked me why I dropped the case. I explained because there is currently an appeal before the appellate division that, if appealed, will make this case much stronger on my behalf (A-2205-23). It made more sense to hold off for now and await the outcome of the appeal. Though the Defendant kept arguing that the is a case of 'UPEPA', Judge Geiger clearly ruled that since no answer was even given in this case to be able to show any evidence that this case was frivolous or falls under the guidelines of 'UPEPA', he rightfully dismissed the motion (**Da7**).

The Defendant then filed an appeal regarding this matter.

Statement of Facts

On October 17, 2023, I filed a complaint against Keshet Starr, The Organization for the Resolution for Agunot, The Jewish link, Neal Turk, and The Beis Medrash of Bergenfield (**Da1**). The reason for the complaint was that they used a picture of me, taken in the privacy of my own home, and spread it all over the internet and in other public places without consent.

On December 7, 2023, the Defendants made a motion to extend time to answer the complaint. I replied opposing the motion to extend time on December 16th.

With no answer given to date, on December 27, 2023, I made a motion for default judgement. The defendants answered my reply for the motion to extend time

on January 2nd, 2024. Attached to their reply at the end, was an order to show cause (**Da47**). Also, on January 2nd, the defendants made another motion for admission for *pro hac vice* which I replied in opposition to on January 12th, 2024.

On January 24, 2024, the judge granted the order to extend time to answer, granted the motion for *pro hac vice,* and denied my motion for default judgement.

On January 24, 2024, I voluntary dropped the case (**Da58**)

On March 12, 2024, the defendants made a motion to reopen the case based on UPEPA. I submitted my opposition to this motion two days later which was March 14, 2024.

On April 4, 2024, Judge Geiger denied the defendants motion to reopen the case (**Da7**) and on May 15, 2024, the defendants appealed the judge's decision.

Legal Argument

1. THE DEFENDANT FAILED TO FOLLOW THE GUIDELINES FOR AN ORDER TO SHOW CAUSE UNDER NEW JERSEY RULE 4:67-1

Under *New Jersey Rule 4:67: Summary Actions, Part 1*, it states:

> "This rule is applicable (a) to all actions in which the court is permitted by rule or by statute to proceed in a summary manner, other than actions for the recovery of penalties which shall be brought pursuant to R. 4:70; and (b) to all other actions in the Superior Court other than matrimonial actions and actions in which unliquidated monetary damages are sought, provided it appears to the court, on motion made pursuant to R. 1:6-3 and on notice to the other parties to the action not in default, that it is likely that

> the matter may be completely disposed of in a summary manner."

Under the title of Summary Actions is an order to show cause. As you can see from New Jersey Rule 4:67-1(b), an order to show cause must be made as a separate motion to the court accompanied by a $50 fee. The Defendants did not make a separate motion. They attached a (proposed) order to show cause to their reply to my objection to their motion for extension to answer. In JEDS it is only reordered as "Reply Brief" and nothing else (**Pa3**). Hence, the court, nor myself, was never notified of this order to show cause.

Since the order to show cause was not filed as per New Jersey Guidelines, it is irrelevant. Also, the SLAPP law (June 27, 2023) guidelines for the timing of filing an order to show cause are "Not later than 60 days after a party is served". It is way past the deadline to make any sort of motion for an order to show cause now.

2. THIS IS NOT A CASE OF 'UPEPA'

I am a little confused where the Defendant is concluding that this case is one that falls under the 'UPEPA' guidelines. This complaint was about using a picture of me that was taken in the privacy of my own home. This falls under invasion of privacy and false light. The courts have said that "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if

the intrusion would be highly offensive to a reasonable person" *(NOC, Inc. V. Schaefer, 484 A.2d 729, 197 N.J. Super. 249 (1984)*. Invasion of privacy has also included cases such as "(1) intrusion upon solitude or seclusion (2) public disclosure of private facts, e.g., unreasonable publicity given to one's private life (3) false light privacy, e.g., publicity that normally places the other in a false light before the public; (4) appropriation of name or likeness". *3 Restatement, Torts 2d, § 652A, at 376 (1977); Weller v. Home News Publishing Co., 112 N.J. Super. 502 (1970); Devlin v. Greiner, 147 N.J. Super. 446 (1977); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761 (D.N.J. 1981).*

In my complaint on the page that states "Relief Sought", every claim for damage is in regard to the picture that was taken of me in the confines of my home (**Pa1**). New Jersey law, *N.J.S.A. 2A:53A-49*, applies to complaints based on a person's exercise of speech, press, assembly, petition, or association rights 'on a matter of public concern.' My complaint was based on a picture taken without consent in the privacy of my own home that was used in many different situations to violate my privacy rights. Two completely different cases.

3. THE CONDITIONS TO CLAIM THIS CASE AS 'UPEPA' HAVE NOT BEEN SATISFIED

This complaint was voluntarily dropped before an answer was even given. There was no discussion at all between the Defendant and myself about any of the

facts of the case. The SLAPP law itself (June 27, 2023) states under the section "Hearing for Order to Show Cause":

> "The bill further provides that the court would hear an order to show cause as expeditiously as possible, unless the court allows limited discovery. In ruling on an order to show cause, the court would consider the pleadings, the order to show cause application and support certifications, briefs, any reply or response to the order to show cause, and any evidence that could be considered in ruling on a motion for summary judgment."

In order for this to be considered a case under SLAPP, there had to be evidence provided on both sides showing their respective positions. None of this was done. The law further states:

> "The court is permitted to dismiss with prejudice a cause of action, or part thereof, if: (1) the moving party established that the act applies; (2) the responding party fails to establish that the act does not apply; and (3) either: (a) the responding party fails to establish a prima facie case as to each essential element of the cause of action; or (b) the moving party establishes that: (i) the responding party failed to state a cause of action upon which relief can be granted; or (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part thereof."

This clearly shows what must take place before any case can be deemed a SLAPP case. None of this took place. The case was voluntarily dismissed before any evidence or even any answer was submitted to the court. As Judge Geiger said to the Defendants when they made their claim that this lawsuit falls under the guidelines

of SLAPP, "That's your position". There is, however, no evidence presented to the court to be able to argue that it does fall under SLAPP for the court to make a ruling that it is, in fact, a SLAPP case.

Courts will not disturb the rulings and legal conclusions that flow from the lower courts unless convinced they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Ricci v. Ricci, 448 N.J. Super. 546, 564 (App. Div. 2017) (quoting Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015).* The courts have ruled that, "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." *Cesare, 154 N.J. at 411–12, 713 A.2d 390 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484, 323 A.2d 495 (1974).* "Discretionary determinations, supported by the record, are examined to discern whether an abuse of reasoned discretion has occurred." *Ricci, 448 N.J. Super. at 564, 154 A.3d 215 (citing Gac v. Gac, 186 N.J. 535, 547, 897 A.2d 1018 (2006).* The court abuses discretion when "findings inconsistent with or unsupported by competent evidence," utilizes "irrelevant or inappropriate factors," or "fail[s] to consider controlling legal principles." *Elrom, 439 N.J. Super. at 434, 110 A.3d 69 (internal citations omitted).* An abuse of discretion is also when the court "fails to take into consideration all relevant factors[,] and when its decision reflects a clear

error in judgment." *State v. C.W., 449 N.J. Super. 231, 255, 156 A.3d 1088 (App. Div. 2017) (quoting State v. Baynes, 148 N.J. 434, 444, 690 A.2d 594 (1997)).*

Stating all the above cases, there is no reason for the lower court's ruling not to stand.

Conclusion

This case has nothing to do with UPEPA. The complaint clearly states that all claims are for using a picture that was taken in the privacy of my own home. There is also no evidence that has been provided that this case falls under UPEPA nor evidence to the contrary which, as per the SLAPP guidelines, I would have a right to provide to the court before a decision would be made on whether this case was a SLAPP case or not. As of now, it's just the Defendants opinion and nothing more.

It is for these reasons that I am asking the court to deny this appeal.

Certification

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 9/16/24

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ALLEN J. SATZ,

Plaintiff,

v.

KESHET STARR, ORGANIZATION FOR THE RESOLUTION OF AGUNOT, THE JEWISH LINK, NEAL TURK, AND BEIS MEDRASH OF BERGENFIELD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appellate Docket No. A-002785-23

Submission Date: November 3, 2024

On Appeal from the Superior Court of New Jersey Law Division: Bergen County

Sat Below: Hon. Peter Geiger

Trial Court Docket No. BER-L-005596-23

REPLY BRIEF OF DEFENDANT-APPELLANTS

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INTRODUCTION

This Court should reverse the denial of Defendants' motion to reopen the judgment under N.J. Ct. R. R.4:50-1(f). In denying Defendants' motion, the trial court failed to address or even consider Defendants' argument that an exceptional circumstance warranting relief was the future viability of New Jersey's recently enacted anti-strategic lawsuit against public participation ("SLAPP") law itself, whose protections would be vitiated if Plaintiff were permitted to avoid even litigating a request for attorneys' fees simply by dismissing his lawsuit while Defendants' proposed order to show cause seeking such fees was pending. As Defendants emphasized at the motion hearing, that law—the Uniform Public Expression Protection Act ("UPEPA")—was designed specifically to prevent such gamesmanship by explicitly authorizing a party to "obtain a ruling on the order to show cause and seek costs, attorney's fees, and expenses" notwithstanding a SLAPP plaintiff's "voluntary dismissal without prejudice of a responding party's cause of action." N.J. Stat. Ann. § 2A:53A-55(b).

Failure to reopen the judgment, Defendants cautioned, would be an implicit endorsement of Plaintiff's tactics and provide a roadmap for future SLAPP litigants on how to undermine the law. This issue was not once mentioned by the trial court in denying Defendants' motion. Compounding that error, the trial court conflated the prevailing party standard for attorneys' fees under UPEPA with the standard

under New Jersey's Frivolous Litigation Statute, denying Defendants' motion on the ground that no showing had been made that Plaintiff's action was frivolous notwithstanding that Defendants are not moving under the Frivolous Litigation Statute; that their yet-to-be-filed motion for attorneys' fees was not before the court; and that they had already prevailed via Plaintiff's dismissal of his claims. The trial court's misapprehension of the applicable legal standard was an abuse of discretion.

Plaintiff makes no effort to address these arguments or to defend the decision below on its own terms. Instead, he argues Defendants will not ultimately be able to recoup attorneys' fees under UPEPA. Plaintiff's arguments are irrelevant here and premature. Plaintiff will be able to litigate Defendants' rights under UPEPA upon reopening of the judgment and Defendants' filing of a motion for attorneys' fees—but Defendants, at minimum, have a right to pursue those fees. Plaintiff's arguments are also meritless. He argues that Defendants failed to comply with R.4:67-1, but that rule does not apply because this is not a summary proceeding. Plaintiff also argues that UPEPA is not applicable because he brings claims for invasion of privacy and false light. But UPEPA's applicability is determined by the conduct targeted by Plaintiff's lawsuit, and Plaintiff's Complaint plainly seeks to impose liability on Defendants for their constitutionally protected activities.

The trial court's decision should be reversed and the judgment reopened for the limited purpose of permitting Defendants to seek attorneys' fees under UPEPA.

ARGUMENT

Plaintiff's response brief does not address Defendants' abuse of discretion arguments or explain how the trial court properly exercised its discretion in denying Defendants' motion to reopen. Plaintiff instead argues that Defendants have no right to attorneys' fees under UPEPA because they purportedly failed to follow the applicable procedural requirements and because this action does not fall within the statute's scope. Plaintiff's failure to defend the reasoning of the decision below is a concession that it was an abuse of discretion to deny Defendants' motion. Plaintiff's arguments are, moreover, meritless. The trial court's decision should be reversed.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO REOPEN UNDER R.4:50-1(f).

In their motion to reopen and at oral argument, Defendants identified two "exceptional situations" warranting relief from the court's order of dismissal. *See* T20:10–12 (arguing that "we have demonstrated that there are *two* exceptional circumstances warranting reopening of the judgment.") (emphasis added). First, Defendants argued that failure to reopen the judgment in light of Plaintiff's voluntary dismissal would create a perverse incentive for SLAPP litigants to file speech-suppressive lawsuits, only to dismiss them before the court could rule on a pending order to show cause under UPEPA and only after subjecting defendants to the costs, burdens, and stress of litigation. *See* T39:18–40:2 (arguing that failure to reopen judgment "would provide a roadmap for future litigants on how to circumvent the

statute's provisions"); *see also Jacobson v. Clack*, 309 A.3d 571, 581 (D.C. 2024) (noting that "[i]f [plaintiff] were correct that a voluntary dismissal nullifies any right to attorneys' fees, then plaintiffs could inflict the harm the Anti-SLAPP Act was meant to combat—siphoning defendants' money, time, and resources—without recompense."). Such a result, Defendants warned, would "render UPEPA a dead letter." T8:3–4. Defendants also argued that a second exceptional circumstance warranting relief was the profound inequity that would result if Defendants were to be rendered without a remedy "[on] account of [Plaintiff]'s gamesmanship" and "despite attorney's fees being statutorily authorized." *Id.* at 39:18–20. Attorneys' fees, Defendants noted, were particularly necessary in this case to dissuade Plaintiff from continuing to use the justice system to settle his own personal vendettas. *See id.* at 10:24–11:25 (arguing that failure to reopen judgment to allow Defendants to seek attorneys' fees would mean that Plaintiff "in the future could threaten or again file the exact same claims against our clients in the future.").

In denying Defendants' motion, however, the trial court did not mention or consider Defendants' first proffered "exceptional situation": that allowing Plaintiff to voluntarily dismiss the case despite a pending proposed order to show cause would "profoundly subvert the purpose of the New Jersey anti-SLAPP statute[,] which was to nip in the b[u]d lawsuits like [Plaintiff's], . . . to disincentivize . . . them in the first place." T39:18–25; *see also id.* at 41:20–42:14, 44:2–15 (trial

court's reasoning for denying motion). In failing to consider or address this argument, the trial court abused its discretion. *See State v. S.N.*, 231 N.J. 497, 500 (2018) (trial court abuses discretion "by failing to consider *all* relevant factors"); *see also Masone v. Levine*, 382 N.J. Super. 181, 193 (App. Div. 2005) (abuse of discretion where "the discretionary act was not premised upon consideration of all relevant factors").

In addition, the trial court misapprehended the legal standard for obtaining attorneys' fees, erroneously conflating the prevailing party standard under UPEPA with the frivolous litigation standard under New Jersey's Frivolous Litigation Statute. Under UPEPA, the court "shall" award attorneys' fees and costs "if the moving party prevails on the order to show cause." N.J. Stat. Ann. § 2A:53A–58. No showing that the non-moving party's action is "frivolous" is required. By contrast, to obtain discretionary attorneys' fees under the Frivolous Litigation Statute, the court must find that the complaint, counterclaim, cross-claim or defense in question "was frivolous," N.J. Stat. Ann. § 2A:15-59.1(a)(1), meaning that it was "pursued in bad faith, solely for the purpose of harassment, delay or malicious injury," *Ferolito v. Park Hill Ass'n, Inc.*, 408 N.J. Super. 401, 407 (App. Div. 2009). In denying Defendants' motion, however, the trial court found that Defendants had failed to demonstrate that Plaintiff's action was frivolous, noting the lack of a "court order that, at least in the eyes of this Court, adjudicates whether the matter is

frivolous and has no basis for going forward." T26:21–24; *see also id.* at 44:8–13 (court "d[id] not and c[ould] not find and make that leap . . . that this was a frivolous action and only filed by the plaintiff with the purpose to harass the defendant.").

Further compounding that error, the trial court appeared to graft onto the R.4:50-1(f) standard a requirement that any motion to dismiss filed by Defendants ultimately be successful—despite Plaintiff already having voluntarily dismissed the action, rendering Defendants the prevailing parties. *See* T18:23–19:2 (trial court asking "where is that substantially before the Court that this would even have been ripe for a motion to dismiss given the liberal standard of that requirement that the Court has to adhere to on the case law, court rules?").

The trial court's "misconception of the applicable law" governing the award of attorneys' fees—Defendants' entitlement to which has no bearing on their ultimate entitlement to relief from the judgment under R.4:50-1(f)—was an abuse of discretion. *Johnson v. Johnson*, 320 N.J. Super. 371, 378 (App. Div. 1999); *Connolly v. Burger King Corp.*, 306 N.J. Super. 344, 349 (App. Div. 1997) (trial court abused its discretion by applying "an incorrect standard."). The trial court's order should accordingly be reversed.

II. PLAINTIFF FAILS TO ADDRESS DEFENDANTS' ARGUMENTS AND THE ISSUES HE RAISES ARE MERITLESS.

Plaintiff's arguments that Defendants failed to follow applicable procedural requirements and will not ultimately be entitled to attorneys' fees under UPEPA are

not only premature and irrelevant to the narrow question of the motion to reopen, but meritless.

a. DEFENDANTS DID NOT FAIL TO COMPLY WITH R.4:67-1.

Plaintiff argues that Defendants "failed to follow the guidelines for an order to show cause under New Jersey Rule 4:67-1" and that their proposed order to show cause is therefore "irrelevant." Opp. at 4–5. This argument was not raised in opposing the motion to reopen below and is therefore waived. *See State v. Nasir*, 355 N.J. Super. 96, 103 (App. Div. 2002). In any event, Plaintiff is wrong. Whatever procedural missteps Defendants may have made in seeking relief under UPEPA (there were none), they have no bearing on whether the trial court abused its discretion in denying Defendants' R.4:50-1(f) motion, which is an entirely different motion than Defendants' yet-to-be-filed motion for attorneys' fees under UPEPA.

In any event, Rule 4:67-1 does not apply to this action. It provides that

> [t]his rule is applicable (a) to all actions in which the court is permitted by rule or by statute to proceed in a summary manner, other than actions for the recovery of penalties which shall be brought pursuant to R. 4:70; and (b) to all other actions in the Superior Court other than matrimonial actions and actions in which unliquidated monetary damages are sought, provided it appears to the court, on motion made pursuant to R. 1:6-3 and on notice to the other parties to the action not in default, that it is likely that the matter may be completely disposed of in a summary manner.

N.J. Ct. R. R.4:67-1. Subsection (a) does not apply here—and Plaintiff does not argue as much—because nothing in UPEPA's text authorizes such actions to proceed in a summary manner. *Cf. Courier News v. Hunterdon Cnty. Prosecutor's*

Off., 358 N.J. Super. 373, 378 (2003) (language in Open Public Records Act providing that "[a]ny such proceeding shall proceed in a summary or expedited manner" required the "trial court to proceed under the procedures described in Rule 4:67."). To be sure, UPEPA requires the court to hear and rule on an order to show cause "as soon as practicable," but that is not the same as authorizing summary treatment. N.J. Stat. Ann. § 2A:53A-53. And no case has held that actions subject to UPEPA must proceed summarily. Nor does subsection (b) apply because Defendants do not seek to have this action treated in a summary manner and have not filed a motion seeking such relief. Plaintiff has not indicated such desire or filed a motion for summary disposition either. Accordingly, Defendants were not required to file any type of "motion" to seek dismissal or fees under UPEPA.

Plaintiff also argues that he "was never notified of this order to show cause" because Defendants "attached a (proposed) order to show cause to their reply . . . [i]n JEDS it is only reordered [sic] as 'Reply Brief' and nothing else." Opp. at 5. This argument is meritless. As just discussed, Rule 4:67 does not apply to this action, and Defendants do not seek to proceed in a summary manner.

Moreover, Plaintiff's characterization of Defendants' filing is wrong: Defendants filed a full, formal proposed order to show cause separate from and alongside their reply brief. *See* Da47–50. That Defendants' proposed order was referenced in their reply brief and submitted at the same time as that brief does not

make the proposed order to show cause a "reply brief" or change the fact that Defendants filed a separate order to show cause. If Plaintiff was unaware of Defendants' proposed order to show cause, that is only because he did not carefully monitor the docket or fully read Defendants' filings. That omission is on him, not Defendants. *See Kaplan v. Gruber*, 2011 WL 4901347, at *6 (D.N.J. Oct. 13, 2011) (unpublished) ("Appellant's argument that her pro se status . . . eliminated her ability to monitor the docket is unavailing. Parties have a responsibility to monitor the docket, whether they are pro se or not.").

Finally, Plaintiff argues that because more than 60 days have elapsed since Defendants were served, "[i]t is way past the deadline to make any sort of motion for an order to show cause now." Opp. at 5. But Plaintiff never properly served Defendants, *see* Da17, and, in any event, Defendants' proposed order to show cause was timely filed and is already pending—they do not seek to file an order to show cause for the first time upon remand, *see* Da47–50.

b. UPEPA Applies to this Action.

Plaintiff next argues that UPEPA does not apply to this action because he is asserting causes of action for invasion of privacy and false light and that the Act's procedural requirements have not been satisfied. Neither argument is relevant to whether the district court abused its discretion, and each is meritless.

i. *Plaintiff's action is based on Defendants' exercise of their free speech, press, and assembly rights under the New Jersey and U.S. Constitution.*

Plaintiff asserts that UPEPA does not apply to this action because he asserts causes of action for invasion of privacy and false light. Opp. at 5–6. But even if that were relevant to whether the trial court abused its discretion in denying Defendants' motion—it is not—how Plaintiff denominated his claims is not the test for whether UPEPA governs this action. Rather, as relevant here, UPEPA "applies to a cause of action asserted in a civil action against a person based on the person's . . . (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United State[s] Constitution or the New Jersey Constitution, on a matter of public concern." N.J. Stat. Ann. § 2A:53A-50(b)(3); *see also Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) (noting, with regard to California's anti-SLAPP statute, that "[t]he . . . statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.").[1]

[1] And by its express terms, UPEPA excludes only a narrow class of cases based on the following causes of action, none of which is asserted by Plaintiff. Excluded causes of action are those: "(1) against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity; (2) by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety; or (3) against a person primarily engaged in the business of selling

Plaintiff's Complaint is plainly "based on" Defendants' exercise of their free speech, freedom of the press, and associational rights, namely their publication of Plaintiff's refusal to grant his wife a religious divorce (in the case of the Jewish Link) and their advocacy for him to do so (in the case of Rabbi Turk and BMOB). As alleged in the Complaint, "the Jewish Link" "posted [a picture of Plaintiff] along with an article to protest my parents and harass me." Da2. Plaintiff further alleges that on May 21, 2023, Rabbi Turk "pass[ed] out flyers that had this exact picture on it" and that "[t]he previous week, the synagogue sent out the same picture in their weekly newsletter encouraging people to protest my parents and defame me at a rally that coming week." *Id.* According to the Complaint, "[t]he photo has been used in flyers passed out in my parents' neighborhood" and "has been used in posters for a protest against me in front of my parents' house making placards and banners with the picture." *Id.*

The flyer in question describes how Plaintiff "has been refusing to give [his ex-wife] a *get*, a Jewish bill of divorce," which leaves her "unable to remarry and is left an *agunah*, chained to a dead marriage." Pa1. It further states that Plaintiff "is obligated to give [his ex-wife] a *get*" and that "Jewish law forbids . . . conducting business with Ari, engaging him in conversation, counting him towards a *minyan*, or

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or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services." N.J. Stat. Ann. § 2A:53A-50(c).

providing him with food or drink." *Id.* The refusal to give a *get*, the flyer declares, "[i]s [d]omestic [a]buse" and encourages the reader to "help us convince [Plaintiff] to unchain [his ex-wife]!" *Id.*

These allegations clearly implicate Defendants' protected speech, press, and associational rights. It is well established that "creating and distributing flyers"—even those that are "vulgar[] and mean[]"—is protected under the First Amendment and Article I, Paragraph 6 of the New Jersey Constitution. *See State v. Burkert*, 231 N.J. 257, 263, 269 (2017) (affirming vacatur of harassment conviction for creating and distributing "wholly unprofessional and inappropriate" flyers in the workplace "in light of our constitutional free-speech guarantees."). It is likewise beyond debate that Defendants' alleged protest activity is quintessential First Amendment activity. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("[P]eaceful demonstrations in public places are protected by the First Amendment."). And the freedom of the press plainly encompasses the right to publish flyers in a newspaper, as Defendant The Jewish Link is alleged to have done here. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs.") (internal citation omitted).

Defendants' alleged activities also involve a "matter of public concern." N.J. Stat. Ann. § 2A:53A-50(b)(3). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal citation omitted). "*Get*-refusal," Pa.1, and its impact on *agunot*, or "chained women," is a topic of significant interest and concern in the Jewish community, and one that has been covered extensively in the pages of Defendant The Jewish Link. *See, e.g.*, Eliana Baer, *Coercive Control Amendments Offer Potential Relief to Agunot*, THE JEWISH LINK (Jan. 18, 2024). Da116–18. It has likewise been covered in the pages of national news outlets such as the New York Times. *See* Jennifer Medina, *Unwilling to Allow His Wife a Divorce, He Marries Another*, N.Y. TIMES (Mar. 21, 2024). Da119–24. This action, therefore, is undoubtedly "a subject of legitimate news interest," *Snyder*, 562 U.S. at 453, and therefore involves "a matter of public concern," N.J. Stat. Ann. § 2A:53A-50(b)(3).

Because this action satisfies UPEPA's definitional section, the Act applies.

ii. *Plaintiff's procedural argument is meritless.*

Plaintiff next argues that UPEPA does not apply because "there had to be evidence provided on both sides showing [the parties'] respective positions," and

Plaintiff was unable to provide such evidence because "[t]he case was voluntarily dismissed before any evidence or even any answer was submitted to the court." Opp. at 7. Again, whatever the merits of Plaintiff's argument, it is irrelevant to whether the trial court abused its discretion in denying Defendants' motion. Moreover, the only reason this action was voluntarily dismissed is because, after the trial court denied Plaintiff's cross-motion for default judgment and granted Defendants' motion for an extension of time, it became "clear" to Plaintiff "that this [action] will be going nowhere." Da66. Plaintiff's procedural argument amounts to nothing more than a suggestion that he should be permitted to evade the strictures of UPEPA after filing a speech-suppressive lawsuit simply because he chose to discontinue the action.

That is wrong. As relevant here, UPEPA provides that "[a] voluntary dismissal without prejudice of a responding party's cause of action, . . . that is the subject of an order to show cause . . . *does not affect a moving party's right to obtain a ruling on the order to show cause and seek costs, attorney's fees, and expenses.*" N.J. Stat. Ann. § 2A:53A-55(b) (emphasis added). Plaintiff's action was the subject of a proposed order to show cause, and Defendants are accordingly entitled to pursue the attorneys' fees and costs they are owed under the statute. As discussed in their opening brief, Br. at 5–6, Defendants submitted a Proposed Order to Show Cause along with their reply brief in support of their motion for an extension of time that

sought "relief . . . pursuant to the Uniform Public Expression Protection Act (UPEPA)." Da47.

Although the trial court failed to act on Defendants' proposed order to show cause, it remains true that Plaintiff's action was "the subject of an order to show cause," and Defendants therefore have the right to seek their statutorily authorized attorneys' fees. Plaintiff will have the opportunity to provide argument and evidence on the merits of that application once this case is reopened and Defendants file a motion for attorneys' fees.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the trial court's denial of their motion to reopen the judgment be reversed.

Dated: November 3, 2024

Respectfully submitted,

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