Superior Court of New Jersey

Appellate Division

Docket No. A-002855-23

LADAWN CHAPMAN, *Plaintiff-Appellant,* vs. ALARIS HEALTH, LLC, ALARIS HEALTH AT HAMILTON PARK, AND JOHN DOES 1-10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No.: HUD-L-1583-20 Sat Below: HON. JANE L. WEINER, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

MATSIKOUDIS & FANCIULLO, LLC
Attorneys for Plaintiff-Appellant
128 Monticello Avenue, Suite 1
Jersey City, New Jersey 07304
(201) 915-0407
bmatsikoudis@mf-legal.com

On the Brief:
WILLIAM C. MATSIKOUDIS, ESQ.
Attorney ID# 022391997

Date Submitted: October 31, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (330184)

TABLE OF CONTENTS

Page

TABLE OF JUDGMENT, ORDERS AND RULING BEING APPEALED

Page

TABLE OF TRANSCRIPTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

This is an appeal of the Trial Court's denial of Plaintiff's Motion for a New Trial in a Conscientious Employee Protection Act ("CEPA") case that was based on the Trial Court's refusal to include the law of constructive discharge in the jury charge. Plaintiff Ladawn Chapman was a Certified Nursing Assistant ("CNA") at Defendant Alaris at Hamilton Park nursing home ("AHP") during the outset of the COVID pandemic, who alleged that she had unmasked exposures to unmasked COVID positive individuals and that, consequently, her physician directed her to self-quarantine. But, when Plaintiff presented her doctor's note to AHP on April 3, 2020, AHP's Director of Nursing ("the DON") rejected it and told Plaintiff via text to call her so the DON could explain why, or, the DON would deem the Plaintiff to have resigned. Plaintiff alleged that the DON unequivocally fired her when she called the DON because Plaintiff refused to report to work, which the DON denied.

Plaintiff filed this lawsuit on April 20, 2020, which alleged not only that Plaintiff was discharged because she refused to engage in conduct that was against law and public policy regarding public health because she refused to report to work after unmasked COVID exposures, but also that her unmasked COVID exposures were the result of AHP actions that (1) forbade the use of masks and (2) concealed suspected and confirmed COVID cases from staff. In

between April 3 and April 20, (1) Plaintiff's physician prescribed her Lexapro and directed her not to work due to severe anxiety and (2) Plaintiff attended "town hall" meetings with her labor union which led her to believe that the working conditions at AHP caused the infection and death of Plaintiff's patients and coworkers. On April 27, the Administrator of AHP wrote Plaintiff to clear up any "misperceptions" she had about being terminated and to inform her that she was still an employee. Plaintiff did not report to work, and instead filed an Amended Complaint. Plaintiff testified that she understood from the April 27 letter that she could return to her job, but refused, due to the conditions at AHP.

Plaintiff's Amended Complaint did not specifically allege "constructive discharge" but simply alleged that she was "discharged." Plaintiff did not include language concerning constructive discharge in her initial proposed jury charge but did include it in a revised version before the final charge conference.

The Trial Court refused to include constructive discharge in the jury charge, holding that Defendants' conduct did not meet what the Trial Judge deemed to be the necessary threshold: conduct more egregious than that required to prove a hostile work environment under the Law Against Discrimination ("LAD"). The jury concluded that Plaintiff had a reasonable belief that AHP's insistence that she report to work was against the law or a clear mandate of public policy regarding public health and that it constituted the improper quality

of patient care. However, the jury determined that Plaintiff was not terminated, resulting in a no cause verdict.

In denying the Plaintiff's Motion for a New Trial, the Trial Court relied on different reasoning: (1) that Plaintiff was required but failed to plead constructive discharge and (2) the evidence at trial did not justify amending the pleadings to conform to the evidence because Plaintiff consistently testified that she was terminated, she never affirmatively resigned and doing so would be prejudicial to Defendants. The Trial Court separately also held that any claim that Plaintiff's anxiety caused a constructive discharge could not be sustained because she did not have an expert. The Trial Court erred because: (1) New Jersey's liberal construction of pleadings did not require her to specifically plead "constructive discharge"; (2) CEPA does not mandate that a Plaintiff affirmatively resign (as opposed to abandoning employment) to sustain a claim for constructive discharge; (3) the evidence at trial was adequate for a jury to conclude that Plaintiff was constructive discharged; (4) Plaintiff did not need an expert because there was substantial evidence that Plaintiff was unable to report to work because of anxiety caused by the working conditions at AHP; and (5) adding constructive discharge to the jury charge would not be prejudicial because the exact same legal analysis was already part of the case because of Plaintiff's claim for front pay.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Plaintiff's Career as an Excellent Certified Nursing Assistant at AHP

Plaintiff worked at AHP nursing home for 18 years as a licensed CNA. (1T 73:23-75:1; 3T 84:4-8). Plaintiff cared for AHP residents by bathing them, feeding them, cleaning them if they soiled themselves, transferring them, communicating with them to make sure their concerns and needs were expressed to doctors, and providing post-mortem care to prepare deceased residents bodies for the coroner. (1T 79:7-81:22). Plaintiff was very close to her patients and knew everything about them. (1T 95:20-25). Plaintiff's direct supervisor testified at trial that Plaintiff was an "excellent" CNA because she cared for her residents. (3T 192:2-9). Plaintiff was a full-time CNA until her final year of employment, when she became a part-time employee, so she could take care of her mother and to focus on her jewelry business. (IT 81:23-82:4).

AHP Covers Up COVID Cases From Staff Including Plaintiff

Plaintiff first heard about COVID in early March 2020. (1T 84:5-7). In March 2020, AHP took several precautions related to COVID, including suspending visitation and providing hand-washing training. (1T 83:10-84:4).

[1] The factual background developed at trial and procedural history of this matter are intertwined and thus presented together.

AHP administrators claimed that the first confirmed COVID case at AHP was discovered on March 27, 2020. (3T 113:19-23; 1T 94:22-95:9). Plaintiff testified at trial that she suspected that AHP residents contracted COVID before March 27, 2020, because she observed her patients with fevers, chills, coughing, fatigue, and diarrhea, which she understood to be symptoms of COVID, and also because she observed an unusually high number of residents die. (1T 95:15-98:13). Plaintiff reported her concerns to her supervisor, but was told that nobody had COVID at AHP. (1T 97:3-13). Indeed, as of April 1, 2020, a nurse asked how many COVID cases were "in the building" in a Whats App® chat, and an Assistant Director of Nursing ("ADON") responded "[w]e do not have a case in the building." (Pa379-Pa380; 6T 227:19-228:24). In fact, as of March 27, 2024, there were 23 suspected COVID cases and four confirmed cases. (6T 225:15-226:22; 3T 186:14-188:23, 3T 118:4-20; Pa341-Pa374).

AHP Does Not Permit Staff to Wear Masks and Plaintiff Has Maskless Exposures to Unmasked Covid Positive Residents and a Coworker as a Result

As of at least March 26, 2020, AHP staff, including Plaintiff, were not permitted to wear masks throughout their shifts. (6T 220:7-17 and Pa390). AHP Administrator's testified that masks were not allowed because AHP was following guidance. (6T 220:7-17). However, AHP's ADON responsible for infection control testified that there was never Center for Disease Control

("CDC") guidance that healthcare workers should not wears masks. (6T 223:8-224:2).

AHP issued correspondence to staff dated March 25, 2020 entitled "We hear you and we are here for you," stating that AHP was following guidance from the CDC on masking, but that AHP recognized that "many of you would feel more comfortable using a mask throughout your shift," and that, consequently, "each employee will be issued a mask during check in at the beginning of every shift." (Pa340). At some point after this policy was implemented, masks were permitted, but not obligatory. (8T 85:18-86:4).

Plaintiff testified at trial that although AHP had masks in March of 2020, masks were not distributed to staff like CNAs to wear for the duration of their shifts. (1T 92:14-94:4). Indeed, Plaintiff testified that AHP did not allow staff to wear masks, even if they brought their own masks because Plaintiff was told that the masks would scare residents. (1T 94:5-21).

Plaintiff worked at AHP on March 15th, March 18th, March 22nd, March 25th, and April 1, 2020. (1T 101:3-102:3). On April 1st, Plaintiff was caring for one of her regular patients with whom she had a close relationship and whom she regularly hugged upon entering his room, but on April 1, 2020, the patient told Plaintiff not to hug him because he had contracted COVID from his roommate, who was also in the room on that day. (1T 99:11-100:20; 103:24-

104:12; Pa362; Pa366). Plaintiff testified that she also cared for both of these patients on March 15th, March 18th, March 22nd, March 25th, and April 1st, and that one of the patients reported not feeling well and did not appear to be his usual self on one of those days, and that the other patient had a fever and chills on these days. (1T 101:25-103:13). Plaintiff further testified that neither she, nor either of these residents were wearing masks when she cared for them on March 15th, March 18th, March 22nd, March 25th, and April 1st. (1T 103:14-23; 1T 197:14-20). Plaintiff later discovered that the resident who told Plaintiff not to hug him and with whom she had a close relationship had died. (1T 104:13-105:11). Plaintiff also discovered on April 1, 2020, that one of her coworkers, with whom she had recently worked in close proximity while neither were wearing masks, was COVID positive. (1T 105:12-106:8).

Plaintiff's Physician Directs Her to Self-Quarantine Via a Note Excusing Her from Work That AHP Does Not Accept

Plaintiff was concerned that she may have contracted COVID from the unmasked exposures to the two unmasked COVID-positive roommates, so she informed her physician, Dr. Syed, at a previously scheduled appointment on April 2, 2020, even though Plaintiff was asymptomatic. (1T 106:9-23). Dr. Syed directed Plaintiff to self-quarantine until April 16, 2020 by writing a note on a prescription paper as a precautionary measure, so as to prevent Plaintiff from infecting her elderly patients, co-corkers or even her mother in accord with

the guidelines at the time. (1T 109:19-110:6; 4T 214:6-216:17; 218:13-220:22; Pa397). Dr. Syed's direction to self-quarantine was based upon both CDC guidelines in effect at the time that asymptomatic healthcare workers that had unmasked exposure to unmasked COVID-positive individuals should be excluded from work for 14 days and New Jersey's quarantine statute. (4T 216:22-218:12; 218:17-220:22). Dr. Syed faxed the note to AHP. (1T 108:3-13).

In response to Dr. Syed's note directing Plaintiff to self-quarantine, AHP DON Nancy LaBattaglia sent plaintiff a text message stating:

> Hi Ladawn it's Nancy. Please call me at this number. Need to speak to you regarding that note. Can't accept it. I can explain further if you call me back. If not I have to accept your official resignation. I'm sorry. (Pa100).

Plaintiff called the DON back and what transpired on the call was disputed at trial. (1T 112:16-21). Plaintiff testified that after being asked and confirming that she did not have any COVID symptoms, the DON demanded that Plaintiff come to work, but Plaintiff refused and that the DON said she was no longer an employee at AHP. (1T 112:2-113:6). Plaintiff testified that her takeaway from the call was that she was "fired," and that she verified this with the AHP staffing coordinator the next day. (1T 113:17-114:5; Pa7). Plaintiff testified that had DON LaBattaglia accepted her note, she would still be employed at AHP. (1T 158:8-13). Conversely, DON LaBattaglia testified that Plaintiff's stated rationale for not coming to work was different from what was on Dr. Syed's

note, in that Plaintiff expressed a fear of infecting her mother with COVID and that the DON only told Plaintiff, "I really need you," but that she never fired her. (3T 173:5-175:4).

Plaintiff Learns of Consequences of AHP's Actions, Dr. Syed Prescribes Plaintiff Lexapro After an April 15th Virtual Visit and Sends Another Note to AHP Excusing Plaintiff from Work in an Effort to Salvage Plaintiff's Job

Plaintiff testified that, after her call with the AHP's staffing coordinator on April 4, 2020, she called her union to complain about the situation and had multiple calls with her union representative and her representative's superior. (1T 114:21-115:22; 129:8-14; 129:18-130:21). Over the next three weeks, Plaintiff participated in two conference calls with approximately 20 coworkers from AHP in what her union called "town hall" meetings, during which these AHP employees shared complaints about not having personal protective equipment at AHP and about multiple deaths at AHP. (1T 129:8-130:21).

Plaintiff had a tele-health visit with Dr. Syed on April 15, 2020 and reported that AHP did not accept Dr. Syed's previous note. (1T 133:14-134:1). At Plaintiff's April 15th visit, Dr. Syed recorded that Plaintiff complained of "anxiety," "unrealistic worry . . . sweating, chest pain, palpitations, unusually strong or irregular heartbeats, and feeling choking," and that the "anxiety has been worse since she was questioned of why she was out of work" and "threatened by her supervisor in that if she did not show up to work she would

-- she should hand in her resignation letter." (4T 225:4-22). At the April 15 visit, Dr. Syed wrote and faxed another note to AHP excusing Plaintiff from work until May 16, 2020 due to "medical incapacity," which was the result of anxiety, and that Dr. Syed testified she sent because she wanted to "salvage" Plaintiff's job." (4T 226:10-227:8; 5T 72:15-73:2 Pa398). Dr. Syed also prescribed Plaintiff Lexapro on April 15th, due to Plaintiff's "severe anxiety" and "panic attacks." (4T 227:13-228:8; Pa399). This was the first time Plaintiff was ever prescribed psychiatric medicine. (1T 136:21-23). Dr. Syed also referred Plaintiff to a therapist after the April 15th visit. (1T 136:24-138:21).

AHP Sends an Email to Plaintiff in Response to Dr. Syed's April 15th Note and Plaintiff Sues AHP

On April 17, 2024, AHP's business office manager, Derek Froiran, emailed Plaintiff in response to Dr. Syed's note excusing Plaintiff from work due to "medical incapacity" asking for "more specific details about [Plaintiff's] medical condition," because of requirements that AHP "submit information regarding staff members who may be exhibiting signs and/or symptoms of COVID-19 . . .." (Pa150). Plaintiff testified that she did not respond to Florian's email because she had already "been fired." (1T 140:8-24). On cross-examination, Plaintiff testified that she could agree that, based upon the April 17th email from Mr. Froiran, he may have considered her to still be employed by AHP. (3T 64:6-17). Mr. Froiran testified that AHP utilized a "progressive

discipline policy," whereby sequential discipline like suspension was done before an employee would be terminated, and that he never processed paperwork to terminate Plaintiff in April 2020. (8T 30:25-31:4; 34:8-22; 71:16-72:14).

Plaintiff sued the Defendants on April 22, 2020, alleging that they violated CEPA because AHP retaliated against her by "actions, including, but not limited to, terminating" her for objecting to AHP's insistence that she report to work notwithstanding Plaintiff's unmasked COVID exposures in contradiction to law and public policy concerning the public health. (Pa29-37).

AHP Sends Plaintiff a Letter Denying That Plaintiff Was Terminated and Confirms That She Can Return to Her Exact Same Job, But Plaintiff Refuses and Instead Amends Her Complaint.

On April 27, 2020, AHP's Administrator sent Plaintiff a letter stating, among other things, that:

> "You remain an active employee on our staff roster and the facility has immediate CNA position work ready for you to return to health care for our residents. I hope that this letter clarifies any misperceptions that you may have made. We anticipate your return back to work on May 16th.

(Pa151).

Plaintiff testified that, although she thought AHP was "trying to cover themselves because I already filed a lawsuit," she did understand that she could go back to the exact same job she had at AHP. (1T 151:4-11) Nonetheless, Plaintiff testified that she would not go back to work at AHP:

> Q. Why didn't you go back?
>
> A. Two reasons. One being that I was a dedicated employee there for 18 years and I couldn't believe how they treated me when I was simply trying to follow my doctor's orders and maintain proper care for the residents and not spread anything to my co-workers, nor the residents that I was attending to. Secondly, knowing that they had PPE, but they refused to give it to us because they didn't want to scare the residents, as they said to me directly, with the masks in particular, I feel, like, a lot of these sicknesses and deaths could've been prevented if it was treated with such care, like, it was supposed to. I complained to supervisors. I complained to the union. I did not keep this to myself. I did everything that I was supposed to do. All I wanted to do was just quarantine to keep everybody safe.
>
> Q. As of the date of this letter – you mentioned deaths. How did you come to learn about the deaths?
>
> A. Because I seen some when I was there, that I prepared their bodies for the coroner myself and after -- was talking to other co-workers and they're telling me about people that I care who that have died, friends, one in particular that was one of my best friends who had died that I worked with. It was just a lot of deaths there.

(1T 151:12-152:17).

On cross-examination, Plaintiff reiterated that she believed she was fired but that AHP was offering her job back. (3T 68:19-71:1). Plaintiff further testified that, based upon the AHP's Administrator's letter of April 27, 2020, she believed "she still had a job" at AHP. (3T 70:10-14).

Plaintiff visited with Dr. Syed about a week after AHP's letter to Plaintiff stating she could return to her job on May 4, 2020. (Pa400-Pa407). Dr. Syed's notes state that Plaintiff "was severely anxious and cannot function due to

watching people die and saw many dead bodies and feels that she has PTSD at this time." (Id.) Per Dr. Syed, while Lexapro helped to "take the edge off," Plaintiff could not function normally. (Id.) Ultimately, Dr. Syed directed plaintiff to consult a psychiatrist for PTSD and anxiety. (Pa410).

On June 30, 2020 Plaintiff filed an Amended Complaint. (Pa39-pa48). The Amended Complaint added a claim that Plaintiff objected to AHP's insistence that she report to work after the maskless exposures to COVID positive individuals who were also unmasked, because she believed it constituted improper quality of patient care. (Pa45). The Amended Complaint does not mention the term "constructive discharge," but states that Plaintiff was "discharged" and retaliated against by AHP "through the aforementioned actions, including, but not limited to, terminating LaDawn." (Pa43-Pa45).

Plaintiff Defeats Two Motions for Summary Judgment

Defendants filed a Motion for Summary Judgment that the Trial Court denied on October 21, 2022. holding that there was a genuine issue of material fact as to whether the Plaintiff was terminated. (Pa1-Pa2; Pa8; Pa19; Pa23[2]). Defendants filed a Motion for Reconsideration, which was also denied. (Pa24).

[2] Plaintiff voluntarily dismissed her discharge in violation of public policy at this time (Pa23).

Defendants filed another Motion for Summary Judgment alleging that the conduct complained of by Plaintiff was not violative of law or public policy, which the Trial Court denied on December 15, 2024, holding, "Plaintiff presents several statutes and guidelines from the Center for Disease Control and from the New Jersey Department of Health, all which set out clearly expressed mandates of public policy related to public health and show a substantial nexus to the activity in which Plaintiff refused to participate in after being exposed to two COVID-19 positive individuals without a mask." (Pa5). At trial, the Trial Judge charged the jury accordingly: "I charge you that there are laws and public policy that relate closely to the conduct in question here" and cited, for example: (1) N.J.S.A., 26:13-2 that mandates quarantine of individuals "exposed to a contagious or possibly contagious disease and who do not show signs or symptoms"; (2) "N.J.S.A. 34:11d-12, a law that makes it unlawful to penalize an employee if the employee requests to take time off work based on recommendation of a medical professional because the employee may have an infectious disease"; (3) "CDC guidelines that state asymptomatic healthcare professionals unmasked and exposed to a COVID-positive patient who is also unmasked that the healthcare worker should be excluded from work for 14 days"; and New Jersey Department of Health guidelines (N.J.A.C. 8:39) "that provided that a nursing home staffer should be restricted from entry into a

nursing home if, in the last 14 days, the staffer has had contact with someone with a confirmed diagnosis of COVID-19 or under investigation for COVID-19 . . .” (9T 222:4-224:4). The Trial Court also denied Defendants’ attempt to dismiss the Complaint on Summary Judgment pursuant to an argument that any termination was rescinded, holding that a completed termination cannot be rescinded. (Pa6).

Trial: The Jury Charge Issue and the Jury Verdict

During the Opening Statement, Plaintiff proffered what the evidence would show with regard the AHP’s Administrator’s August 27, 2020 letter to Plaintiff:

> [T]he administrator of Alaris sends a letter to LaDawn saying hey, this was a misunderstanding. You were never terminated. Come on back to work. You know, you -- you're still an employee here. You have the exact same job, you can take it. And LaDawn acknowledges that she could have gone back to that job that day, but LaDawn did not go back. And I believe the evidence that you'll hear in this case will present to you that the circumstances completely justify her not going back.

(1T 42:14-42:24).

The Plaintiff’s first proposed jury charge did not mention the law of constructive discharge. (Pa197-Pa209). However, before trial commenced on the morning of third day of the trial, while Plaintiff was still presenting her case in chief, Plaintiff’s counsel emailed Defendants’ counsel and the court a revised jury charge setting forth proposed language to charge the jury on the law of

constructive discharge. (Pa248; Pa171). Specifically, Plaintiff added language that is bolded below:

> Retaliatory action can be a discharge, suspension, demotion, or any other adverse employment action taken against an employee in the terms and conditions of employment. **If you find that Plaintiff was terminated, by Defendants, Plaintiff has proven this element of her claim. However, if you do not find that Plaintiff was terminated, she may still prove this element of her claim if you believe she was constructively discharged – that is, that she left her job because the conditions Defendants created at the nursing home where Plaintiff worked were so intolerable that a reasonable person would be forced to resign rather than continue to endure them. With respect to the "intolerable conditions" Plaintiff may have had to endure, you may consider Defendants' treatment of Plaintiff as well as the conditions at the nursing home you believe Defendants created prior to Plaintiff's leaving her employment**.

(Id.[3]).

The Trial Judge heard argument on the issue of constructive discharge the following day, on February 13, 2024. (7T 53:5-57:10). The Trial Judge asked

[3] Near the end of a full day of trial consisting of testimony and argument on various issues, Plaintiff's counsel briefly withdrew the request to add the law of constructive discharge to the jury charge. (6T 249:11-253:216). Minutes later, Plaintiff's counsel emailed the Judge and Defendants' counsel that "[a] little while ago when we were concluding today's proceedings, I said, I would withdraw the request to have a constructive discharge language, added to the jury charge. I miss spoke after Mr. Jasinski's argument because he correctly paraphrased plaintiff testimony that she would have come back to work on April 3, 2020 had she been excused by Nancy LaBataggloa. However, our contention is that that did not happen and that she was given a Hobson's choice and I misstated that constructive discharge is not appropriate here." (Pa250; 10T 34:17-35:5). In any event the Trial Judge's decision had anything to do with the momentary withdrawal of the request. (Pa7-12).

Defendants' counsel why a constructive discharge jury charge would be prejudicial, noting that issues with regard to Plaintiff not wanting to report to work were part of the trial testimony. (7T 55:8-13). Defendants argued that it would be confusing, and thus prejudicial, to provide the jury alternative options of termination and alternatively constructed discharge. (7T 56:8-13).

Later on February 13th, on a day where the court heard no testimony, but solely heard arguments on Defendants' motions for a directed verdict, evidentiary issues, and jury charge issues, the Trial Judge ruled that the evidence at trial was not adequate to support adding the law of constructive discharge to the jury charge, relying on a case that was decided under the LAD and not CEPA:

> And then on to constructive discharge. I'm reading a quote -- I don't know how to pronounce this. Kluczyk? K-l-u-c-z-y-k v. Tropicana Products, the Superior Court of New Jersey, 368 N.J. Super. 479, a 2004 case from the Appellate Division: "In order to establish a prima facie case of constructive discharge in New Jersey, a plaintiff must establish that 'the employer knowingly permitted conditions'" -- I think that's dealing with that LAD case, but ... "-- of discrimination in employment so intolerable that a reasonable person subject to them would resign.' Constructive discharge requires not merely 'severe or pervasive conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. precisely, the standard envisions a 'sense of outrageous, coercive and unconscionable requirements.' Simply put, a constructive discharge claim requires more [than] egregious conduct than that sufficient for a hostile work environment claim." So I do find that, based on the fact it doesn't rise to the level of a constructive

> discharge, so I'm not going to allow that and I'm going to remove that from the charge.

(7T 90:21-91:23).

Defendants also moved for a Directed Verdict arguing that (1) the case should be dismissed in its entirety because of lack of evidence to support a jury finding that there was an adverse job action and (2) alternatively, Plaintiff's claim for "front pay" should be dismissed because she was given an unequivocal offer to return to her job via the April 27 letter. (7T 5-21). The Trial Judge denied both motions for a directed verdict holding: (1) that "a reasonable jury could conclude that there was an adverse employment action"; and (2) that "a reasonable jury could find, based on the evidence as presented by the plaintiff and all the favorable inferences that could be drawn from them -- from it, that she was justified in not returning to work." (7T 25:1-11; 40:6-41:2).

In its verdict, the jury answered three interrogatories in Plaintiff's favor, concluding that the Plaintiff met the burden of proof that Plaintiff: (1) reasonably believed "Defendants' requirements that she report to work on April 3, 2020 was violative of either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy"; (2) reasonably believed that "Defendants' insistence that she report to work on April 3, 2020 constituted the improper quality of patient care"; and that (3) Plaintiff objected to, or refused to come to work. (Pa98). The jury further concluded that Plaintiff did not meet the

burden of proof that she was terminated. (Id.) Accordingly, deliberations stopped and a No Cause Verdict was reached. (Pa98-Pa99; Pa60).

The Motion for a New Trial

Plaintiff filed a Motion for a New Trial arguing that the jury could conclude Plaintiff was constructively discharged on either April 3rd after AHP did not accept her doctor's note excusing her from work, or April 27th, when AHP wrote her stating Plaintiff was still an employee and could return to her job, but Plaintiff refused and instead amended her Complaint . (10T 6:8-21; 42:7-43:24). The Trial Court denied Plaintiff's Motion for a New Trial on April 26, 2024. (Pa13).

ARGUMENT

I. THE TRIAL COURT'S DECISION DURING TRIAL NOT TO INCLUDE THE LAW OF CONSTRCUTIVE DISCHARGE IN THE JURY CHARGE AMOUNTED TO A DIRECTED VERDICT AND WAS WRONG, BECAUSE IT WAS BASED UPON AN INAPPLICABLE LEGAL STANDARD AND THE EVIDENCE AT TRIAL WARRANTED THAT THE LAW OF CONSTRCUTIVE DISCHARGE BE CHARGED TO THE JURY (7T 90:21-91:23)

CEPA specifies that the "discharge" of an employee for engaging in protected activity is retaliatory action. N.J.S.A. 34:19–2(e). But "a discharge encompasses not just an actual termination from an employment, but a constructive discharge." Donelson v. DuPont Chambers Works, 206 N.J. 243,

257 (2011). In Daniels v. Mut. Life Ins. Co., 340 N.J. Super. 11 (App. Div. 2001), the court considered what constitutes constructive discharge under CEPA in circumstances where the statute of limitations was at issue:

> in a constructive discharge situation, a violation occurs at the point where a reasonable employee is compelled to resign due to the employer's action. At that point, the employer has engaged in a retaliatory action. The employee cannot change the intolerable conditions imposed by the employer by demonstrating loyalty or excellent work performance. The employer cannot rescind a constructive discharge. The harm has been done when the employee feels compelled to resign. . . .. In a constructive discharge situation, the retaliatory action is the creation of ***intolerable conditions which a reasonable employee cannot accept***. The conditions become intolerable when the employee tenders his or her resignation.

Ibid at 17–18 (emphasis added). Constructive discharge is a "heavily fact-driven determination." Muench v. Twp. of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992)(quoting Levendos v. Stern Ent., Inc., 860 F.2d 1227, 1230 (3d Cir. 1988)). Certainly, a constructive discharge can be found where an employer's "conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 166 (App. Div. 2005).

The Court's quotation from Kluczyk v. Tropicana Prod., Inc., 368 N.J. Super. 479 (App. Div. 2004) in its decision actually came from the New Jersey Supreme Court case of Shepherd v. Hunterdon Center, 174 N.J. 1, 27–28, (2002) (quoting Muench, supra, 255 N.J. Super. at 288). A LAD-based analysis of a

constructive discharge claim is inapplicable to the CEPA analysis of constructive discharge. "CEPA and LAD are statutes that have their own distinct purposes and are worded differently to achieve those purposes." Donelson, supra, 206 N.J. at 261–62.

Yet, like the Appellate panel that was overruled in Donelson, this Court relied on LAD and the reasoning in Shepherd (as quoted in Kluczyk, supra) to conclude that "[c]onstructive discharge requires not merely 'severe or pervasive conduct' but a "sense of outrageous, coercive and unconscionable requirements," and that "a constructive discharge claim requires more [than] egregious conduct than that sufficient for a hostile work environment claim." This reasoning, just like the Appellate panel's reasoning in Donelson, is entirely flawed, both because this case has nothing to with LAD and it certainly has nothing to do with harassment. It follows that there was no "severe or pervasive" harassment in this case - because there was no harassment. What Justice Albin said with regard to the erroneous attempt to analogize the standard in Shepherd to CEPA applies in the exact same way here: "*Shepherd addressed entirely different issues, under entirely different facts, within the context of an entirely different statute. Shepherd cannot control the outcome of this case.* Donelson, supra 206 N.J. at 262 (emphasis in original).

The evidence at trial was adequate to establish intolerable working conditions justifying the Plaintiff to resign: (1)AHP's prohibition on staff to wear masks for much of March 2020 so that residents would not be scared; (2) AHP's misrepresentations to staff regarding the existence of suspected and confirmed COVID cases; (3) DON LaBattaglia's April 3, 2020 text message to Plaintiff in response to Dr. Syed's note directing Plaintiff to self-quarantine, stating that "[c]an't accept it" (i.e., the note), indicating that DON LaBattaglia would have to "accept [Plaintiff's] official resignation"; and (4) Plaintiff's interactions with her labor union and co-workers in the days and weeks after April 3, during which she heard fellow employees express similar complaints about the conditions at AHP, such as the failure to give staff PPE, as well as learning about the sickness and deaths of residents and co-workers. Plaintiff tried to do the right thing at every turn, asking if she could wear a mask, expressing concern that patients may have COVID, and trying to quarantine when having maskless exposures to COVID positive individuals, but AHP pushed back every time and the Plaintiff ultimately recognized the tragic and deadly manifestation of AHP's conduct, which it made it impossible for her to work there.

Here the Plaintiff did not affirmatively resign, and the significance of this, or lack thereof, will be discussed infra; however, there is no dispute that the

Plaintiff never went back to work after receiving the text from DON LaBattaglia on April 3, 2020 stating that she "[c]an't accept" Plaintiff's doctor's note excusing her from work, and that if Plaintiff did not call her back, DON LaBattaglia would "accept [Plaintiff's] official resignation." (Pa100). Although Plaintiff testified that she believed she was fired that day when she called back and spoke with DON LaBattaglia, the jury concluded she was not fired. Two weeks later, on April 27, 2020, after Plaintiff heard how other AHP employees also had concerns about AHP's practices like prohibiting employees from wearing masks and denying the existence of COVID, as well as the fatal consequence of these practices, AHP's Administrator wrote Plaintiff a letter to clarify "misperceptions" and stating that "[y]ou remain an active employee on our staff roster and the facility has immediate CNA position work ready for you . . ." (Pa151). Although Plaintiff testified that she understood that she had a job at AHP as of her receipt of this letter, she refused to go back to work and instead continued her lawsuit and amended her Complaint. Since the jury concluded Plaintiff was never terminated, the jury should have been permitted to determine whether the working conditions amounted to constructive discharge justifying Plaintiff to not return to work after April 27, 2020, when AHP informed Plaintiff that she still had a job.

By refusing to allow the law of constructive discharge into the jury charge, the Trial Judge was essentially issuing a directed verdict on this issue. A directed verdict is granted only if, accepting the plaintiff's facts and considering the applicable law, "no rational jury could draw from the evidence presented" that the "plaintiff is entitled to relief." Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 569 (App. Div. 2014), aff'd as modified and remanded, 223 N.J. 245, 122 A.3d 328 (2015) (citation omitted). Here, as to the Plaintiff's decision not to return to work after AHPs Administrator wrote her on April 27 to tell Plaintiff that she had "misperceptions" about being terminated and informing Plaintiff that she still had a job, a reasonable jury could conclude that Plaintiff was justified in not returning to work because she was constructively discharged.

II. THE TRIAL COURT'S DECISON TO DENY PLAINTIFF'S MOTION FOR A NEW TRIAL ON DIFFERENT GROUNDS THAN ITS DECISION TO NOT ALLOW THE LAW OF CONSTRUCTIVE DISCHARGE TO BE CHARGED TO THE JURY AT TRIAL WAS IN ERROR BECAUSE THE EVIDENCE AT TRIAL WARRANTED THAT THE PLAINTIFF BE AFFORDED THIS AVENUE OF RELIEF AND THE BASES RELIED ON BY THE COURT TO DENY PLAINITFF'S REQUEST FOR A NEW TRIAL AROSE OUT OF A MISREADING OF THE LAW AND AN INAPPROPRIATE STRICT CONSTRUCTION OF CEPA (Pa7-Pa12).

"The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a

miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)). The Appellate Court does not have to "accept the trial court's legal reasoning: '[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Id at 386–87 (quoting Twp. of Manalapan v. Gentile, 242 N.J. 295, 304 (2020)). This appeal does not in any way challenge the factual conclusions of the jury or the Trial Judge in her opinion, but solely the legal determinations of the Trial Court.

Jury charges are acceptable only if they "adequately convey the law to the jury … Zappasodi v. State, Dep't of Corr., Riverfront State Prison, 335 N.J. Super. 83, 89 (App. Div. 2000). "It is a well-settled principle that appropriate and proper jury charges are essential to a fair trial." State v. Collier, 90 N.J. 117, 122 (1982). "An incorrect jury charge, however, constitutes reversible error only if the jury could have come to a different result had it been correctly instructed." Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 374 (2007)

A new trial is in order when a court determines its "earlier rulings had been in error" and "created undue prejudice." Crawn v. Campo, 136 N.J. 494, 512 (1994). "The same is true if the judge concludes that his erroneous or confusing instructions to the jury had that effect." PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment 1, R. 4:49-1.

When it denied Plaintiff's Motion for a New Trial, the Trial Court abandoned the flawed reasoning it used at trial to exclude constructive discharge from the jury's consideration and instead relied on erroneous procedural and legal bases to justify the non-inclusion of the law of constructive discharge in the jury charge. The errors of the Trial Court were in its legal reasoning, as argued infra, and none of these legal conclusions require that this court give deference to these determinations. If the jury was permitted to consider whether there was a constructive discharge in this case, the ultimate outcome of the case may have been different, thus, the Plaintiff was prejudiced in the extreme, and the result was a miscarriage of justice.

A. PLAINITFF WAS NOT REQUIRED TO SPECIFICALLY PLEAD OR MENTION "CONSTRUCTIVE DISCHARGE" IN HER COMPLAINT AND THE AMENDED COMPLAINT WAS ADEQUATE FOR THE TRIAL COURT TO CHARGE THE JURY WITH THE LAW OF CONSTRUCTIVE DISCHARGE (Pa10-Pa11).

The Trial Court held that, to recover under a theory of constructive discharge, it "must be pled" (which Plaintiff did not specifically do) without citing to any legal authority. (Pa10). The Trial Court also stated that the Plaintiff's pleading was inadequate to put the Defendants on notice that she may seek recovery under a theory of constructive discharge because she did not refer to "intolerable working conditions," or state that she resigned or that, if she was not fired, she was "constructively discharged." (P10-Pa11).

The Trial Court erred in its decision to rely on the inadequacy of the pleading as a basis for its decision not to grant Plaintiff's Motion for a New Trial because constructive discharge is not a cause of action, but a manner or theory to prove one of the elements of Plaintiff's CEPA claim: "that an adverse employment action was taken against her." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). CEPA specifies that the "discharge" of an employee for engaging in protected activity is an adverse job action under N.J.S.A. 34:19–2(e), and "discharge encompasses not just an actual termination from an employment, but a constructive discharge." Donelson v. DuPont Chambers Works, supra, 206 N.J. at 257.

This factual recitation of the Amended Complaint does not use the word "terminate" or "constructive discharge," but simply "discharge." Plaintiff did use the word "terminate" as she set forth the Amended Complaint's counts, but only and expressly *non-exclusively*, as she stated, "By and through the aforementioned actions, *including, but not limited to*, terminating LaDawn from her CNA position, Defendants violated CEPA by retaliating against LaDawn . . ." (Pa43 at ¶ 38 (emphasis added)).

In any event, the Amended Complaint did not *need* to specifically state the phrase "constructive discharge" or recount that Plaintiff refused to return to work after AHP wrote her on April 27, 2020. "New Jersey is a notice-

pleading state, which means that only a short, concise statement of the claim need be given in the complaint, without requiring any technical forms of pleading." Evesham Twp. Bd. of Educ. v. Vitetta Grp., 2008 WL 4735883, at *8 (N.J. Super. Ct. App. Div. Oct. 30, 2008) (overturning dismissal of a complaint against contractors that generally alleged "defects and deficiencies" in construction, but did not specifically allege a deficient "HVAC system or a mold problem," and holding that the "complaint generally apprised the [defendants] of the claims and issues in dispute-they were being sued under negligence and breach of contract theories for defects and deficiencies," . . . "even were key words were not used . . ..") (Pa326-Pa338). R. 4:5-7 states that "[e]ach allegation of a pleading shall be simple, concise and direct," and that "[a]ll pleadings shall be liberally construed in the interest of justice." Ibid. When determining whether a pleading states a cause of action, the court must look "to the entire record, giving plaintiff every favorable inference," and a complaint is deemed sufficient if "it fairly apprises the adversary of the claims and issues in dispute." Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 76 (1990). Plaintiff's Amended Complaint sufficiently stated a case under CEPA, and she was simply not required to plead every fact or theory that she might rely on at trial to prove the elements of her claim.

Moreover, not only did the court rules require that the Plaintiff's pleading be liberally construed, but the Trial Court was mandated to liberally construe this issue under the mandates of CEPA. See Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 555, (2013); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). The Trial Court did the opposite and applied a strict and narrow construction of CEPA.

There simply is no requirement that a Plaintiff specifically plead constructive discharge to recover under this theory. Indeed, in Donelson, the Supreme Court granted Plaintiff's petition for certification to determine "whether recovery for economic losses associated with back and front pay requires proof of actual or constructive discharge," where Plaintiff did not "plead constructive discharge and specifically declined to do so when the question was pressed by the trial court." Donelson, supra, 206 N.J. at 265.

As set forth supra, and as further argued infra, the Defendants were given abundant notice that the relevant issues associated with constructive discharge would be litigated at trial because they are similar to - if not exactly the same as - the issues related to Plaintiff's claim for front pay: whether Plaintiff was justified in not returning to work after AHP's April 27, 2020 letter, informing her that she was still an employee and had a job to which she could return. In short, the court rules, CEPA and case law give no basis for the legal conclusion

that Plaintiff's Amended Complaint, which alleged "discharge" and adverse job action by "actions, including, but not limited to termination" was inadequate to support a claim for constructive discharge because it did not specifically state the words "constructive discharge" or that Plaintiff resigned. The Trial Court's narrow construction of Plaintiff's pleading flies in the face of the mandate of R. 4:5-7 and CEPA that the pleadings be liberally construed and it cannot stand as a basis to deny Plaintiff's request for a New Trial where she should be able to present her claim for constructive discharge to a jury.

B. THE TRIAL COURT MISINTERPRETED THE LAW OF CEPA AND CONSTRUCTIVE DISCHARGE TO CONCLUDE THAT BECAUSE PLAINITFF BELEIVED SHE WAS FIRED AND DID NOT AFFIRMTAIVELY RESIGN THE EVIDENCE COULD NOT SUSTAIN A FINDING OF CONSTRUCTIVE DISCHARGE (Pa11-Pa12; 10T 13:8-12; 10T 60:15-18; 10T 65:1-10; 69:2-8)

i. Even if the Plaintiff's Amended Complaint Is Deemed Inadequate for the Purpose of Asserting that She was Constructively Discharged, the Evidence at Trial Mandated That the Court Amend the Pleadings to Conform to the Evidence

The Trial Court recognized that R. 4:9-2 provides in pertinent part that, "[i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings . . . the court may allow the pleadings . . . to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that

the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits." (Pa 10). Indeed, "the trial court's broad discretion to permit amendment to conform to the evidence is required to be liberally exercised." PRESSLER & VERNIERO, Current N.J. COURT RULES, R. 4:9-2, Comment 1.

In multiple cases, courts have amended the pleadings to conform to the evidence to allow for the consideration of theories or causes of action not alleged in the Complaint. See, Cuesta v. Classic Wheels, Inc., 358 N.J. Super. 512, 517 (App. Div. 2003)) (overturing trial court dismissal of a case after trial where the Plaintiff plead Consumer Fraud Act violation against a car dealer but could only establish damages pursuant to a theory of revocation under Uniform Commercial Code, which was not plead); 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law. Div. 1976) aff'd, 150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977) ("partnership or joint venture theory was not advanced in the pleadings or pretrial order; it was fully aired at trial, however, and in post-trial briefs and is therefore properly resorted to in determining the issues. R. 4:9-2"); Teilhaber v. Greene, 320 N.J. Super. 453, 466 (App. Div. 1999)(overturning a trial judge's dismissal of a medical malpractice case that did not plead a theory of "lack of informed consent," although the evidence at trial made a *prima facie* case for same, stating "even if the judge viewed plaintiff's complaint as

deficient, a 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory"); Farese v. McGarry, 237 N.J. Super. 385, 388(App. Div. 1989)(though Plaintiff only pleaded a breach of express contract, the trial judge, on his own initiative, instructed the jury on and allowed it to return a verdict based on an implied contract, and the Appellate Division upheld the trial judge's determination to allow the jury to consider a theory that was not pleaded, stating that it "was not error for the trial judge to have submitted the case to the jury on a legal theory which was not asserted in the pleadings," and that a "complaint or counterclaim is not required to spell out the legal theory upon which it is based"); Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140 (App. Div. 2003) (plaintiff's complaint for fraud asserted "affirmative misrepresentation," the Court allowed an amendment to conform to the facts adduced in Discovery of "deliberate suppression" of information).

Here, aside from the legal errors that led the Court to conclude that the evidence at trial, the jury's findings and the Trial Court's own factual conclusions, could not sustain a finding of constructive discharge because the Plaintiff believed she was fired and did not affirmatively resign, the undisputed evidence, the jury's findings and the Trial Court's own conclusions of fact warranted that the law of constructive discharge be charged to the jury *even if*

the Amended Complaint were deemed insufficiently articulate to put Defendants on notice that Plaintiff would seek to recover under a theory of constructive discharge. Although the Plaintiff argued that the jury could find that constructive discharge occurred on April 3 or after she refused to report to work after receiving the April 27 letter, Plaintiff acknowledges that the easier case is made with regard to the April 27 letter.

But the Trial Court erred in its holding that the Plaintiff did not offer evidence that she was constructively discharged on April 3. (Pa11). With regard to April 3, the Trial Court found that, after receiving a note from Plaintiff's doctor directing her to quarantine due to possible Covid exposure, DON LaBattaglia "text messaged Plaintiff and said she could not accept the note, and, if Plaintiff did not call her, LaBattaglia would have to accept her official resignation." (Pa7-Pa8). This alone created a Hobson's Choice and a "threatened reprisal" that in and of itself can be deemed a constructive discharge. Zubrycky v. ASA Apple, Inc., supra, 381 N.J. Super. at 167. See also Levendos v. Stern Ent., Inc., supra 860 F.2d at 1230) and Moser v. Streamwood Co., 2023 WL 4502288 (App. Div. July 13, 2023) (Pa154-Pa157).

The Trial Judge pointed out that "Plaintiff testified she was not returning to work because she was quarantining for two weeks, not because of the conditions." (Pa11). While this is technically true, it ignores the fact that

Plaintiff *never* went back to work. The Trial Court also stated that Plaintiff "testified that if LaBattaglia had accepted her first doctor's note, she would still be employed by Defendant," to assert that the Plaintiff was not offended by AHP's working conditions, at least on April 3, 2020. (Pa12). But the Trial Court failed to note that it cannot be disputed that DON LaBattaglia did *not* accept Plaintiff's doctor note. Of course, DON LaBattaglia literally texted, "[n]eed to speak to you regarding that note. Can't accept it," which the Trial Court's decision acknowledges. (Pa7; Pa100). Indeed, the jury's determination that "Defendants' requirements that she report to work on April 3" and "Defendants' insistence that she report to work on April 3" gave Plaintiff a reasonable belief that the Defendants had violated law and public policy dealing with public health and had engaged in conduct constituting the improper quality of patient care" demonstrates that it is indisputable that the Defendants did *not* accept Plaintiff's doctor's note. (Pa98). The indisputable fact of the matter is that the note was *not* accepted, and we cannot live in an alternate universe.

As to whether the jury should have been charged that the Plaintiff was constructively discharged after being told by AHP that she was still an employee and could return to her exact same job on April 27, 2020, the Trial Court decision denying Plaintiff's Motion for a New Trial did not in any way state that the Plaintiff did not produce adequate evidence to show that there were intolerable

working conditions to justify a constructive discharge. Rather, the Trial Court decision on this issue solely (and erroneously as discussed infra) relied on the contention that the Plaintiff could not sustain a claim for constructive discharge because she testified that she believed she was fired and because she never affirmatively resigned. (Pa11).

The jury could have determined that a reasonable person in Plaintiff's position would have considered the working conditions at AHP's so intolerable as to justify Plaintiff's resignation on April 27, 2020 because of: (1) AHP's prohibition on staff to wear masks so that residents would not be scared; (2) AHP's misrepresentations to staff regarding the existence of COVID cases; (3) DON LaBattaglia's April 3 text message to Plaintiff rejecting Dr. Syed's note directing Plaintiff to self-quarantine and presenting Plaintiff the Hobson's choice of either being fired/quitting or potentially spreading COVID; (4) Plaintiff's interactions with her union co-workers in the weeks after April 3, during which she heard fellow employees complain about the conditions at AHP, realized that the AHP Administration was lying to her about the existence of COVID and learned about the sickness and deaths of many of her residents and co-workers; and (5) the severe anxiety, depression, and PTSD that Plaintiff suffered as she realized the harm that directly resulted from AHP's actions.

In Moser v. Streamwood Co., supra, the plaintiff was employed by a property manager who told plaintiff to treat housing applications in a way plaintiff deemed discriminatory toward Section 8 housing applicants in violation of LAD and, when Plaintiff objected, her employer said, "[T]hings don't look good for you," which Plaintiff said caused her acute anxiety that caused her never to return to work again. Id at *1. The trial court granted defendant's motion for Summary Judgment stating, "[I]ts a close call, but I think that summary judgment needs to be granted here because . . . I don't think that a reasonable jury could conclude that the one comment itself was … with no action being taken by plaintiff after that comment … that any reasonable juror could find that the alleged singular comment could possibly rise to the level of outrageous, coercive[,] and unconscionable conduct required under CEPA." Id. at 2. The Appellate Division disagreed, noting that CEPA "has been described as the most 'far reaching 'whistleblower statute' in the nation," and that "constructive discharge occurs when the employer has imposed upon an employee working conditions 'so intolerable that a reasonable person would resign,'" they reversed the trial court, stating:

> "[It] was not a "single comment" that induced plaintiff to resign. Rather, it was her employer's repeated insistence, in the face of plaintiff's objections, that she engage in actions she reasonably

> believed were in violation of LAD leading up to, and in conjunction with, the comment that induced plaintiff to resign.

Id. at 4.

In Moser, the Appellate Division allowed the jury to consider constructive discharge because the working conditions that included illegal conduct and the threat when Plaintiff objected to the conduct created intolerable working conditions. The Moser trial court erred when it superimposed onto a CEPA case the LAD "constructive discharge" standard, which demands proof of a hostile work environment and requires a demonstration of *harassment of the Plaintiff*; as the Appellate Division held, the CEPA "constructive discharge" standard views a plaintiff's working conditions in their totality, and includes not only the retaliatory action against the plaintiff, but conduct and working conditions created by the defendant that are against the law, public policy and, in this case, constitute improper quality of patient care – to which the plaintiff might object.

ii. The Thrust of the Trial Court's Decision to Deny Plaintiff's Motion for a New Trial Was the Erroneous Legal Reasoning That Plaintiff Could Not Prevail on a Constructive Discharge Claim Because (1) She Believed She Was Fired and (2) Did Not Affirmatively Tender Her Resignation

The Trial Court opined that, "Constructive discharge occurs when, instead of firing an employee, the employer makes work so intolerable for the employee that she resigns. Resignation is an element and it must be reasonable." (Pa10).

While the Trial Court decision acknowledged that "[o]n April 27 Defendant sent a letter to Plaintiff indicating she was still an active employee and could return to work at any time," and that Plaintiff "said she did not return to work on that date because of how Defendants treated her and because of the working conditions," the Trial Court still concluded that the Plaintiff could not recover under a theory of constructive discharge because the Plaintiff "offered no evidence that she resigned." (Pa8, Pa11, Pa12). Beside pointing out that Plaintiff testified that, had her doctor's note been accepted on April 3, she would have remained an employee at AHP, the Trial Court made no findings on the quality of the working conditions complained of by Plaintiff, nor did the Trial Court's decision make any mention of the jury's findings in favor of the Plaintiff on the three interrogatories that spoke to bad/intolerable working conditions at AHP.

Instead, the Trial Court improperly reasoned that, because Plaintiff believed she was terminated, she could not have resigned. The Trial Court Opinion states that "Plaintiff testified more than 25 times that she was fired . .." The import of Plaintiff's subjective belief to the Trial Court is why the court found that, notwithstanding the fact that AHP's Administrator informed Plaintiff on April 27 that she was still an employee and could return to her job and that Plaintiff testified that she would not return to the job due to the working

conditions at AHP, "Plaintiff's own testimony establishes that she believed she had been fired and did not accept this unequivocal offer of reemployment because of how she was treated and the working conditions . . . [a] refusal of a new offer of employment is not a constructive discharge." (Pa11). The Trial Court was under that misimpression, which was clear at oral argument, that because Plaintiff believed she was fired, she could not bring a constructive discharge claim, as if both claims were mutually exclusive:

> "if she didn't allege that she was told she was fired I could see how that argument would make sense. But she thought she was fired, so how could you be constructively discharged and fired at the same time?"

(10T 13:8-12).

> But how can you make an argument when you're insisting you were fired that you were also constructively discharged?

(10T 69:2-8).

There is simply no case law that mandates that Plaintiff must *affirmatively resign* versus simply abandoning one's position. Moreover, while a Plaintiff could not recover both on claims of termination and constructive discharge, "alternative claims" can be asserted "in an appropriate case … [w]hen supported by the facts." Kluczyk v. Tropicana Prod., Inc., supra. 368 N.J. Super. at 495. While, as discussed supra, the Trial Court incorrectly relied on Kluczyk for the test of what constitutes intolerable working conditions that could give rise to

constructive discharge, the case completely undercuts the Trial Court's rationale that Plaintiff could not succeed on a claim for constructive discharge because she did not say the words "I resign" or "I quit":

> Plaintiff never formally resigned or quit his employment. Rather, he obtained a disability leave which would have permitted his return. The denial of summary judgment was appropriate because the proffer justified alternative theories of liability based on either a constructive or retaliatory discharge for presentation to a jury.

Kluczyk, supra, 368 N.J. Super. at 494. Simply, as Kluczyk and other appellate decisions evince, a constructive discharge claim arises when an employee "*leaves the workplace*" because the "'employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them *would* resign.'" Toto v. Princeton Twp., 404 N.J. Super. 604, 615 (App. Div. 2009) (emphasis added)(internal citation omitted). There is no case that states Plaintiff must affirmatively *say* she resigned to assert constructive discharge. Instead, a "constructive discharge occurs when the employer has imposed upon an employee working conditions "so intolerable that a reasonable person subject to them *would* resign." Daniels v. Mut. Life Ins. Co., supra, 340 N.J. Super. at 17 (quoting Muench v. Township of Haddon, supra, 255 N.J. Super. at 302 (emphasis added).

Plaintiff never returned to work after her last day at AHP on April 1, 2020. On April 3, 2020, AHP expressly rejected Plaintiff's attempt to call out from

work on the basis of a doctor's note directing Plaintiff to self-quarantine due to possible exposure to COVID, and threatened Plaintiff that AHP "would have to accept [Plaintiff's] resignation." (Pa100). On April 27 2020, AHP's Administrator wrote Plaintiff a letter stating, "[y]ou remain an active employee on our staff roster and the facility has an immediate CNA position work ready for you …" and that he "hopes this clarifies any misperceptions . . ." and that "[w]e anticipate your return back to work on May16th." (Pa151).

Plaintiff testified that she understood that she could go back to the exact same job she had at AHP, but she refused to do so due to the working conditions at AHP. (1T 151:12-152:17). And while Plaintiff maintained that she believed she was fired on cross-examination, she also testified that based upon the AHP's Administrator's letter of April 27, she believed "she still had a job" at AHP, (3T 70:10-14), and that based upon the April 17 email from Mr. Froiran that he may have considered her to still be employed by AHP. (3T 64:6-17). Notably, Mr. Froiran pointed out that AHP used progressive discipline and he never processed paperwork to terminate Plaintiff. (8T 30:25-31:4; 34:8-22; 71:16-72:14).

Thus, a reasonable jury could deem that AHP's Administrator was right when he stated Plaintiff had "misperceptions" about being terminated, especially since she was threatened with being deemed to have offered an "official resignation." A reasonable jury could have further concluded that whatever

happened on the call between DON LaBattaglia and Plaintiff, AHP never completed a formal termination. Indeed, the Plaintiff made clear that even though she knew she could go back to her job, she refused, and the jury should have been able to determine whether Plaintiff was justified in refusing to return to work, after concluding that Plaintiff was not technically terminated, and to determine whether the working conditions at AHP amounted to constructive discharge.

There is nothing in the law that prevents a plaintiff from presenting alternative claims to a jury. To this end, consider the contrast between a breach of contract claim and an unjust enrichment claim. Breach claims require the existence of a contract, while unjust enrichment claims are only available when there is no contract. The Appellate Division has found that such different theories of recovery are not inconsistent for purposes of argument and can be presented to a jury to decide which theory, if any, Plaintiff has proved, if the facts support them both:

> We conclude that a plaintiff who has attempted to prove both breach of contract and unjust enrichment need not choose which one will go to the jury, as long as there is sufficient evidence as to both. Under proper instructions from the judge, the jury may decide which of the two was proved, and plaintiff will be able to recover under one of the theories.

Caputo v. Nice-Pak Prod., Inc., 300 N.J. Super. 498, 504–05 (App. Div. 1997)(internal citations omitted).

It makes no sense that Plaintiff would be barred from asserting a constructive discharge claim simply because she believed she was fired and never said, "I resign," even though she affirmatively testified that she was unable to return to work at AHP due to the intolerable conditions at AHP and the harm that resulted from them. Such a holding could only come from a strict and narrow construction of CEPA, but the Trial Court was mandated to liberally construe CEPA. See Battaglia v. United Parcel Serv., Inc., supra, 214 N.J. at 555; Abbamont v. Piscataway Twp. Bd. of Educ., supra, 138 N.J at 431.

iii. **The Working Conditions at AHP Caused Plaintiff Such Emotional Distress That She Was Unable to Return to Work There and This Alone Required the Jury to Be Charged with the Law of Constructive Discharge**

The Trial Court decision states that Donelson v. Dupont Chambers Works, supra, held that "a constructive discharge occurs if an employer's retaliatory actions cause an employee's mental unfitness for duty." (Pa10). However, the Trial Court held that, because "[t]here was no expert testimony offered by Plaintiff that established a connection between her mental condition and her employment . . . [it was] insufficient for a jury to conclude that a constructive discharge took place." (Pa12).

As related supra, after attending "town hall" meetings with approximately 20 coworkers from AHP organized by her labor union shortly after Plaintiff's doctor's note directing her to self-quarantine was rejected by AHP, Plaintiff had

the revelation that AHP's refusal to allow staff to wear masks and failure to disclose COVID cases lead to the deaths of multiple AHP patients and one of Plaintiff's close co-worker friends. (1T 129:8-130:21). Consequently, at a tele-health visit with her physician on April 15, Plaintiff's doctor noted that Plaintiff complained of "anxiety", "unrealistic worry . . . feelings -- that strike suddenly and repeatedly . . . sweating, chest pain, palpitations, unusually strong or irregular heartbeats, and feeling choking" and that the "anxiety has been worse since she was questioned of why she was out of work" after a "possible exposure to COVID" and being "threatened by her supervisor in that if she did not show up to work she would -- she should hand in her resignation letter." (4T 225:4-22). At the April 15th visit, Plaintiff's doctor wrote and faxed another note to AHP excusing Plaintiff from work because of anxiety and prescribed Plaintiff Lexapro. (4T 226:10-228:8; 5T 72:15-73:2; Pa398, Pa399). The following month, Plaintiff's doctor noted that Plaintiff "was severely anxious and cannot function due to watching people die and saw many dead bodies and feels that she has PTSD at this time." (Pa400-Pa407). Plaintiff's Doctor testified that Plaintiff's anxiety "was pretty bad" at that time as Plaintiff was "still having a hard time functioning, although she was on medication." (4T 231:1-3). Ultimately, Plaintiff's doctor directed her to consult a psychiatrist for PTSD and anxiety. (Pa410).

The Trial Court misstated the holding in Donelson, where the Supreme Court held Plaintiff could be entitled to "economic damages related to his psychiatric disability" including front pay if the plaintiff proved the defendant "proximately caused his disability, and that his disability rendered him unable to perform work for" the defendant. Supra, 206 N.J. at 263. The Court in Donelson did *not* create a requirement that expert testimony is needed to prove mental disability to enable a plaintiff to recover damages for being unable to work.

Here, there was ample evidence presented at trial to demonstrate that the work conditions at AHP cause Plaintiff's mental incapacity that made it impossible for her to return to work at AHP. Plaintiff' testimony, the testimony of her primary care physician, her doctor's notes, and referrals for psychiatric medication and mental health treatment were more than enough evidence to present this claim to a jury. Once again, the Trial Court's mandate that the Plaintiff offer expert testimony to prove mental incapacity is consistent with an inappropriate narrow construction of CEPA.

III. ADDING THE LAW OF CONSTRUCTIVE DISCHARGE TO THE JURY CHARGE AND ALLOWING THE JURY TO CONSIDER THIS CLAIM WOULD NOT HAVE BEEN PREJUDICIAL TO THE DEFENDANTS BECAUSE ALL ISSUES RELEVNT TO THE CLAIM WERE ALREADY FRONT AND CENTER IN THE CASE (Pa12)

The Trial Court opined that the Defendants would have been prejudiced had the law of constructive discharge been charged to the jury because Defendants "were not on notice and did not have a proper opportunity to question witnesses about, or defend against it," which is completely false. (Pa12). Simply, the question of whether Plaintiff was entitled to "front pay" injected similar if not identical issues into the trial, as the Plaintiff had to prove "special circumstances" in order to be entitled to such pay as it was undisputed that, at a minimum, the April 27, 2020, letter from AHP was an offer of reinstatement. (9T 236:17-25). Evidentiary issues surrounding that fact questions related to Plaintiff not returning to work after April 27 were discussed on the first day of trial, when the Trial Court asked: "So you're attempting to elicit from Ms. Chapman testimony about her state of mind, things she heard which caused her not to want to return to work . . ." (1T 120:23-121:1).

Indeed, the parties still argued about the appropriateness and reasonableness of Plaintiff's decision not to return to AHP after the April 27th letter in their closing arguments. As Defendants' counsel argued:

> So, all of this stuff with regards to observing deaths, that she couldn't go, that there was an unusually large number of deaths at Hamilton Park and that prevented her from going back, that there wasn't PPE and that prevented her from going back. That stuff was all made up because of this lawsuit . . ..

(8T 136:4-10). Conversely, Plaintiff argued that:

> [D]uring the time between the termination and talking to the unions and seeing the harm that she was trying to not do, manifest itself in the form of deaths of residents, the death of one of her good friends, a co-worker, she was not only immobilized by emotional distress, but she was revolted. No one would want to go back and work in that place ever again and she had every right not to go back there.

(8T 194:25-195:7).

Every single issue related to constructive discharge was thoroughly litigated at trial even without a change to the jury charge. Indeed, when constructive discharge was initially argued, the Trial Judge recognized that the issues and themes related to why Plaintiff would not go back to work after April 27 were present throughout the course of the trial:

> If I can ask what the prejudice is. I know it wasn't in the pleadings, but it's really -- it has been elicited throughout the course of the trial that, you know, she couldn't return for X, Y, and Z reasons. What's the prejudice if it were to be included?

(7T 55:8-13).

In the argument over whether Plaintiff could make a claim for front pay, the parties argued over similar issues that are relevant to whether there was a constructive discharge: Was the Plaintiff reasonable and justified in refusing to report to work after the April 27 letter from AHP telling Plaintiff that she could come back to her exact same job? Although the Trial Court somehow opined that constructive discharge should not be charged to the jury, it contradictorily held that "a reasonable jury could find, based on the evidence as presented by

the plaintiff and all the favorable inferences that could be drawn from them -- from it, that she was justified in not returning to work." (7T 25:1-11; 40:6-41:2).

Finally, part of the rationale for the Trial Court's conclusion that adding constructive discharge to the jury charge would be prejudicial was the erroneous belief that "it was not until the testimony was complete, during the charge conference, that the notion of constructive discharge was raised for the first time." (Pa12). On the contrary, Plaintiff emailed the Trial Court and the Defendants a draft jury charge that contained Plaintiff's proposed language regarding constructive discharge before trial started on the morning of February 12, 2024 - i.e., the third day of a five-day trial and while Plaintiff was still presenting her case and witnesses. (Pa248 and 5T, generally). Moreover, the jury charge conference was the appropriate time to address the issue anyway.

In short, adding constructive discharge would not have created any prejudice to the Defendants whatsoever because each and every legal and factual issue regarding constructive discharge was already part of the case and thoroughly litigated during trial, even though the Trial Court refused to allow the jury to consider constructive discharge.

CONCLUSION

The Trial Court's decision not to charge the jury with the law of constructive discharge and its refusal to allow the jury to consider this theory as

a way for Plaintiff to recover arose out of an inappropriately narrow construction of CEPA. On appeal, this court should first consider whether the evidence at trial as presented in the Appendix, the jury's findings, and even the Trial Court's own factual conclusions in its Opinion were satisfactory to let a reasonable jury conclude that the working conditions at AHP were so intolerable as to justify a reasonable person in abandoning her position. If that answer is yes, the court must determine whether the Plaintiff's Amended Complaint was adequate from a notice perspective to permit the Trial Court to charge the jury with constructive discharge. If the answers to these two questions are yes, then the Trial Court decision should be overruled, because the Plaintiff was inappropriately denied the prospect of recovering under theory of constructive discharge, which is a manifest miscarriage of justice. But if this court should find that the facts warranted that the jury be charged with constructive discharge but that the Amended Complaint was inadequate because it did not specifically plead constructive discharge, it must then determine whether the Trial Court should have amended the pleadings to conform to the evidence, which it should have done, unless this Court concludes that this would have been prejudicial to the Defendants, which it clearly was not, since each and every issue related to constructive discharge was already part of the case due to the front pay issue.

Finally, this court will need to decide whether the Trial Court was correct in opining that to succeed on a constructive discharge, a plaintiff: (1) must affirmatively resign as opposed to simply abandoning her job; and (2) cannot subjectively believe she was fired. Simply, there is no law supporting the Trial Court's findings on these issues, and if the Trial Court's decision is allowed to stand, it would mark a new, narrow and illiberal approach to CEPA interpretation.

The jury in this case concluded that AHP's insistence that Plaintiff report to work after multiple exposures to unmasked Covid positive individuals gave Plaintiff a reasonable belief that AHP's conduct was violative of law or a clear mandate of public policy regarding public health and constituted the improper quality of patient care. The jury concluded that the Plaintiff was not terminated; but the jury should have been given the opportunity to decide whether Plaintiff was constructively discharged, because even though AHP told Plaintiff she was still an employee and that she was welcome back to work on April 27, 2020, Plaintiff refused to go to work specifically because of the work conditions at AHP, which created a quintessential case of constructive discharge. Accordingly, Plaintiff respectfully requests that this court overturn the Trial Court's decision denying the Motion for a New Trial and order a new trial to be held on the issue of constructive discharge.

s/ WILLIAM C. MATSIKOUDIS
William C. Matsikoudis, Esq.

Superior Court of New Jersey
Appellate Division
Appellate Docket No. A-002855-23

LAWDAWN CHAPMAN, Plaintiff-Appellant, v. ALARIS HEALTH, LLC, ALARIS HEALTH at HAMILTON PARK, AND JOHN DOES 1-10, Defendant-Respondents.	Civil Action On Appeal from the Final Order of the Superior Court of New Jersey, Law Division, Hudson County Docket No.: HUD-L-1583-20 Sat Below: Honorable Jame L. Weiner, J.S.C.

DEFENDANTS-RESPONDENTS BRIEF

JASINSKI, P.C.
2 Hance Avenue, 3rd floor
Tinton Falls, NJ 07724
T: 973-824-9700
F: 732-842-1805

Attorneys for Defendants-Respondents

Of Counsel:
David F. Jasinski, Esq. (006051982)

On the Brief:
Jennifer C. Van Syckle, Esq. (050561996)
Erin L. Henderson, Esq. (027782007)

Date Submitted: December 18, 2024

TABLE OF CONTENTS

TABLE OF JUDGMENTS/ORDERS/RULINGS

TABLE OF AUTHORITIES

Cases

Rules

PRELIMINARY STATEMENT

To quote Plaintiff in her brief, "we cannot live in an alternate universe," but that is exactly what she wants this Appellate Court to do when she makes arguments never raised, makes arguments Plaintiff herself does not believe, and cites cases in contrary manners throughout the brief.

For 1,391 days, including from the inception of the case through discovery, an amended complaint, motion practice, two rounds of summary judgment, and Plaintiff's case in chief at trial, Plaintiff's counsel asserted that Plaintiff's employment was terminated. In fact, in response to an unconditional offer of reinstatement that Respondents sent to Plaintiff in April 2020, Plaintiff's Counsel responded, in pertinent part, that Plaintiff's employment had been terminated by Respondents.

Notwithstanding, Plaintiff's Counsel sought to change the theory of Plaintiff's case for the first time by slipping in a constructive discharge claim when it was neither pled, litigated, nor argued. Although the Trial Judge initially suggested the charge be considered by the parties as part of damages, the Trial Judge was ultimately correct in her decision to not include constructive discharge in the jury charge as a whole, was correct in her decision not to allow the pleadings to be amended to plead constructive discharge, and to deny Plaintiff's request for a new trial.

Not once during this litigation, opposition to summary judgment, or even at any time in the trial has Plaintiff ever alleged she resigned. Those words were never uttered. She has been unwavering in her belief that Nancy LaBattaglia's text message to her and subsequent call was a termination and that she was fired. The jury, however, did not accept this belief. There needs to be finality for the parties, particularly when a party makes representations to the Court and jury and then, after all of the testimony is presented, interjects a different theory after her counsel realizes that the jury may not find her story credible.

As set forth more fully below, the motion for a new trial was unwarranted, unjust, and was correctly denied. Plaintiff's 180-degree change of legal theory from actual termination to constructive discharge is wholly at odds with Plaintiff's most fundamental factual claims, the evidence, and the claims proffered from pleading through trial. The evidence relating to events that occurred after April 3rd was presented by Plaintiff for mitigation of damages, not constructive discharge. Simply because the same facts that were relevant to whether Plaintiff had reason not to accept an unconditional offer of reinstatement could have been relevant to whether Plaintiff was justified in resigning does not change the fact that Plaintiff seeks to bring a totally new theory of the case of which Defendants had no prior knowledge.

Plaintiff had her day in court and should not be given another because her counsel is unhappy with the outcome and has second guessed the way they chose to

litigate the matter. Plaintiff did in essence argue that she was terminated because it was a Hobson's choice. In her closing, Mr. Matsikoudis stated the following to the jury: "Call it what you will, but if someone tells me, 'You resign,' it's the equivalent of, **'You're fired.' "** . . . (8T, T183:15-17) (emphasis added). The jury did not agree.

STATEMENT OF RELEVANT FACTS AND BRIEF PROCEDURAL HISTORY

Defendant Alaris Health, LLC is business entity organized and operating under the laws of the State of New Jersey. (Pa29.) Defendant Alaris at Hamilton Park operates as a long term healthcare facility. (Pa29.) Plaintiff, Ladawn Chapman was a Certified Nursing Assistant at Defendants.

The last physical day Plaintiff was at work was April 1, 2020. (Pa151.) On April 2, 2020, Plaintiff presented a note from Dr. Syed that stated: "[d]ue to patient taking care of elderly mother and **possibly** been exposed to a COVID patient, patient advised to self-quarantine and off from work. 4/2/2020 to 4/16/2020." (Pa397.) (emphasis added). There is no reference in the Doctor's note to being exposed while working at AHP and unmasked. (Pa397.)

Both Plaintiff and the Director of Nursing, Nancy LaBattaglia, testified regarding what was said relating to the time off. (3T 109:17-20; 1T 113:5-11.) [1]

[1] For the Court's convenience, Respondent has repeated herein the transcript naming convention used in the Appellant's Brief.

According to Nurse LaBattaglia, "[t]he conversation that I had with LaDawn (Chapman) when I spoke to her by phone, she told me that her mother's home health aid was – had been—had tested COVID positive and that she could no longer you know, take care of her mother during that short amount of time because she had to quarantine, and that she herself was fearful of exposing her mother as well." (3T 109:17-20.)

What was not in dispute was that Plaintiff had no symptoms of COVID-19 at this time. (Pa24.) In addition, Plaintiff's April 2, 2020, doctors note putting her out of work until April 16, 2020, did not state that she was exhibiting symptoms. (Pa397.)

On April 15, 2020, a day before her anticipated return date, Plaintiff presented another note from Dr. Syed. (Pa398.) The note extended Plaintiff's absence another four weeks until May 16, 2020. (Pa398.) The facility contacted her about this second note, to which she never responded. (Pa151.)

On April 27, 2020, a letter was sent by the Administrator Yosef Wulliger advising that the facility expected Plaintiff's return to work on May 16, 2020. (Pa151.*)* Plaintiff admitted to receiving the letter and understanding that it meant that she had a job. (3T 70:10-71:6.) Plaintiff never returned to work (3T 58:7-12.)

Moreover, as the record established, during March and April of 2020, there was sufficient PPE, *i.e.*, gloves, masks, gowns, and surgical hats. (6T 219:16-221:8;

3T 173:9-175:18.) Defendant never directed anybody not to wear a mask. (6T 227:1-5.) During the beginning when caring for a patient who is not exhibiting symptoms, it was not required to wear a mask. (3T 96:4-8; 6T 219:16-221:8.) Defendant did not tell its employees not to wear masks against any guidance at the time. (6T 227:1-5.) Additionally, Defendants did not lie about COVID being in the building. (6T 229:2-6.) Carla Sampson clearly testified as follows: "If I said that we did not have a case in the building at that time, we didn't have a case in the building at that time. The patient was sent out to the hospital. I do not know who the patient is, but I will never lie about cases in the building." (6T 229:2-6.)

Plaintiff filed her Complaint in this action on April 22, 2020. (Pa29-37.) Plaintiff filed her First Amended Complaint on June 30, 2020, adding additional factual allegations and specific statutes to paragraph 38. (Pa39-48.) Despite these additional allegations, constructive discharge was never pled. On July 9, 2020, Defendants filed their Initial Answer. (Pa49-58.)

A Summary Judgment motion was filed by Defendants on September 23, 2022. (Pa24.) The Court denied Defendants' Summary Judgment motion on October 21, 2022. (Pa1-3.)

A reconsideration motion was filed on November 10, 2022. (Da1-3.) Plaintiff's last day of work was April 1, 2020 (Pa151) and her doctor had authorized her absence from work until May 16, 2020 (Pa398). Before the expiration

of her leave of absence, a letter dated April 27, 2020 was sent by Administrator Yosef Wulliger to Plaintiff stating; that "[w]e anticipated your return back to work on April 17th, but received the additional note extending your absence with an anticipated return to work on May 16th. You remain **an active employee on our staff roster** and the facility has immediate CNA position work ready for your return to help care for our residents. I hope that this letter clarifies any misperceptions that you may have made. **We anticipated your return back to work on May 16th."** (emphasis added.) (Pa151.)

Defendants argued that Ms. LaBattaglia's text message did not raise a material issue of fact and the Wullinger letter would indeed eradicate any alleged prior termination even if it was found to have occurred. *Assuming arguendo* that even if a jury finds Plaintiff's version of the facts to be correct, Defendants averred the law is clear that "employer actions that are rescinded makes a plaintiff completely whole and remedies a prior decision cannot constitute an adverse action." (Da5.)[2]

In opposition, Plaintiff argued the following:

[2] Pursuant to R. 2:6-1(a)(1)(I), "The appendix prepared by the [respondent] shall contain . . . (I) such other parts of the record . . . as are essential to the proper consideration of the issues . . .".. Subsection (2) of R.2:6-1(a) reads: "Briefs submitted to the trial court shall not be included in the appendix, unless either the brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included."

> . . . Defendants' assertion that the letter sent on April 27, 2020, by AHP Administrator Wulliger (the "Wulliger Letter") remedies the adverse employment action undertaken by Defendants is still incorrect. First, the court held that there is a genuine issue of material fact as to whether **Plaintiff was terminated**, crediting as true both a text message sent by Defendant's Director of Nursing and a phone conversation Plaintiff reported having with Defendant's HR department, both of which indicated she had been fired. Thus, for purposes of considering recission, **one must accept that Plaintiff was terminated** . . . . (Da8-9.)
>
> First, while a termination *in process* can be rescinded and the harm be considered nullified, **a *completed* termination cannot be rescinded** . . . . (Da9.)
>
> Instead, **all that an offer of re-employment can do, concerning a wrongful discharge claim, is potentially mitigate the damages owed to the terminated employee**.
>
> Per New Jersey Model Jury Charge 2.33:
>
> The evidence in this case reveals that, subsequent to the defendant's (refusal to hire plaintiff/termination of plaintiff's employment), the defendant then offered to (hire plaintiff for the position sought/reinstate plaintiff to his/her former position). Absent special circumstances, for purposes of determining the period of back pay to which plaintiff is entitled in this matter, such an offer from the defendant employer terminates the running of the back-pay period so long as the offer is unconditional . . . . (Da10-11.)
>
> Based on sound evidence and incontrovertible law, the court properly concluded that there is a genuine issue of material fact as to whether Plaintiff was terminated, and there is no doubt that the Wulliger Letter came only after this lawsuit was filed. Therefore, under both controlling law and according to common sense, the Wulliger Letter should not be considered as a recission of **Defendant's completed termination of Plaintiff**, and the Defendants' motion should be denied. (Da11.)

(emphasis added.)

Like the initial summary judgment motion, the reconsideration motion was denied. (Pa24.)

A second summary judgment motion was filed by Defendants on November 17, 2023, limited to whether a clear mandate of public policy was articulated and whether a termination had been rescinded. (Pa24.) The Court denied Defendants' summary judgment on December 18, 2023. (Pa3-6.) The Court stated:

> Lastly, Defendants' argument that the termination of Plaintiff's employment was rescinded, eliminating any adverse employment action, was also ruled on by the Court previously, as the Court found that there was a genuine issue of fact as to whether Plaintiff was terminated from her job at Defendant Alaris Health at Hamilton Park. The same holds true here, **as a completed termination of employment cannot be rescinded and there is a genuine issue of fact [w]as to whether Plaintiff reasonably believed that her employment was terminated.**
>
> (Pa6.) (emphasis added.)

During the opening, Plaintiff's counsel argued:

> [s]ubsequently, the evidence will show you that at a regularly scheduled visit with her physician on April the 2nd, 2020, Ladawn told her doctor about these exposures and that her doctor, acting in accord with the clear mandates of public policy and the law, wrote Ladawn a note on a prescription pad and faxed it to Alaris at Hamilton Park directing Ladawn to self-quarantine and to not to report to work, but **the evidence will show you that on April 3rd, 2020, Alaris rejected this note and terminated Ladawn's employment for failing to come to work.**
>
> (1T 36:4-14.)

Plaintiff's initial proposed jury charges on February 5, 2024, provided to Defense Counsel and given to the Court on February 7, 2024, stated as follows.

> **Plaintiff claims that Defendants terminated her employment** at Defendant Alaris Health at Hamilton Park nursing home because Plaintiff refused to participate in an activity or practice which the Plaintiff asserts she reasonably believed was in violation of a law and/or incompatible with a clear mandate of public policy concerning the public health, safety or welfare, and/or constituted improper patient care. Namely, **Plaintiff asserts that she was fired on April 3, 2020** for refusing to report to work after being exposed to multiple Covid-positive people for extended periods of time while neither she, nor the Covid-positive individuals, were wearing masks. Defendants deny these allegations and instead maintains that they did not terminate Plaintiff. If Defendants did, in fact, terminate Plaintiff because she refused to report to work after being exposed to multiple Covid-positive people while neither Plaintiff nor the Covid-positive people were wearing masks, it would be unlawful under the New Jersey Conscientious Employee Protection Act.
>
> (Pa165.) (emphasis added.)

Plaintiff's charge also stated:

> To prove the second element of her claim, Plaintiff must establish that Defendant took retaliatory action against her. Retaliatory action can be discharge, suspension, demotion or any other adverse employment action taken against an employee in the terms and conditions of employment. **Here, Plaintiff asserts she was terminated.**
>
> (Pa171.) (emphasis added.)

Plaintiff further provided a charge on an unconditional offer of reinstatement. On February 7, 2024, during her direct and cross examinations, Plaintiff testified as follows.

> Q: And when did your employment end at Alaris at Hamilton Park?
> A: April 3rd, 2020.
> (1T 74:1-3.)

> Q: Did you resign?
> A: **No. I was fired.**
> (1T 113:17-20.) (emphasis added.)

> Q: Ms. Chapman, if Nancy LaBattaglia accepted your note on April 3rd, 2020 and let you quarantine, would you still be employed at Alaris at Hamilton Park today?
> A: Yes. I would.
> Q: Why is that?
> A: Because I loved my job. I loved what I did. I am a caregiver at heart. So, it just – I worked there for almost two decades. That should describe it in itself. I literally loved everyone. I loved the co-workers, I loved the staff. I was -- I was just completely devastated with how the outcome happened to be, but if she would've accepted that, I definitely would've been there to care for the residents because they needed people like me there to care for them.
> (1T 161:13- 162:-2.)

On cross examination, Plaintiff testified as follows:

> Q: You said that if Nancy Labattaglia had accepted the letter, you'd still be at Hamilton Park today.
> A: That is correct.
> Q: Is that correct?
> A: Yes.
> (1T 165:5-10.)

> Q: So deaths had nothing to do with your coming back to Hamilton Park because if Nancy Labattaglia had accepted your – your leave for 14 days, you would've been back there, correct?

A: That's correct.
(1T 165:19-23.)

Q: But you would have been prepared to work at Hamilton Park if Nancy Labattaglia had just accepted your letter to be out for quarantine for 14 days, correct?
A: That's correct.
(1T 166:9-12.)

Q: So it's your testimony that Nancy Labattaglia said to you on April the 3rd that you're fired?
A: That's my testimony. Correct.
(2T 259:1-3.)

Q: Were you concerned what Derek was referring to on April the 17th about the term "medical incapacity" when you received this note?
A: I wasn't concerned at all.
Q: Did you have medical incapacity on April the 17th, 2020?
A: Yes I did.
Q: So, you knew what Derek was talking about?
A: I knew **I was fired.**
(3T 68:10-18.) (emphasis added.)

Q. So, seeing that, that Derek Frorian at Hamilton Park thought you were still employed by Hamilton Park, why didn't you call anyone up?
A. Because I believed **I was fired.**
(3T 64:14-17.) (emphasis added.)

A. Honestly, I didn't care because I was already fired. I already applied for unemployment.
(3T, T58:9-10.)

Q Yes, in this letter.
A Yeah. When he says that -- that they have immediate position work available, I felt like that meant that he was offering me the job back. So that's what I was trying to say.
Q All right. So –
A. Because –
Q As of April 27th, 2020, you believed that Hamilton Park was offering you a job?
A That's what I believed.
(3T 70:23-71:6.)

On February 9, 2024, Judge Weiner provided the parties a copy of the proposed jury charges to review and comment upon. The Court's proposed charge included the aforementioned language Plaintiff had proposed. For consideration of the parties, it also included in the damages section a charge entitled "Impact of Finding No Constructive Discharge." Nowhere else did constructive discharge appear. (Da23-64.)

On February 10, 2024, in response to the judge's proposed charges, Plaintiff did not dispute the inclusion of her previously proposed language and left the "Impact of Finding No Constructive Discharge" in the damages section of the charge. (Pa236.) Defendants objected to including the "Impact of Finding No Constructive Discharge" in the charge. (7T 33:15-38:23.)

On February 12, 2024, Plaintiff submitted her charge again. Plaintiff expanded the second element of the charge as follows contrary to what she argued to the jury in her opening statement and how she testified.

> To prove the second element of her claim, Plaintiff must establish that Defendant took retaliatory action against her. Retaliatory action can be a discharge, suspension, demotion, or any other adverse employment action taken against an employee in the terms and conditions of employment. If you find that Plaintiff was terminated, by Defendants, Plaintiff has proven this element of her claim. However, if you do not find that Plaintiff was terminated, she may still prove this element of her claim if you believe she was constructively discharged – that is, that she left her job because the conditions Defendants created at the nursing home where Plaintiff worked were so intolerable that a reasonable person would be forced to resign rather than continue

> to endure them. With respect to the "intolerable conditions" Plaintiff may have had to endure, you may consider Defendants' treatment of Plaintiff as well as the conditions at the nursing home you believe Defendants created prior to Plaintiff's leaving her employment.
>
> **(**Pa171.)

Plaintiff provided the Trial Judge with a copy of the case of *Moser v. The Streamwood Company*, No. A-1703-21, 2023 WL 4502288 (App. Div. July 13, 2023) (Pa154-7) when she requested a constructive discharge instruction (Pa250). Plaintiff's counsel specifically stated: "I think the attached case explains why constructive discharge is appropriate here even though Plaintiff testified, she would've come back to work." (Pa250.)

After Defendants argued that the evidence in this case did not demonstrate constructive discharge, Plaintiff's counsel admitted such, conceded to Defendants' argument, and withdrew the constructive discharge charge at the end of the day on February 12, 2024. (6T 253:1-4.) Only later did Plaintiff's Counsel write to the Trial Judge that the constructive discharge language should be included. Plaintiff's Counsel belatedly contended that Plaintiff was given a Hobson's choice on April 3, 2020 and therefore a constructive discharge instruction was appropriate. (Pa250.)

The Trial Judge held the Charge Conference on February 13, 2024 and found based on its own research:

> THE COURT:
> And then on to constructive discharge. I'm reading a quote – I

> don't know how to pronounce this. Klyczyk? K-l-uc-z-y-k v. Tropicana Products, the Superior Court of New Jersey, 368 N.J. Super. 479, a 2004 case from the Appellate Division:
> "In order to establish a *prima facie* case of constructive discharge in New Jersey, a plaintiff must establish that 'the employer knowingly permitted conditions'" –
> I think that's dealing with the LAD case, but…
> "—of discrimination in employment so intolerable that a reasonable person subject to them would resign.' Constructive discharge requires not merely 'severe or persuasive' conduct, but conduct that is so intolerable that **a reasonable person would be forced to resign** rather than continue to endure it. More precisely, the standard envisions a 'sense of outrageous, coercive, and unconscionable requirements.' Simply put, a constructive discharge claim requires more [than] egregious conduct than that sufficient for a hostile work environment claim."
> So I do find that, based on the fact it doesn't rise to the level of a constructive discharge, so I'm not going to allow that and I'm going to remove that from the charge.
>
> (7T 90:21 - 91:23.) (emphasis added.)

As for the verdict sheet, Defendants asked that the April 3rd date be inserted.

> MS. HENDERSON: -- on Your Honor's copy. "Did defendants terminate plaintiff's employment?" We would just ask that the date April 3rd of 2020 be inserted at the end of the sentence.
> THE COURT: Any objection to the date?
> …
> MR. MATSIKOUDIS: **No objection.**
> THE COURT: Okay. I'm going to say "Did defendants terminate plaintiff's employment on April 3rd 2020?" Okay?
> MS. HENDERSON: Okay. And we would also ask that, regarding mitigation --
> MR. MATSIKOUDIS: The only -- wait. Can I step back? The only issue that is that, you know, the testimony does show that she confirmed it was -- you know, that it was -- the confirmation on the April 4th conversation with Katrina Wilkins. So, I mean,

> that might be a little misleading. I mean, how about we say April of 2020?
> THE COURT: Well, she confirmed, but the conversation was on the 3rd.
> MR. MATSIKOUDIS: Okay. All right. Fair enough.
>
> (7T 136:24-137:24.) (emphasis added.)

The final charge stated:

> Plaintiff claims that Defendant terminated her employment at Alaris Health Hamilton Park nursing home because Plaintiff refused to participate in an activity or practice which the Plaintiff asserts she reasonably believed was in violation of a law and/or incompatible with a clear mandate of public policy concerning the public health, safety or welfare, and/or constituted improper patient care. (Pa75.)
>
> To prove the third element of her claim, Plaintiff must establish that Defendant took retaliatory action against her. Retaliatory action includes termination or firing. (Pa79.)

The verdict form asked the question: "Did Defendants terminate Plaintiff's employment on **April 3rd 2020?**" (Pa99.) (emphasis added.)

Defendants argued that a directed verdict was warranted on the issue of an unconditional offer of reinstatement. The Court denied the request in order to allow the jury to determine whether Plaintiff had mitigated her damages.

Closing arguments took place on February 14, 2024. Plaintiff's counsel, in painstaking detail, went through the verdict form in his closing and argued as follows.

Question number four, this is a big one, major contention in the case. Did defendant terminate plaintiff's employment on April 3rd, 2020?
(8T 179:23-25.)

Call it what you will, but **if someone tells me, "You resign," it's the equivalent of, "You're fired."** . . .
(8T 183:15-17.)(emphasis added.)

Next question will be easy if you answer yes to four. Four was, "Was she terminated?" Five was, "Was there a causal connection between the plaintiff's refusal to report to work on April 3rd, 2020 and her termination?" . . . . If you're –- I am not going to spend much time on this because **if she was fired April 3rd, clearly it was because of the note and the refusal to report to work** and the judge will tell you in the jury charge that if you conclude that the plaintiff has met her burden that she was terminated for refusing to report to work, that she prevails.
(8T 192:19-22, 193:4-10.) (emphasis added.)

If you answer those questions yes, then we move into the damages part and this is the time when you assess the economic damages to live on and the emotional distress damages. We're going to talk briefly about both of these. First and foremost, it's important to talk about what happened on April 27th. On April the 27th, Ladawn got a letter from the head of Alaris saying, "Hey," citing the –- the Sayad letter -- note of the 15th. Saying, "Hey, we thought, you know, you were coming back, misunderstanding. Come on back to work." Ladawn acknowledges, recognizes, understands, affirms that, "Hey, I could've gone back to work there. I could've gone back to work there. There's no doubt about it." Jury charge will tell you that you can cut off damages based upon that, unless you find that there's special circumstances for that.
(8T 193:11-194:102.)

> Ladies and gentlemen, I submit to you that Ladawn Chapman was completely justified in not wanting to go back to work. Not only because **she was terminated after 18 years** of dedicated service for simply following her doctor's orders, but because during the time between the termination and talking to the unions and seeing the harm that she was trying to not do manifest itself in the form of deaths of residents, the death of one of her good friends, a co-worker, she was not only immobilized by emotional distress, but she was revolted. No one would want to go back and work in that place ever again and she had every right not to go back there.
> (8T 194:20-195:7.) (emphasis added.)

The jury found that Defendants did not terminate Plaintiff's employment on April 3, 2020 and deliberations stopped at question 4 on the verdict sheet. (Pa99.) The question regarding exceptional circumstances in response to an unconditional offer of reinstatement was not reached.

Thereafter, Plaintiff filed a Motion for a New Trial. (Pa24.) Thereafter, on April 1, 2024, Plaintiff's counsel wrote the Trial Judge stating:

> We write to request limited supplemental briefing of five pages or less on the distinct issue of the adequacy of Plaintiff's Amended Complaint as it relates to the theory of constructive discharge. Although not part of the Court's rationale when it decided not to include the law of constructive discharge in the Jury Charge, and not a specific legal argument in Defendant's opposition to Plaintiff's Motion for a New Trial (though Defendants' brief did mention that constructive discharge was not pleaded as part of their "judicial estoppel" argument that Plaintiff was barred from simultaneously arguing for termination and constructive discharge . . .the adequacy of Plaintiff's Amended Complaint as it relates to constructive discharge was a major focus of oral argument.
>
> (Da65.)

Defendants objected to supplemental briefing, but the Court granted Plaintiff's request. (Da67.) Plaintiff filed her sur-reply and Defendants filed their response to Plaintiff's sur-reply. (Pa24.)

The Motion for a New Trial and to Amend the Complaint were denied on April 26, 2024. This appeal by Plaintiff followed.

ARGUMENT

A. The Trial Judge's Decision Not To Allow Amending The Pleadings To Raise A New Constructive Discharge Claim Was Not A Clear Abuse Of Discretion. (7T 90:21-91:23; Pa7-12.)

Plaintiff argues that the Court erred in not amending the pleadings to conform to the evidence. Glaringly and tellingly is the standard of appellate review. Such a ruling, is generally left to the sound discretion of the Trial Judge, which the Appellate Court will not intervene absent a "clear abuse of discretion." *Robert Allen, Inc. v. Spring St. Realty Co.,* 111 N.J.L. 88, 92 (1933) (setting forth the appellate standard of review and noting that a party's argument that court "misconceived the law" does not satisfy this standard ("It is the propriety of the court's ruling and not the reason given therefor with which we are here concerned.")).

An "abuse of discretion only arises on demonstration of 'manifest error or injustice[,]' or when "there has been a clear error of judgment." *Rodriguez v. Wal-Mart Stores, Incl.,* 237 N.J. 36, 57 (2019) (internal citations and quotations omitted). An abuse of discretion occurs when the trial judge's decision was "made without a

rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *U.S. Bank Nat. Ass'n v. Guillaume,* 209 N.J. 449, 468-69 (2012) (internal citations and quotations omitted).

In the case at hand, the Trial Judge provided a rational explanation, did not depart from establish policies and did not rest her decision on an impermissible basis. Plaintiff providing a string cite where courts have allowed an amendment does not establish that the Trial Judge departed from established polices as her decision was completely discretionary. Indeed, it is beyond dispute that whether or not to allow an amendment to a pleading is within the sound discretion of the trial court. *See Robert Allen, Inc.*, 111 N.J. at 92.

Here, the Trial Judge determined that a proposed amendment to include constructive discharge did not conform to the evidence presented at trial by Plaintiff. (7T 90:21-91:23.) Plaintiff does not challenge the factual conclusions of the Trial Judge in her Opinion. (Plaintiff's Br. 25.) In the Opinion, the Trial Judge found that, on April 2, 2020, Plaintiff sent Defendant a note from her doctor stating she should quarantine for 14 days as a result of possibly being exposed to COVID-19. (Pa7.) The next day, the Director of Nursing, Nancy LaBattaglia, text messaged Plaintiff and said she could not accept the note and if she did not call her, LaBattaglia would have to accept Plaintiff's official resignation. (Pa7-8.)

The Trial Judge found that Plaintiff testified she called LaBattaglia and told

her that **Plaintiff would not be resigning but would be following her own doctor's orders and quarantining**. (Pa8.) Plaintiff said LaBattaglia told her she was fired. (Pa8.) The next day, Plaintiff confirmed her firing with another supervisor who said she was done. (Pa8.) Plaintiff believed she was fired and immediately sought Unemployment Compensation. (Pa8.) She told her doctor she had been fired and reported to the union she was wrongfully terminated. (Pa8.)

The Trial Judge further found that a Complaint was filed by Plaintiff on April 20th. (Pa8.) Constructive discharge and intolerable working conditions were not pled in the Complaint. (Pa8.) On April 27th, Defendants sent a letter to Plaintiff indicating she was still an active employee and could return to work. (Pa8.) On June 30th, Plaintiff filed the Amended Complaint and constructive discharge was not mentioned in the new pleading. (Pa8.) At trial, Plaintiff's statement of the case alleged "wrongful termination." (Pa8.) Defendants' statement of the case was that they denied wrongfully terminating Plaintiff. (Pa8.)

The Trial Judge found that Plaintiff testified more than 25 times that she was fired, that she did not quit, and she did not resign. (Pa8.) Plaintiff further testified **in response to her own attorneys' questioning** that had LaBattaglia accepted Plaintiff's first note, she would have returned to work and would still be employed at Defendants. (Pa12.) Plaintiff testified that she believed the April 27th letter was a cover up since she had filed a lawsuit, that she had been fired and that Defendant

were making an offer of reemployment. (Pa11.) Plaintiff requested that the admission of the April 27 letter be for purposes of mitigation and damages. (Pa9.)

Given these factual findings which Plaintiff does NOT challenge, Plaintiff cannot satisfy the high burden of showing a clear abuse of discretion by the Trial Judge in denying a request to amend the pleadings. As clearly articulated by the Trial Judge with respect to both April 3rd and April 27th, Plaintiff offered absolutely no evidence on which a jury could conclude she was constructively discharged. (Pa11.) Indeed, the proposed amendment actually contradicted the arguments and evidence presented at trial by Plaintiff and entirely altered the foundation of Plaintiff's case. Plaintiff never argued at trial that she was abandoning her position. Rather throughout trial, Plaintiff argued that she was fired as of April 3rd.

Moreover, the Trial Judge determined that including a constructive discharge instruction would have been prejudicial to Defendants. (Pa9.) As Plaintiff concedes in this appeal, the Trial Judge stated that Plaintiff's pleading was inadequate to put Defendants on notice that she may seek recovery under a theory of constructive discharge because she did not refer to "intolerable working conditions," or state that she resigned or that, if she was not fired, she was 'constructively discharged.'" (Plaintiff's Br. 26). Given such concessions by Plaintiff, it was not a clear abuse of discretion for the Trial Judge to conclude that Defendants had no notice of

constructive discharge being in the case and did not have a proper opportunity to question witnesses about it or defend against it.

Although the Complaint may have used the phrase "including but not limited to terminating," there is not one utterance of "constructive discharge" or "intolerable working conditions" in the Complaints. (Pa29-48.) Use of the term "discharge" or the phrase "including, but not limited to," after the term "terminate" would not have put Defendants on notice that Plaintiff was also contending she resigned due to an intolerable work environment. Indeed, the Complaints themselves clearly stated Plaintiff was **not** resigning. (Pa29-48.) While Plaintiff now acknowledges "that the easier case is made with regard to the April 27 letter," (Plaintiff's Br. 33) as stated in the Opinion, "[t]hroughout the trial, the only assertion by Plaintiff was that she was fired on April 3" (Pa12).

"It was not until the testimony was complete, during the charge conference, that the notion of constructive discharge was raised for the first time." (Pa12.) "Plaintiff requested the admission of the April 27 letter for purposes of mitigation and damages." (Pa9.) The Trial Court was correct in noting that "[a] refusal of a new offer of employment is not constructive discharge. Additionally, the letter was not offered by Plaintiff to establish a constructive discharge; to the contrary, it was offered solely on the issue of mitigation and damages." (Pa11.)

As explained by the New Jersey Supreme Court in the case of *Bauer v. Nesbitt*, 198 N.J. 601, 610 (2009)**:**

> The basic function of a complaint is to "fairly apprise an adverse party of the claims and issues to be raised at trial." *Rule* 4:5–2 requires that a complaint "set[ ] forth a claim for relief" and that it "contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief." Although "[a]ll pleadings shall be liberally construed in the interest of justice," the fundament of a cause of action, however inartfully it may be stated, still must be discernable within the four corners of the complaint. A thoroughly deficient complaint—a complaint that completely omits the **underlying basis** for relief—cannot be sustained as a matter of fundamental fairness. An opposing party must know what it is defending against; how else would it conduct an investigation and discovery to meet the claim?

(emphasis added) (internal citations omitted). *Accord Skarbnik v. Life Time Fitness, Inc.*, 2021 WL 3923270 (Sept. 2, 2021) (Da111) ("New Jersey is a notice-pleading state, meaning only a short statement of the claim needs to be pleaded. But **the claim must be pleaded**.") (emphasis added) (internal citations omitted).

The Complaints in this case completely omitted that the underlying basis for relief was a constructive discharge. It never was the basis for relief. To quote Plaintiff's counsel:

> This is in response to the letter you sent on behalf of Alaris health ("Alaris") to our client, LaDawn Chapman ("LaDawn"), on April 27, 2020 regarding supposed "misconceptions" about the termination of my client's employment by Alaris. . . . LaDawn filed a lawsuit **that recounts how she was terminated from employment by Alaris** . . . As the lawsuit makes clear, there was no "misconception." **LaDawn was wrongfully fired**. (emphasis added.) (Pa282.)

It defies logic how Plaintiff can now claim she was constructively discharged on **April 27** when she had already alleged on **April 20** when she filed the initial Complaint that she was terminated as of April 3rd. Again to quote Plaintiff, "we cannot live in an alternate universe." (Plaintiff's Br. 34.) The final date that appears in the Complaint is April 15, 2020, when Plaintiff allegedly experienced worsened anxiety "**since Alaris discharged her**." (Pa33.) (emphasis added.)

As set forth in the *Bauer* case, the underlying basis of relief must be apparent from the Complaint. Ignoring Plaintiff's allegations that she was not resigning, Plaintiff nevertheless contends, even in the face of a denial of resignation, that "there is no case that states Plaintiff must affirmatively say she resigned to assert constructive discharge." (Plaintiff's Br. 40.) However, in the case of *Daniels v. Mut Life Ins. Co.*, 340 N.J. Super 11 (App. Div. 2001), a case cited and even block quoted by Plaintiff, the Appellate Division states: "The conditions become intolerable **when the employee tenders his or her resignation.**" *Id.* (emphasis added). Simply put, nowhere do the complaints say that Plaintiff tendered her resignation and, in fact, deny such.

Plaintiff's own case eviscerates her argument on appeal. The Trial Judge did not clearly abuse her discretion in concluding Defendants would be prejudiced by inclusion of constructive discharge in the case and that an amendment did not conform to the evidence at trial.

B. The Jury Charge Was Correct. (7T 90:21-91:23; Pa7-12.)

As set forth in the Appellate Division case of *Rendine v. Pantzer,* 276 N.J.Super. 398, 431, 648 *A.*2d 223 (App. Div.1994) *aff'd,* 141 N.J. 292, 661 *A.*2d 1202 (1995):

> "A jury is entitled to an explanation of the applicable legal principles **and how they are to be applied in light of the parties' contentions and the evidence produced in the case**." The charge as a whole should state the law "correctly and intelligently," so that ordinary jurors can understand it. But a party is "not entitled to have the jury charged in words of her own choosing." (internal citations omitted) (emphasis added).

1. Plaintiff's Contentions And Presentation Of Evidence Did Not Support A Constructive Discharge Claim. (7T 90:21-91:23; Pa7-12.)

First, jury charges must be applied in light of the parties' contentions. *Id.* Throughout this litigation and even before the filing of the Complaint, Plaintiff's contention has always been that she was fired and did not resign. Plaintiff's counsel clearly demonstrated in response to the April 27th letter and throughout his opening that Plaintiff never intended to make a constructive discharge claim. (Pa282; 1T 34:23-43:21.)

To quote Plaintiff's counsel:

> This is in response to the letter you sent on behalf of Alaris health ("Alaris") to our client, LaDawn Chapman ("LaDawn") on April 27, 2020 regarding supposed "misconceptions" about the termination of my client's employment by Alaris. . . . LaDawn filed a lawsuit **that recounts how she was terminated from employment by Alaris** . . . As the lawsuit makes clear, there was no "misconception." **LaDawn was wrongfully fired**.

(Pa282.) (emphasis added).

Plaintiff believed she was fired, Plaintiff pled this and testified to such at trial. Plaintiff's entire theory of the case was that she was terminated on April 3rd. To have allowed Plaintiff to claim she was constructively discharged on April 27, 2020 when she did not return to work would have been totally at variance with what she herself believed, her counsel's response to the April 27th letter, pretrial discovery and how Plaintiff's counsel tried the case. To quote Plaintiff, "we cannot live in an alternate universe." (Plaintiff's Br. 34.)

Secondly, jury charges must be applied in light of the evidence presented at trial. It is disingenuous for Plaintiff to state that the Opinion did not in any way state that Plaintiff failed to produce adequate evidence to show that there were intolerable working conditions to justify a constructive discharge. The Opinion clearly stated: "With respect to intolerable conditions, Plaintiff also failed to establish that the conditions were so horrible that she was resigning instead of going back to them." (Pa12.)

As the Court correctly found, there was no evidence at trial to support a constructive discharge claim. The evidence presented to the jury by Plaintiff did not support a constructive discharge claim and the Trial Judge was correct in not charging the jury on such. Plaintiff did not testify that she resigned because of an intolerable work environment. To the contrary, on direct examination Plaintiff

stated that she would have immediately returned to work if her leave had been granted. Plaintiff unequivocally testified she was terminated. The Trial Judge did not base the Opinion solely on Plaintiff's testimony that she believed she was fired and never affirmatively resigned.

Plaintiff attempts to argue that Defendants' presentation of the facts (*i.e*. that Plaintiff was not terminated) warranted a constructive discharge claim. Plaintiff argues that the jury could have determined that Plaintiff was justified to resign on April 3, 2020, when Ms. LaBattaglia texted her and said she could not accept Dr. Syed's note. (Plaintiff's Br. 35.) Plaintiff's argument fails because, throughout this litigation and during her trial testimony, Plaintiff has been firm in her conviction that she was fired. She was, and remains, adamant that she did not resign. This was unequivocally testified to at trial. As the Trial Judge notes in her decision and Plaintiff does not dispute, "Plaintiff testified more than 25 times that she was fired, that she did not quit and she did not resign." (Pa8.)

In the face of Plaintiff's counsel's opening and closing, her unequivocal testimony and the motion practice that has occurred in this case, Plaintiff cannot claim she resigned. Plaintiff is plainly missing a key element of constructive discharge yet continues to assert the argument that a constructive discharge instruction should have been included. Again, Plaintiff herself repeatedly testified

at trial – on both cross and direct – that she did not believe she resigned. Rather, Plaintiff was staunch and unwavering in her testimony that she was fired.

The Court correctly found that the evidence presented at trial did not demonstrate conduct so intolerable that a reasonable person subjected to it would have resigned. Notwithstanding, Plaintiff argues that the quality of the working conditions complained of by Plaintiff constituted conduct so intolerable as to be considered constructive discharge. But, for purposes of constructive discharge, it must be conduct directed to Plaintiff that mattered, and the conduct directed towards Plaintiff did not rise to an intolerable level. **Indeed, Plaintiff in her brief concedes that Plaintiff was not harassed.** (Plaintiff's Br. 21.) Constructive discharge cannot be read as broadly as Plaintiff now wishes so that that a claimant has a cause of action when work conditions could potentially lead to a resignation although it did not. As stated in the *Daniels* case cited by Plaintiff, "the conditions become intolerable when the employee tenders his or her resignation." (Plaintiff's Br. 20.)

As conceded in Plaintiff's brief, "[h]ere the Plaintiff did not affirmatively resign." (Plaintiff's Br. 22.) In light of such an acknowledgment, under no stretch of the imagination can Plaintiff now contend she tendered her resignation. Without question in this case, the work environment did not lead to a resignation as the Trial Judge recognized. Plaintiff testified that if Nancy LaBattaglia had accepted her

letter, Plaintiff would still be working at Defendants' facility. (1T 161:13-17.) This undercuts any argument of an intolerable work environment.

Plaintiff seemingly likes the *Moser* case for its use of the term "Hobson's choice" and has argued that Ms. LaBattaglia's text on April 3rd was a Hobson's choice. In *Moser*, the court explained that "[o]ur Supreme Court has described a Hobson's choice as having 'no choice at all.'" *Moser v. The Streamwood Company*, 2023 WL 4502288, at *4, fn. 1 (App. Div. July 13, 2023). Plaintiff's reliance on *Moser* is misplaced and the *Moser* case actually supports Defendants position that a resignation is needed.

In *Moser*, the plaintiff's supervisor had become angry and told the Plaintiff, "things don't look good for you." *Id.* at *1. There were no further actions or comments made to the plaintiff. *Id.* at *2. The plaintiff considered her supervisor's statement to be a "threat; ultimatum; and a 'Hobson's choice' . . .". *Id.* at *1. The plaintiff "did not attempt to speak with upper management, seek outside advice on the issue, or discuss the matter" with her supervisor again. *Id.* Instead, the plaintiff "sought medical treatment for her anxiety and was placed on medical leave by her medical provider. . .". *Id.* (internal citations and quotations omitted). Following completion of her medical leave, the decision clearly stated that the plaintiff **resigned** and that did not seem to be in question. *Id.*

Thus, in *Moser* it was beyond dispute that Plaintiff resigned.[3] *Id.* at *1. Indeed, the *Moser* case dealt with the requirement that in a constructive discharge case, an employee is expected to take all reasonable steps necessary to remain employed and whether a court on summary judgment can conclude the plaintiff had not. *Id.* at *4. The *Moser* case cannot be read to dispel of the need of a plaintiff to consider herself or himself as being forced to resign.

As stated by the Appellate Division in the case of *Zubrycky v. ASA Apple, Inc.*, 381 N.J. Super. 162, 166 (2005), another case cited by Plaintiff in her brief, "For purposes of the laws against discriminatory or retaliatory discharge, an employee is expected to take all reasonable steps necessary to remain employed." *Id.* Here, Plaintiff's testimony established that she did not take all reasonable steps necessary to remain employed. Plaintiff cannot be said to have been presented with a Hobson's choice by Ms. LaBattaglia. Plaintiff testified at trial that although Ms. LaBattaglia texted that she would have to accept Plaintiff's official resignation, Plaintiff called Ms. LaBattaglia and told Ms. LaBattaglia she was not resigning and would be

[3] For example, the *Moser* case states as follows. "Plaintiff considered Leonard's statement to be a threat; ultimatum; and a 'Hobson's choice,' *i.e.,* either participate in her employer's scheme to violate LAD or resign." *Id.* (internal quotations omitted). "Following completion of her medical leave, plaintiff resigned." *Id.* "Rather, it was her employer's repeated insistence, in the face of plaintiff's objections, that she engage in actions she reasonably believed were in violation of LAD leading up to, and in conjunction with, the comment that induced plaintiff to resign." *Id.*

following her doctor's orders.

Additionally, in this case, contrary to *Moser*, where no company representative reached out to the plaintiff, it is undisputed that both Messrs. Frorian and Wullinger reached out to Plaintiff. Both gentlemen still believed Plaintiff was employed. Plaintiff testified that she did not respond to Derek Frorian's request for information although he thought Plaintiff was still employed by Hamilton Park. She also did not reply to a letter sent by the Administrator of Alaris at Hamilton Park, Yosef Wulliger, stating she remained an active employee on the staff roster and the facility has immediate CNA position work ready for plaintiff to return to help care for our residents and expected her return to work. (Pa151.) In Plaintiff's own words at trial, "I was fired" by the time she received Mr. Frioran's April 16, 2020 email. Thus, Plaintiff's testimony clearly established that she did not take all reasonable steps necessary to remain employed which would not be consistent with a constructive discharge claim.

The New Jersey Supreme Court has made it clear that a party should not be allowed to present a new theory mid-trial that is totally at variance with pretrial discovery and the evidence that the party previously presented at trial. *See Lynch v. Galler Seven-up Premix Corp.*, 74 N.J. 146 (1977). In the *Lynch* case, a pressurized soda canister exploded injuring the plaintiff. *Id.* at 148. The plaintiff's theory during discovery and initially at trial was that the cap on the canister was the wrong size.

Id. at 149. During Defendant's presentation of evidence, Plaintiff's theory of liability had been weakened and rebutted. *Id.* Plaintiff then sought to explore a new explanation for the explosion during the cross examination of defendant's expert. *Id.* The trial court, which was affirmed on appeal, did not allow Plaintiff to cross examine defendant's expert regarding the new theory of the case. *Id.* at 150. As seen in the *Lynch* case, Plaintiff cannot rely upon Defendants' evidence to raise a new theory of the case after her case was rebutted. The New Jersey Supreme Court found that "[t]he theory proffered by plaintiffs was totally inconsistent with the prior testimony and the written report of its expert which had been received in evidence . . ." and that "a contrary ruling by the court would have redounded to the prejudice of defendants." *Id.* at 151.

Likewise, the N.J. Supreme Court in *Stewart v. New Jersey Turnpike Authority Garden State Parkway*, 249 N.J. 642, 657-58 (2022) found that a new theory should not be considered at the summary judgment stage. The Supreme Court explained:

> Defendants could not reasonably anticipate that the Stewarts were going to change their theory of liability given that they failed to mention anything regarding the pavement in their complaint or throughout the 757 days of discovery . . . . We do not suggest that parties cannot revise their theories throughout the litigation process. But a change in theory as fundamental and belated as the one here cannot be countenanced.

Id. (internal citations omitted). *Accord New Mea Const. Corp. v. Harper*, 203 N.J. Super. 486, 492 (App. Div. (1985) (upholding denial of motion to amend where

"defendants had numerous opportunities to amend the negligence and breach of contract counts to specifically include Ashworth, either when granted leave to file the amended counterclaim or during the twelve days of actual trial."). Like the *Stewart* case where pavement was not mentioned in the complaint, here, resignation; April 27, 2020; or the Administrator's letter were not mentioned in the complaints.

In the cases Plaintiff cites, the court looked at the plaintiff's presentation of evidence to see if he or she had asserted the claim. Here, Plaintiff's presentation of evidence did not support charging the jury on constructive discharge.

2. THE JURY WAS CORRECTLY CHARGED WITH THE LEGAL PRINCIPLES APPLICABLE TO THE CASE. (7T 90:21-91:23; Pa7-12.)

Contrary to what Plaintiff would like to believe, the law is clear that a party is "not entitled to have the jury charged in words of her own choosing." *Rendine,* 276 N.J.Super. at 431. Here, Plaintiff's counsel wanted to charge the jury on legal principles that were incorrect and not even applicable to the case at hand. Claiming constructive discharge is nothing more than the last-minute argument of counsel, not even believed or advanced by Plaintiff herself or her counsel in the beginning of the case.

The New Jersey Supreme Court has not opined that imposing a LAD analysis on CEPA claims is improper. Plaintiff's reliance on *Donelson v. DuPont Chambers Works,* 206 N.J. 243, 254 (2011) is misplaced as the case's holding is limited to the

issue of damages as expressed by the New Jersey Supreme Court itself. In *Donelson*, the Appellate Division reversed and entered judgment in favor of Dupont concluding that the plaintiff could not prevail on a lost wage claim under CEPA unless he proved an actual or constructive discharge. *Id.* at 253. The New Jersey Supreme Court reversed the Appellate Division. *Id.* at 263. The **limited** question presented in the case according to the New Jersey Supreme Court was "whether, under CEPA, an employee who becomes the victim of employer retaliation for engaging in statutorily protected whistle-blowing activities and who becomes psychologically disabled due to that retaliation can pursue a lost-wage claim without having to prove a constructive discharge." *Id.* at 254-55. Thus, the *Donelson* case did not deal with whether a retaliatory action had occurred and the standard to be applied in a constructive discharge claim.

The *Donelson* court found that "[i]t is enough for us to decide the case before us based on the controlling statutory language in CEPA without resolving different scenarios that might arise under LAD." *Id.* at 262. The *Donelson* court also found that LAD case law was not necessarily different and left that to be decided another day. *Id.* Specifically, the Supreme Court held that "[w]e need not decide here whether, under the anti-retaliation provisions of LAD, a plaintiff can proceed with a lost-wage claim when an employer's misconduct causes a mental-illness-induced retirement." *Id.* Thus, it is simply disingenuous for Plaintiff to state that *Donelson*

stands for the proposition that a lesser standard applies to prove constructive discharge in a CEPA case, as not only is that not *Donelson's* holding, but it also stands contrary to governing case law.

It is equally disingenuous to claim that the Trial Judge wrongly relied on the law of *Kluczyk v. Tropicana Products, Inc.*, 368 N.J. Super. 479 (2004) when Plaintiff in her brief relies on this very case to set forth the standard for constructive discharge, albeit selectively quoting the case. Plaintiff contends, "[s]imply, as Kluczyk and other appellate decisions evince, a constructive discharge claim arises when an employee 'leaves the workplace' because the 'employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.' " (Plaintiff's Br. 40.) Plaintiff then ignores the very next line in *Kluczyk* which states and upon which the Trial Judge relied:

> [C]onstructive discharge requires not merely "severe or pervasive" conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. More precisely, the standard envisions a "sense of outrageous, coercive and unconscionable requirements." Simply put, a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim.

Kluczyk, 368 N.J. Super. at 493 (quoting *Shepherd v. Hunterdon Center*, 174 N.J. 11, 28 (2002)) (internal citations omitted).

Here, Plaintiff states, "this case has nothing to with LAD and it certainly has nothing to do with harassment. It follows that there was no 'severe or pervasive' harassment in this case - because there was no harassment." (Plaintiff's Br. 21.) Thus, such an admission is fatal to Plaintiff's argument as the *Kluczyk* case makes it clear that what plaintiff seeks to rely on is the argument in support of a retaliatory discharge in violation of the LAD. The *Kluczyk* court explained when comparing a constructive discharge claim to a LAD retaliatory discharge claim: "On the other hand, a retaliatory discharge in violation of the LAD can occur even if there was no underlying unlawful harassment." *Id.* at 493.

In the case of *Zubrycky v. ASA Apple, Inc.*, 381 N.J.Super. 162, 166 (App. Div. 2005), yet another case cited by Plaintiff, the Appellate Division stated:

> In contrast [to a hostile work environment claim], constructive discharge requires not merely "severe or pervasive" conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. More precisely, the standard envisions a "sense of outrageous, coercive, and unconscionable requirements." Simply put, a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim.
>
> **The same analytical framework applies to a CEPA claim**, because CEPA is an anti-discrimination statute.
>
> (internal citations omitted) (emphasis added).

The *Zubrycky* case remains good law and is not considered reversed by the *Donelson* case. *Accord Molnar v. State, Div. of State Police,* No. A-3278-10T3,

2013 WL 764639 at *8 (App. Div. Mar. 1, 2013) ("[C] onstructive discharge [under CEPA] requires not merely severe or pervasive conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it . . . . More precisely, the standard envisions a sense of outrageous, coercive and unconscionable requirements."); *Noto v. Skylands Community Bank*, No. A-0322-04T3, 2005 WL 2362491 at *5 (App. Div. Sept. 28, 2005) (CEPA case stating: "[a] constructive discharge occurs when 'the employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.' " (internal citations omitted)); *Cook v. Prime Healthcare Services – St. Clare's, LLC*, No. A-2264-18T2, 2020 WL 3494375 at *3 (App. Div. June 29, 2020) (same); *Comet Management Company, LLC v. Wooten,* No. A-1892-17T1, 2020 WL 897973 at *8 (App. Div. Feb. 25, 2020) (noting, where employee relied on the same conduct to support the employee's LAD counterclaim as that which supported the employee's CEPA counterclaim, "[i]t is beyond dispute that the framework for proving a CEPA claim follows that of a LAD claim . . .".) (internal citations omitted).

Plaintiff also cites *Toto v. Princeton Township*, 404 N.J. Super. 604 (App. Div. 2009) to support her misguided argument that "a constructive discharge claim arises when an employee 'leaves the workplace' because the 'employer knowingly permit[s] conditions of discrimination in employment so intolerable that a person

subject to them would resign." First, on the one hand, Plaintiff argues that a discrimination standard should not apply in this case and concedes that Plaintiff did not suffer any harassment, yet quotes *Toto* which refers to conditions of discrimination. Notwithstanding, in *Toto*, 404 N.J. Super. at 614-15, the Appellate Division actually found that although Plaintiff asserted a hostile work environment cause of action, this did not include a constructive discharge claim.

In **rejecting** the plaintiff's attempt to raise a constructive discharge claim, the Appellate Division explained:

> to the extent plaintiff seeks termination benefits because he could not return to work due to the hostile work environment, he is alleging a constructive discharge claim. A constructive discharge claim arises when an employee leaves the workplace because the " 'employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.' " A constructive discharge claim is more difficult to prove than a hostile work environment claim since "a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim." **Plaintiff has not asserted a constructive discharge claim in this lawsuit and may not now assert one merely by giving it another name.**

Id. at 615. (internal citations omitted) (emphasis added).

The proofs needed to establish a constructive discharge are different and harder than proving an actual termination. *Id.* Thus, the Trial Judge was correct in not allowing Plaintiff a constructive discharge claim by an *ad hoc* assertion that it was the reason she did not return to work or that it was a manner or theory to prove

one element of Plaintiff's CEPA claim. To do such would be to allow Plaintiff to reformulate claims through arguments not previously pled or asserted throughout this lawsuit, a mechanism which the Appellate Division rejected.

The Appellate Division has not changed this interpretation as Plaintiff is well aware. Plaintiff provided the Trial Judge with a copy of the case of *Moser v. The Streamwood Company*, No. A-1703-21, 2023 WL 4502288 (App. Div. July 13, 2023) when she requested a constructive discharge instruction. Plaintiff's counsel specifically stated: "I think the attached case explains why constructive discharge is appropriate here even though Plaintiff testified, she would've come back to work." (Pa250.)

In the *Moser* case, the Appellate Division stated:

> Our Supreme Court has held that, for purposes of a CEPA violation, "[a] discharge encompasses not just an actual termination from an employment, but a constructive discharge." "A constructive discharge occurs when the employer has imposed upon an employee working conditions 'so intolerable that a reasonable person subject to them would resign.' " However, "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action.' " In fact, we have held that "[t]he phrase 'intolerable conditions' conveys a sense of outrageous, coercive[,] and unconscionable requirements.". Moreover, "[f]or purposes of ... retaliatory discharge, an employee is expected to take all reasonable steps necessary to remain employed."
>
> *Moser*, 2023 WL 4502288, at *4 (internal citations omitted).

Given Plaintiff's representation to the Trial Judge that the *Moser* case shows why the constructive discharge charge was appropriate coupled with the fact that Plaintiff is her brief relies upon *Kluczyk*, *Zubrycky*, and *Toto*, it is bad faith for Plaintiff to now claim that the standard *Moser* and *Kluczyk* used and the Trial Judge applied is inapplicable. Indeed, *N.J.Ct. R. RPC* 3.3 requires candor to this tribunal which Plaintiff has arguably failed to apply.

Clearly, the Trial Judge did not apply an incorrect standard when it found there was no constructive discharge to warrant charging the jury.

3. THE TRIAL JUDGE CORRECTLY DENIED PLAINTIFF'S MOTION FOR A NEW TRIAL. (Pa7-12; 10T 13:8-12, 60:15-18, 65:1-10, 69:2-8.)

It is well established that a jury's verdict "is entitled to very considerable respect." *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 597 (1977). As this Court has instructed, "[o]nly with reluctance and . . . in cases of clear injustice" to correct clear error or mistake by a jury should the court set aside a jury verdict. *Crego v. Carp,* 295 N.J. Super. 565, 577 (App. Div. 1996); *Presson v. Minoff,* No. A-4285-05T5, 2007 WL 1610154, at *5 (App. Div. June 6, 2007).

In the Decision, the Court cited to *Rule* 4:49-1. *Rule* 4:49-1(a) is clear. A trial judge shall only grant a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." *R.* 4:49-1(a). The

standard set forth in *Rule* 4:49-1(a) is high. *Crego v. Carp*, 295 N.J. Super. 565, 578 (App. Div. 1996).

The role of the Appellate Division in reviewing a denied motion for a new trial is to uphold the decision and verdict in the lower court unless there is a clear miscarriage of justice, with due deference to the trial court's "feel of the case." *See Presson,* 2007 WL 1610154, at *6. An appellate court only can reverse a trial judge's decision to deny a motion for new trial where it "clearly appears that there was a miscarriage of justice under the law." New Jersey Court Rule, 2:10-1. That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford due deference to the trial court's 'feel of the case," witness credibility, demeanor and other intangible criteria. *Dolson v. Anastasia,* 55 N.J. 2, 67 (1969).

There are no grounds to disturb this jury's verdict. Once again, Plaintiff makes arguments that are simply not true. The Trial Judge did not rest the Opinion solely on Plaintiff's testimony that she was fired and because she never affirmatively resigned. Nor did the Trial Judge change her reasoning from what she applied at trial. The Opinion specifically stated "with respect to intolerable conditions, Plaintiff also failed to establish conditions were so horrible that she was resigning instead of going back to them." (Pa12.) The Trial Judge also took a look at what was presented at trial "in its entirety." This included not only the fact that Plaintiff

did not offer an expert to establish a connection between her mental health condition and her employment but also Plaintiff's testimony that if LaBattaglia had accepted her first doctor's note she would still be employed by Defendants in response to her attorneys' own questioning and Plaintiff testifying 25 times that she was fired, that she did not quit, and she did not resign did not support notions of constructive discharge and was in fact contrary to any argument that Plaintiff resigned.

Plaintiff does not agree with the verdict and believed that she was terminated contrary to what her counsel now wishes to argue, but raises nothing shocking to the conscious nor does she raise anything showing clear error of the Court or anything manifestly unjust about that verdict that requires this Court to exercise its power to nullify the decision of the jury.

C. Judicial Estoppel Precludes Plaintiff's Argument. (Pa7-12.)

Here, there was no error in the charge to the jury that would have caused an unjust result or substantial injustice. The Court did not err when it found that Defendants would be prejudiced at this late stage if a constructive discharge claim was allowed. As stated in the Opinion, "Defendants argue that Plaintiff is estopped from now arguing she was constructively discharged when it was always previously argued she was fired." (Pa9.)

Although Plaintiff argues that the Trial Judge's actions were the equivalent of a directed verdict, the jury could not have concluded that Plaintiff would have been

justified in resigning on April 27, 2020. Since Plaintiff never testified that she resigned on April 27th or on any date and a finding that Plaintiff resigned on April 27th would be against the weight of the evidence. In addition, Defendants, even if Plaintiff could arguably have prevailed, would have been entitled to a judgment notwithstanding the verdict.

Plaintiff cannot make an argument that the separation date was actually April 27th and not April 3rd. Such an argument would be inconsistent with the position Plaintiff has successfully advanced in prior motion practice, and she would be judicially estopped from doing so now. In the case of *Cummings v. Bahr*, 295 N.J.Super. 374, 384-85 (App. Div. 1996), the Appellate Division stated as follows when it determined that the plaintiff was judicially estopped from arguing invitee status when "plaintiff's counsel, an associate, discussed the matter with a senior partner in the same law firm . . ." and only then the "plaintiff's counsel concluded that plaintiff was an invitee." *Id.*

> We also conclude that plaintiff's attempt to argue invitee status is barred by judicial estoppel. The doctrine of judicial estoppel operates to "bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted." . . .
>
> This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation.

> Although judicial estoppel most often arises when a party takes inconsistent positions in different litigation… it can be equally applicable where a litigant asserts inconsistent legal positions in different proceedings in the same litigation . . . .
>
> Thus, we conclude that a position has been "successfully asserted" if it has helped form the basis of a judicial determination. The judicial determination does not have to be in favor of the party making the assertion. If a court has based a final decision, even in part, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position.

Id. at 385-88 (internal quotations and citations omitted); see also, *Connell v. National Retail Systems*, No. A-094-18T2, 2020 WL 2988873 at *6 (App. Div. June 4, 2020) (plaintiff judicially estopped from "relying on her new view of the agreement," where the position taken on appeal contradicts her position on summary judgment where she contends the agreement was binding and valid); *Mastin v. 74-76 & 78-80 Carmer Ave. Associates, LLC*, No. A-5196-17T1**,** 2019 WL 4230696 at *3 (App. Div. Sept. 6, 2019) (third party defendant judicially estopped from claiming he alone maintained and operated the properties when he had previously filed certifications that he had no legal ownership interest).

As explained by the Third Circuit in the case of *Danise v. Saxon Mortgage Services Inc*., 738 Fed. Appx. 47, 50 (3rd Cir. 2018):

> Judicial estoppel, sometimes called the "doctrine against the assertion of inconsistent positions," is a judge-made doctrine that bars a litigant from asserting a position that is inconsistent with one he or she previously took before a court or agency. It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from

> playing fast and loose with the courts. The basic principle . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.

Id. (internal citations and quotations omitted).

Previously, in opposition to two summary judgment motions and a motion for reconsideration, Plaintiff argued that although a termination *in process* can be rescinded and the harm be considered nullified, **a *completed* termination cannot be rescinded**. Plaintiff claimed that Plaintiff's employment was terminated on April 3, 2020, it was a completed termination, and it could not be rescinded. (Da9.) The Court accepted Plaintiff's argument and Defendant's summary judgment motions and reconsideration motion were denied. (Pa6.)

Plaintiff also argued in opposition to two summary judgment motions and a motion for reconsideration, that on **April 27, 2020**, when AHP's Administrator wrote a letter to Plaintiff stating that she remained "an active employee on our staff roster," that he hoped the "letter clarifie[d] any misperceptions that you may have made," and that AHP anticipated Plaintiff's "return back to work on May [16, 2020.]" it was an unconditional offer of reinstatement and did not rescind the termination. According to the oppositions, **all that an offer of re-employment can do, concerning a wrongful discharge claim, is potentially mitigate the damages owed to the terminated employee**. (Da10, 17.) Plaintiff cited to *New Jersey Model Jury Charge* 2.33. (Da10-11, 17.) This jury charge would be used at trial. (*See* 9T

233:6-236:25.) Thus, Plaintiff successfully advanced her position and the April 27th date was to be considered the date when Plaintiff received an unconditional offer of reinstatement for purposes of whether Plaintiff mitigated her damages. (9T:236:17-25; Pa151.)

Plaintiff therefore cannot now claim that the April 27, 2020 letter was not an offer of reinstatement since she had not been terminated. This would be inconsistent with the arguments she successfully argued in opposition to two summary judgment motions, a reconsideration motion, and the charge she submitted. It would also be inconsistent with the verdict sheet to which she agreed (*i.e.*, the termination occurred on April 3rd). (Pa98-99.)

Plaintiff is judicially estopped from now claiming her employment was not separated on April 3rd but rather April 27th.

CONCLUSION

For the aforementioned reasons, the Appeal should be denied.

Respectfully submitted,

JASINSKI, P.C.

s/ David F. Jasinski

DAVID F. JASINSKI

Date: December 18, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-002855-23

LADAWN CHAPMAN, *Plaintiff-Appellant,* vs. ALARIS HEALTH, LLC, ALARIS HEALTH AT HAMILTON PARK, AND JOHN DOES 1-10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No.: HUD-L-1583-20 Sat Below: HON. JANE L. WEINER, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

MATSIKOUDIS & FANCIULLO, LLC
Attorneys for Plaintiff-Appellant
128 Monticello Avenue, Suite 1
Jersey City, New Jersey 07304
(201) 915-0407
bmatsikoudis@mf-legal.com

On the Brief:
WILLIAM C. MATSIKOUDIS, ESQ.
Attorney ID# 022391997

Date Submitted: January 15, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (335703)

TABLE OF CONTENTS

Page

TABLE OF JUDGMENT, ORDERS AND RULING BEING APPEALED

Page

TABLE OF TRANSCRIPTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Defendants repeatedly argue points that the Plaintiff herself made in her Appellate Brief: Plaintiff always asserted that she was terminated, or fired, and that she never affirmatively resigned or said she quit her job, but why their ultimate argument fails, and why the Trial Court decision to deny Plaintiff's Motion for a New Trial should be overturned, is because a plaintiff seeking to recover for a claim under the Conscientious Employee Protection Act ("CEPA") pursuant to a theory of constructive discharge does not have to choose between asserting termination or constructive discharge, but can assert both theories simultaneously, nor does CEPA require a plaintiff to affirmatively communicate a resignation as opposed to alternatively abandoning a job. Similarly, there is no requirement that a plaintiff spell out every theory of adverse job action in her CEPA complaint.

If the court were to hold that a Plaintiff seeking to recover under a theory of constructive discharge pursuant to CEPA: (1) cannot simultaneously allege that she was terminated; (2) must affirmatively resign, as opposed to abandoning her job; and (3) must specifically state or plead constructive discharge, to recover, it would mark a deviation from established case law, as argued infra, but also mark a new illiberal construction to CEPA. But the court is mandated to take a liberal approach to CEPA, and that should be particularly true here,

where the jury found that Plaintiff had an objectively reasonable belief that Defendants tried to force her to engage in actions that were against the law and public policy regarding public health and that constituted the improper quality of patient care. The evidence at trial set forth the possible scenario whereby Defendants never completed the official termination of Plaintiff after her call with the Director of Nursing of Defendant Alaris at Hamilton Park nursing home ("AHP") on April 3, 2020, which meant she was still an employee when the AHP administrator wrote Plaintiff on April 27, 2020, to clear up Plaintiff's "misperceptions" about being fired and that Defendants anticipated Plaintiff's return to work. Since the jury agreed that Plaintiff was not terminated and was therefore still an employee on April 27, 2020, the jury should have been given the opportunity to decide whether Plaintiff was constructively discharged when she refused to return to work after AHP's administrator told Plaintiff that she was still employed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff relies on her statement of Facts and Procedural History from her opening brief.[1]

[1] The factual background developed at trial and procedural history of this matter are intertwined and were thus presented together.

ARGUMENT

A. BOTH CEPA AND NEW JERSEY JURISPRUDECNE CONCERNING THE CONSTRUCTION OF PLEADINGS MANDATE THAT PLAINTIFF'S AMENDED COMPLAINT WAS ADEQUATE TO PURSUE A THEORY OF CONSTRUCTIVE DISCHARGE (Pa10)

"CEPA must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social goal." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). "Remedial acts will be construed to give the words used the most extensive meaning to which they are reasonably susceptible." Metpark, Inc. v. Kensharper, 206 N.J. Super. 151, 156 (Law. Div. 1985).

The mandate to construe CEPA liberally is buttressed by the court rule concerning the construction of pleadings: "[e]ach allegation of a pleading shall be simple, concise and direct," and that "[a]ll pleadings shall be liberally construed in the interest of justice." R. 4:5-7. Defendants' reliance on Bauer v. Nesbitt, 198 N.J. 601 (2009), is misplaced as Bauer sought to recover under a statute, the Dram Shop Act, not plead or referenced in the complaint. Here the Plaintiff alleged she was retaliated against for engaging in protected conduct pursuant to CEPA. Other jurisdictions have ruled that "constructive discharge is not its own cause of action. . .." Haskenhoff v. Homeland Energy Sols., LLC, 897 N.W.2d 553, 591 (Iowa 2017) see also; Einess v. Tresco, Inc., 44 F. Supp. 3d 1082, 1094 (D.N.M.

2014); Owens-Hart v. Howard Univ., 220 F. Supp. 3d 81, 97 (D.D.C. 2016) Sullivan v. St. Joseph's Rehab. & Residence, 2016 ME 107, ¶ 16, 143 A.3d 1283, 1288 (2016)[2]. Accordingly, the Defendants are wrong and the Trial Court erred when it opined that "while constructive discharge can be a form of wrongful termination/adverse employment action, it must be pled . . .." (Pa10).

B. IF THIS COURT FINDS THAT PLAINTIFF'S AMENDED COMPLAINT WAS INSUFFICIENT TO SUSTAIN A CLAIM FOR CONSTRUCTIVE DISCHARGE, THE TRIAL COURT'S FAILURE TO AMEND THE PLEADINGS AT TRIAL TO COMPORT TO THE EVIDENCE WAS AN ABUSE OF DISCRETION WARRANTING THE REVERSAL OF THE DECISION NOT TO GRANT A NEW TRIAL (Pa11-Pa12)

Defendants begin their argument by stating that the Trial Court did not abuse its discretion by refusing to amend the pleadings to allow the jury to consider constructive discharge. This point is moot if this court finds that the Plaintiff's Amended Complaint was adequate to sustain a claim for constructive discharge in the first place. Moreover, since the Trial Court's decision at trial had nothing to do with Plaintiff's supposedly deficient pleading, but the Trial Court only adopted such a rationale in the opinion denying Plaintiff's Motion

[2] Defendants' citation to Toto v. Princeton Twp., 404 N.J. Super. 604 (App. Div. 2009) seemingly to try to paint the opinion as requiring that constructive discharge be pled is unavailing, as this was simply not the issue being decided where plaintiff *never* asserted constructive discharge, but tried to obtain similar relief, while never claiming it was for constructive discharge.

for a New Trial ("the Opinion"), the Appellate Division should also order a new trial if it finds the Trial Court's rationale for the initial decision not to include constructive discharge in the jury charge flawed.

Defendants rely on an opinion from 1933, several decades before the relevant court rule was promulgated[3], that held an "amendment to pleadings is within the discretion of the court, unless, of course, there is an abuse of discretion, . . ." Robert Allen, Inc. v. Spring St. Realty Co., 111 N.J.L. 88, 92, 166 A. 199, 200 (1933). Yet, while cases of a more recent vintage confirm that the Trial Court has the discretion to amend the pleadings to conform to evidence, such discretion not to amend the pleadings should be based upon prejudice to the opposing party. Rivera v. Gerner, 89 N.J. 526, 536 (1982); Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 254 N.J. Super. 380, 386–87 (App. Div. 1992).

The text of R. 4:9-2 mandates the trial judge to amend the pleadings if there is no prejudice: "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and ***shall do so freely*** when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be

[3] PRESSLER & VERNIERO, Current N.J. COURT RULES, R. 4:9-2, HISTORY AND ANALYSIS OF RULE AMENDMENTS, noting the text of the rule was promulgated in 1969.

prejudicial in maintaining the action or defense upon the merits." Ibid. (emphasis added). As the current comment to the Court Rules state "the trial court's broad discretion to permit amendment to conform to the evidence is ***required*** to be liberally exercised." PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment 1, R. 4:9-2 (emphasis added). Furthermore, "a 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory." Teilhaber v. Greene, 320 N.J. Super. 453, 466 (App. Div. 1999).

Here the ***Trial Court recognized*** at trial and during the charge conference that there was no prejudice because issues related to constructive discharge were thoroughly litigated throughout the trial because a key issue in the case, at least as it related to mitigation of damages, was whether Plaintiff was justified in not returning to work after the Administrator of AHP notified her on April 27, 2020 that (1) Plaintiff had misperceptions about being terminated; (2) Plaintiff could return to the exact same job; and (3) Defendants expected Plaintiff to return to work. The Trial Court clearly recognized that there was zero prejudice to Defendants: "I know it wasn't in the pleadings, but it's really -- it has been elicited throughout the course of the trial that, you know, she couldn't return for X, Y, and Z reasons. What's the prejudice if it were to be included?" (7T 55:8-13).

Based upon this correct observation of the judge, the concept of prejudice to the Defendants here is simply impossible. See, 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561, fn1 (Law. Div. 1976), aff'd, 150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977): "The partnership or joint venture theory was not advanced in the pleadings or pretrial order; it was fully aired at trial, however, and in post-trial briefs and is therefore properly resorted to in determining the issues. R. 4:9-2".

The Trial Court flipped on the issue of prejudice in the Opinion denying a New Trial, but in a wholly conclusory fashion and on a demonstrably erroneous, and therefore impermissible basis:

> Throughout the trial, the only assertion by Plaintiff was that she was fired on April 3. It was not until the testimony was complete, during the charge conference, that the notion of constructive discharge was raised for the first time. If anything, including such a charge would have been a miscarriage of justice for the defense who were not on notice and did not have a proper opportunity to question witnesses about, or defend against, it.

(Pa12).

First, Plaintiff has never changed her position that she was terminated on a call with AHP's Director of Nursing on April 3, 2020, but she also testified that after she received AHP's April 27 letter she knew she could go back to the exact same job that she had, and then testified as to why she would not multiple times. (1T 151:4-152:17). Indeed, regarding April 27, the Trial Court acknowledged Plaintiff's "testimony in which Plaintiff said she said she did not return to work on that date because of how Defendants treated her and because of the working

conditions." (Pa11). Moreover, Defendants' counsel questioned Plaintiff at length as to her refusal to report back to work after the April 27th letter. (See, 3T 68:19-72:9). Finally, Defendants reiterate the Trial Court's patently erroneous statement in the Opinion that Plaintiff raised constructive discharge for the first time after testimony was complete' (Pa12) and (Def. Br. at 22). This assertion is ***irrefutably false***, as Plaintiff pointed out in her initial brief (at page 48), because the Plaintiff emailed the Trial Court and the Defendants a draft jury charge that contained Plaintiff's proposed language regarding constructive discharge before trial started on the morning of February 12, 2024 - i.e., the third day of a five-day trial, and while Plaintiff was still presenting her case in chief and witnesses and *before* Defendants started their case in chief. (Pa248, Pa171 and 5T, generally). Multiple witnesses testified, deposition readings occurred and Defendants presented their entire case *after* Plaintiff submitted her proposed jury charge constructive discharge language. (5T through 8T).

An "abuse of discretion" arises when "a decision is made without a rational rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Customers Bank v. Reitnour Inv. Properties, LP, 453 N.J. Super. 338, 348, (App. Div. 2018) citing Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571, (2002). Because the Trial Court decision not to amend the pleadings to conform to the evidence was based upon (1) the misunderstanding of law that

Plaintiff asserting she was terminated foreclosed her from asserting a constructive discharge claim (argued further infra), (2) the absolute falsehood that Defendants were prejudiced in any way since the Defendants questioned Plaintiff on the relevant factual issues as the Trial Court itself recognized during trial, and (3) the Trial Court's erroneous belief that the Plaintiff belatedly sought to have constructive discharge added to the jury charge after testimony concluded, the trial court clearly abused its discretion in deciding not to amend the pleadings to conform to the evidence because the Opinion was founded on a wholly erroneous and therefore impermissible basis.

C. DEFENDANTS DOUBLE DOWN ON THE TRIAL COURT'S LEGAL ERRORS TO ARGUE THAT THE EVIDENCE AT TRIAL DID NOT WARRANT ADDING CONSTRUCTIVE DISCHARGE TO THE JURY CHARGE (7T 90:21-91:23) (Pa11-Pa12)

It is indisputable that on April 3, 2020, after Plaintiff's sent AHP a note from her doctor advising Plaintiff to self-quarantine and take off from work due to possible exposure to a COVID patient (Pa397) that AHP's Director of Nursing texted Plaintiff that she could not accept the note and if Plaintiff did not call her back she would "have to accept [Plaintiff's] official resignation." (Pa100). The jury concluded that the Plaintiff reasonably believed that "Defendants insistence that she report to work on April 3, 2020 constituted the improper quality of patient care" and "was violative of either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy." (Pa98). This text message

from the AHP Director of Nursing for Plaintiff to either follow her doctor's direction and protect her patients, or resign was a Hobson's Choice, sufficient to create the egregious and intolerable working conditions to constitute of constructive discharge. In Moser v. Streamwood Co., 2023 WL 4502288 (App. Div. July 13, 2023) (Pa154-Pa157), the Plaintiff refused to go along with her boss' directive to engage in what she believed was discriminatory acts against tenants in violation of the Law Against Discrimination ("LAD") and the boss told her "things don't look good for you" which Plaintiff considered "to be a threat; ultimatum; and 'Hobson's Choice'—i.e., either participate in her employer's scheme to violate LAD or resign." In Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 167 (App. Div. 2005), the Appellate Division determined that the facts in that case do not warrant "exploring whether such a 'Hobson's choice' could in some circumstances be deemed a constructive discharge." Here, the Trial Court never considered or addressed the concept of the Hobson's Choice in holding that there was no evidence for the jury to conclude there was a constructive discharge on April 3[4](Pa11) presumably because the Trial Judge found no semblance of an affirmative

[4] Defendants misrepresent that Plaintiff argues "the Opinion did not in any way state that Plaintiff failed to produce adequate evidence to show that there were intolerable working conditions" (Def. Br. at 36) which Plaintiff argued only with regard to the Trial Court's Opinion regarding April 27. The Defendants' quote from the Opinion that "Plaintiff also failed to establish that the conditions were so horrible that she was resigning . . ." (Pa12) was clearly not speaking to evidence regarding the working conditions but a lack of evidence that Plaintiff "resigned."

resignation on April 3, 2020. We urge the Appellate Division to consider a Hobson's choice as means for constructive discharge, as it did in Moser, and conclude that April 3 text message was sufficient evidence to warrant a charge of constructive discharge.

With regard to April 27, 2020 there is no dispute that, after Plaintiff filed her initial complaint, that AHP's Administrator sent Plaintiff a letter stating, among other things,: "[y]ou remain an active employee"' "the facility has immediate CNA position work ready for you"; "I hope that this letter clarifies any misperceptions" and that AHP anticipated Plaintiff's "return back to work on May 16th" (Pa151). It is equally indisputable that Plaintiff testified on direct that she agreed that "could go back to your exact same job she had" (1T 151:8-12) and on cross examination that, based on the April 27 letter, Plaintiff believed that "she still had a job" at AHP. (3T 70:10-14). As the Trial Court stated, Plaintiff testified that she did not return to work because of the "working conditions." (Pa11; See also, 1T (1T 151:12-152:17)).

The Trial Court itself undoubtedly concluded that the evidence at trial was enough to satisfy a directed verdict threshold to prove intolerable work conditions because the Trial Court answered a similar question when denying a Defendants' Motion for a Directed Verdict to dismiss Plaintiff's front pay claim: "***a reasonable jury could find, based on the evidence as presented by the***

plaintiff and all the favorable inferences that could be drawn from them -- from it, that she was justified in not returning to work." (7T 25:1-11; 40:6-41:2). (emphasis added).

In arguing against the Motion for a Directed Verdict to dismiss Plaintiff's front pay claim, Plaintiff pointed out that the jury charge[5] gives limited guidance citing "special circumstance" but argued "I would submit that this is for a jury to determine whether a reasonable person underneath these circumstances would go back to work." (7T 26:4-7). This is essentially the constrictive discharge standard and some of the federal cases cited by Plaintiff in her argument for front pay (both sides recognized a lack of New Jersey precedent) also dealt with constructive discharge. (7T 25:15-26:25).

Underlying the jury's findings that Plaintiff had a reasonable belief that Defendants insistence that she report to work after she testified that she had multiple unmasked exposures to unmasked Covid positive patients was violative of law and/or public policy regarding public health, was the clear evidence that AHP did not allow staff to wear masks until March 26, 2020 and that AHP did not disclose the degree to which Covid had spread through AHP as of late March and early April 2020, which not only created the maskless exposures of the Plaintiff, but that also

[5] Plaintiff also pointed out that the constructive discharge language she proposed for the jury charge was drafted by counsel because the Model Jury Charge does not contain language for constructive discharge. (7T 54:5-15)

led to the sickness and death of Plaintiff's patients and her close coworker friend, and which contributed to Plaintiff's decision not to return to on April 27, 2020.[6] Yet, without a legal citation, Defendants argue that "for purposes of constructive discharge, it must be conduct directed to Plaintiff that mattered, and the conduct directed towards Plaintiff did not rise to an intolerable level." (Def. Br. at 28). This is not what the case law states, because it is the "working conditions" in their totality, both the unlawful conduct of the employer resisted by the plaintiff as well as the retaliatory action that are considered when determining working conditions. Thus, in Moser v. Streamwood Co., supra, the court held that it was not a "single comment" that "things don't look good for you," but also the employer's insistence that Plaintiff engage in actions she believed were in violation of LAD.

Yet Defendants double down on what apparently the Trial Court recognized was erroneous reasoning when it applied a LAD standard for constructive discharge arising out of sexual harassment, citing to Kulczyk v. Tropicana Prods., Inc., 368 N.J. Super. 479, 494 (App. Div. 2004), that held in such circumstances, the harassment must be more than the severe and pervasive harassment needed to establish a hostile work environment under sexual harassment theory, and the court did not cite to this case at all in the Opinion. To the extent

[6] The recitation and citation of these crucial facts are in Plaintiff's initial brief at pages 4-7.

Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162 (App. Div. 2005), can be construed to stand for the proposition that an analysis of a CEPA discharge claim and a LAD sexual harassment discharge claim are identical, then Zubrycky is absolutely not "good law" in light of Donelson v. DuPont Chambers Works, 206 N.J. 243 (2011). Regardless, Zubrycky dealt with utterly inapposite circumstances where the court did not find that the Plaintiff alleged that he was threatened with reprisal sufficient to create a "Hobson's choice," unlike the situation here.

D. PLAINTIFF'S ASSERTION THAT SHE WAS FIRED DOES NOT BAR HER CONSTRUCTIVE DISCHARGE CLAIM (Pa11-Pa12)

Defendants argue repeatedly throughout their brief that because Plaintiff's complaint, arguments on summary judgment and testimony at trial posit that she was fired, she is prohibited from making a constructive discharge claim, which is simply false. Defendants are also perplexed how, on one hand, Kulczyk v. Tropicana Prods., Inc., supra, was inappropriately applied by the Trial Court with regard to the standard for constructive discharge, but how it also provides other holdings concerning constructive discharge that are exactly on point for this case and which eviscerate the Defendants' and Trial Court's position that a plaintiff cannot simultaneously ask a jury to consider a termination and constructive discharge case.

But Kulczyk shows why the two key foundations of the Opinion and the Defendants' argument fail: (1) Plaintiff needed to affirmatively resign and (2)

Plaintiff cannot assert a constructive discharge simultaneously with claim she was terminated. In Kulczyk, the plaintiff "never formally resigned or quit his employment" and the court held that a plaintiff should be allowed to "proffer alternative theories of liability based on either a constructive or retaliatory discharge for presentation to a jury." Id at 494. There simply is no collateral estoppel here.

CONCLUSION

Plaintiff should not have been barred from presenting a constructive discharge claim to the jury because she did not articulate the theory in her complaint or because she believed she was fired, because she also realized she could return to her job, but refused, due to her working conditions. The jury should have been given the opportunity to decide whether Plaintiff proved that those working conditions were so intolerable and egregious as to constitute a constructive discharge, and denying the Plaintiff that opportunity was a miscarriage of justice. This Court should remand this case for a new trial solely limited to the issue of constructive discharge.

Respectfully submitted,

s/ WILLIAM C. MATSIKOUDIS
William C. Matsikoudis, Esq.