SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002936-23 T1

TODD STEPHANS,

Plaintiff-Appellant

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY,

Defendant-Respondent

CIVIL ACTION ON APPEAL FROM:

SUPERIOR COURT, LAW DIVISION - BERGEN COUNTY

Honorable David Nasta, J.S.C.
Sat below

APPELLANT'S BRIEF AND VOLUME I OF APPELLANT'S APPENDIX (PA1-PA200)

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Date: November 1, 2024

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PROCEDURAL HISTORY

Todd Stephans ("Plaintiff" or "Mr. Stephans"), originally filed his Complaint on April 10, 2019, in the Philadelphia County Court of Common Pleas, Philadelphia, PA, pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*. Pa67-Pa74. Specifically, Plaintiff alleged Defendant, New York, Susquehanna and Western Railway failed to provide him with a reasonably safe place to work as required under the FELA and that Defendant's negligence, in whole or in part, caused or contributed to his development of bladder cancer. *Id.* On July 1, 2019, Plaintiff and Defendant agreed to a Stipulation of Dismissal without prejudice on the condition that Plaintiff refile his complaint in New Jersey within sixty (60) days, and with the agreement that the statute of limitations would be deemed tolled as of the original filing date of Plaintiff complaint. Pa76. On August 29, 2019, Plaintiff refiled his complaint in the Superior Court of New Jersey, Bergen County, Law Division, which was within the sixty (60) day period established by the parties' stipulation. Pa3-Pa9. Defendant answered Plaintiff's complaint on April 5, 2021. Pa10-Pa17.

On May 27, 2022, Defendant filed a motion for summary judgment, arguing that Plaintiff's claims were not filed within the statute of limitations. Pa47-Pa66. On June 24, 2022, the court granted Defendant's motion for summary judgment in part and denied it in part. *Id.* Specifically, the court granted the Defendant's motion for summary judgment to the extent it related to "any injury which existed in 2014", but

denied the motion to the extent it related to any "aggravation of plaintiff's alleged injury/cancer within the period of the statute of limitations." Pa65-Pa66.

On July 13, 2022, Defendant filed a motion for reconsideration of the court's June 24, 2022, order on Defendant's motion for summary judgment. Pa119-141. On August 5, 2022, the court denied Defendant's motion to reconsider its June 24, 2022, order on Defendant's motion for summary judgment. *Id.*

On August 4, 2022, Plaintiff filed a motion to extend discovery and to amend his complaint, which the court granted on August 26, 2022. Pa87-Pa88. On September 6, 2022, Plaintiff filed his amended complaint. Pa18-Pa24. Defendants answered Plaintiff's amended complaint on September 7, 2022. Pa25-Pa30.

On April 5, 2023, Defendant filed a second motion for summary judgment. Pa33-Pa44. On June 9, 2023, the court granted Defendant's motion for summary judgment and dismissed Plaintiff's amended complaint with prejudice. Pa371, T1.

On June 22, 2023, Plaintiff filed a motion for reconsideration of the court's order granting Defendant's second motion for summary judgment. Pa364-Pa369. The court denied this motion on August 4, 2023, without prejudice and instructed Plaintiff to file another motion for reconsideration with a certification from Plaintiff's treating physician. Pa394-Pa396.

On January 18, 2024, Plaintiff refiled his motion for reconsideration of the court's order granting Defendant's second motion for summary judgment. Ca35-

Ca42. The court denied this motion on February 16, 2024, stating it was untimely under *R.* 4:49-2. Pa429-Pa430.

On March 21, 2024, Plaintiff filed a motion for relief from judgment regarding the court's order granting Defendant's second motion for summary judgment. Ca43-Ca51. The court denied this motion on April 12, 2024. Pa1-Pa2.

The present appeal was taken by the filing of a Notice of Appeal on May 24, 2024. Pa452-Pa456. A Court transcript request form pursuant to R. 2:5-3(a) was also attached to the Notice of Appeal. The transcript from the proceeding in this case is designated as follows:

T1 – Transcript of Oral Argument Held on June 9, 2023

STATEMENT OF FACTS

I. Todd Stephans' Claims

Mr. Todd Stephans worked for the Defendant New York, Susquehanna and Western Railway from 1994 to 1999 and 2004 through October 2021 as a car inspector and locomotive mechanic. Pa458-Pa461. During this time, he was exposed to excessive amounts of diesel exhaust, asbestos, and second hand smoke from diesel locomotives, cranes and from asbestos on the pipes in the railroad buildings and facilities. Pa152-Pa164, Pa330-Pa341. Mr. Stephans was first diagnosed with bladder cancer in May of 2014, and subsequently underwent treatment for his bladder cancer. Pa349. Mr. Stephans returned to work after his diagnosis and

treatment for bladder cancer, and continued to be exposed to diesel exhaust, asbestos and second hand smoke until October of 2021. Pa161-Pa164, Pa326-Pa328, Pa508-Pa511. After his initial diagnosis in May of 2014, Mr. Stephans' bladder cancer has reoccurred. Mr. Stephans' was diagnosed with a reoccurrence of his bladder cancer on the following dates: October 21, 2014, December 22, 2015, February 11, 2016, March 8, 2016, October 4, 2016, and on April 27, 2021. Ca28-Ca31.

II. Plaintiff's Experts' Testimony and Reports

Plaintiff retained Dr. Mark Levin, M.D., to establish medical causation in this action. Pa347-Pa362. Dr. Levin reviewed Plaintiff's medical records, and relied on the opinions of Plaintiff's other experts, including Plaintiff's Industrial Hygienist Hernando Perez, Ph.D., MPH, CIH, CSP, and Plaintiff's Environmental Risk Assessor Paul Rosenfeld, Ph.D., to understand the levels of diesel exhaust, asbestos and second hand smoke Plaintiff was exposed to while working for Defendant. *Id.* Based on his review of this evidence, and his application of the Bradford Hill criteria and a differential diagnosis of etiology to Plaintiff's bladder cancer, Dr. Levin opined:

> In my opinion, it was the combination of Todd Stephans' exposure to diesel exhaust, asbestos and second hand smoke at the railroad that caused or contributed to his development of bladder cancer. In my opinion, Mr. Stephans' continued exposure to diesel exhaust, asbestos and second hand smoke at the railroad after being diagnosed with bladder cancer increased his risk of reoccurring bladder cancer. In my opinion, his continued

> exposure to diesel exhaust, asbestos and second hand smoke at the railroad post diagnosis of bladder cancer increased his risk of dying as a result of bladder cancer.

Pa361.

III. The Lower Court's Ruling

As indicated above, on June 9, 2023, the trial court granted Defendant's second motion for summary judgment and dismissed Plaintiff's amended complaint with prejudice based on the court finding that, because it was undisputed that Plaintiff was currently cancer free, "there is no damage here that can be proved." Pa371, T1 28:17-18.

The court's ruling was premised on an earlier ruling by the court, from June 21, 2022, wherein the court partially granted Defendant's first motion for summary judgment based on a statute of limitations argument. T1 26-27. In that order, the trial court ruled that Plaintiff's claim for bladder cancer under the FELA was barred by the statue of limitations, because Plaintiff developed bladder cancer in May of 2014, and became aware of the causal connection between that cancer and his work for Defendant, but his complaint was not filed until April 10, 2019. Pa40-Pa60. As FELA claims must be filed within three years of the discovery of the injury and knowledge of the connection between those injuries and the negligence of the defendant, the court ruled that Plaintiff's FELA claims for his initial diagnosis of bladder cancer were time barred. *Id.* However, in its June 21, 2022, order, the court

allowed Plaintiff to amend his complaint to pursue FELA claims against Defendant for any aggravation of his bladder cancer that was caused within the three years prior to his filing of his complaint, citing the aggravation rule explained in *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 359 (3d Cir. 1986). *Id.*

When the trial court ruled on Defendant's second motion for summary judgment, it stated that Plaintiff's claims for his initial diagnosis for bladder cancer were time barred, according to the court's June 21, 2022, order. T1 26-28. The trial court also ruled that Plaintiff had failed to demonstrate a valid claim for aggravation under the FELA because his bladder cancer did not reoccur within the three years before he filed his complaint. T1 28:7-16. The court supported this ruling by stating that any aggravation claim must be based on a "reoccurrence of the cancer" and that "the plaintiff is cancer free. . . as a result, summary judgment is appropriate". T1 28:7-24. In its ruling, the court disagreed with Plaintiff's argument that he had a valid claim under the FELA for aggravation due to his increased risk of his bladder cancer reoccurring, and an increased risk of dying from bladder cancer, due to his exposures to toxic substances after he returned to work for Defendant after his bladder cancer diagnosis. *Id.*

On June 22, 2023, Plaintiff filed a motion for reconsideration of the court's order granting summary judgment on the grounds that the court's order was based on a mistake of fact: Specifically, that the evidence produced in discovery did show

that Plaintiff's bladder cancer did reoccur within the three-year period before he filed his complaint. Pa364-Pa369. In support of that motion, Plaintiff identified portions of Plaintiff's medical records that showed that his bladder cancer reoccurred several times after his initial diagnosis, including within the three-year period before Plaintiff filed his original complaint. *Id.* As this reoccurrence of his bladder cancer occurred within the three-year statute of limitations, Plaintiff argued it would be a valid basis for an aggravation claim according to the court's order granting Defendant's motion for summary judgment. *Id.*; T1 28:7-24.

On August 4, 2023, the trial court denied this order without prejudice on the grounds that Plaintiff's motion failed to include a certification from Plaintiff's treating physician "confirming whether Plaintiff in fact had a reoccurrence of new diagnosis of his bladder cancer after April 10, 2016." Pa395-Pa396. The court further ruled that Plaintiff could file another motion for reconsideration, but the motion should include such a certification. *Id.*

On January 8, 2024, Plaintiff refiled his motion for reconsideration and included a certification from Plaintiff's treating physician, Dr. John F. Kerns, M.D. Ca35-Ca42. In that certification, Dr. Kerns stated that Plaintiff suffered several reoccurring bladder tumors after his initial diagnosis of bladder cancer in May of 2014, and that he diagnosed Plaintiff with concurrent/recurrent urothelial dysplasis/neoplasia on April 27, 2021. Ca28-Ca31. Instead of considering this

evidence, the trial court denied this motion on February 16, 2024, as untimely. Pa430.

On March 21, 2024, Plaintiff filed a motion for relief from judgment regarding the trial court's order granting Defendant's motion for summary judgment, and raised the same arguments contained in Plaintiff's prior two motions for reconsideration of that order. Ca43-Ca51. Plaintiff argued that the record evidence and the certification from Dr. Kerns clearly showed that the court's grant of summary judgment was based on a mistake of material fact, as Plaintiff did suffer a reoccurrence of his bladder cancer within the three-year period before he filed his complaint. *Id.* The trial court rejected this argument in a short order that only stated:

> Motion is DENIED. Plaintiff moves for relief and reconsideration of the Court's Order dated 6/9/23 that has been reviewed and readdressed for reconsideration on 2/16/24. No new evidence presented.

Pa1-Pa2.

STANDARD OF REVIEW

New Jersey Appellate Courts review a trial court's order granting summary judgment *de novo*. *Bell Tower Condo. Ass'n v. Haffert*, 423 N.J. Super. 507 (App. Div. 2012). "In an appeal of an order granting summary judgment, appellate courts 'employ the same standard [of review] that governs the trial court.'" *Henry v. N.J. Dep't of Human Servs.*, 204 N.J. 320, 330 (2010) (alteration in original) (quoting *Busciglio v. DellaFave*, 366 N.J. Super. 135, 139 (App.Div.2004)). "[T]he appellate

court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." *Id.* (citing *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App.Div.), *certif. denied*, 154 N.J. 608 (1998)). The reviewing court must view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523 (1995). The trial court's conclusions of law and application of the law to the facts warrant no deference from a reviewing court. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995).

When reviewing a trial court's order on a motion for relief from judgment under *Rule* 4:50-1, New Jersey Appellate Courts apply an abuse of discretion standard. *See U.S. Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 467 (2012). Abuse of discretion arises on demonstration of manifest error or injustice. *See Hisenaj v. Kuehner*, 194 N.J. 6, 20 (2008) (quoting *State v. Torres*, 183 N.J. 554, 572 (2005)).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS PLAINTIFF'S AGGRAVATION CLAIMS ARE COGNIZABLE UNDER THE FELA.
(Raised Below: Pa371)

The trial court erred in granting Defendant's second motion for summary judgment, and in dismissing Plaintiff's amended complaint with prejudice, as

Plaintiff presented sufficient evidence to establish a prima facie case for his bladder cancer aggravation claims, which are cognizable under the FELA.

In his amended complaint, Plaintiff stated that he was employed by Defendant from 1994 to 1999 and from 2004 to 2021. Pa18-Pa24. Moreover, Plaintiff alleged that during his employment with Defendant, including the time period from 2004-2021, that he was exposed to excessive amounts of diesel exhaust/fumes, asbestos and secondhand smoke. *Id.* He also alleged that his toxic exposures were "cumulative" and occurred throughout all locations "on a daily basis during working hours" and that these exposures aggravated his bladder cancer. *Id*.

Plaintiff produced an expert report from his liability expert, Dr. Paul Rosenfeld, wherein Dr. Rosenfeld opined:

> Mr. Todd Stephans was exposed to above background amounts of diesel exhaust, asbestos, herbicides, and secondhand cigarette smoke throughout his employment with New York, Susquehanna & Western Railroad ("NYSW" or "Defendant") for approximately 23 years between 1994 to 1999 and 2004 to 2022. During his employment with the Defendant, Mr. Stephans primarily worked as a Car Inspector and Locomotive Mechanic based out of the Ridgefield Park Yard in Ridgefield Park, New Jersey.

Pa326.

Dr. Rosenfeld concluded that Plaintiff was exposed to above background levels of diesel exhaust, asbestos and second hand smoke over the entire course of Plaintiff's career until he was terminated in October, 2021. Pa326-Pa328.

Based on Dr. Rosenfeld' s exposure assessment, Plaintiff's medical causation expert, Dr. Mark Levin opined,

> In my opinion, Mr. Stephans' continued exposure to diesel exhaust, asbestos and secondhand smoke at the railroad after being diagnosed with bladder cancer increased his risk of reoccurring bladder cancer. In my opinion, his continued exposure to diesel exhaust, asbestos and secondhand smoke at the railroad post diagnosis of bladder cancer increased his risk of dying as a result of bladder cancer.

Pa361.

In his amended complaint, Plaintiff alleged that his bladder cancer was caused or contributed to, in whole or in part, by the negligence of the defendant and/or the negligence of the railroad's agents, servants and/or employees. Pa18-Pa24. The damages Plaintiff alleged include pain, suffering, mental anguish, loss of enjoyment of life, medical bills and expenses, and loss of past wages and future pension benefits due to his reduced life expectancy. *Id.*

The above evidence was sufficient to establish a prima facie case for Plaintiff's bladder cancer aggravation claim under the FELA. This evidence created a genuine issue of material fact regarding whether Plaintiff suffered an aggravation of his bladder cancer during the three years before his complaint was filed due to the negligence of the Defendant. When the trial court granted Defendant's second motion for summary judgement and dismissed Plaintiff's FELA bladder cancer aggravation claim as a matter of law, the trial court committed reversible error.

In *Polizzi v. NJ Transit Rail Operations, Inc.,* 364 N.J. Super. 323 (App. Div. 2003), the plaintiff suffered hearing impairment and learned that it was caused by his exposure to noise, at work, at New Jersey Transit Rail Operations, Inc., in 1995. In 2000, the plaintiff pursued a claim against the defendant railroad pursuant to 45 U.S.C. § 56. *Id.* The plaintiff's claims were dismissed as time barred per the FELA's three (3) year statute of limitations. *Id.* On appeal, the court adopted the *"Kichline* aggravation rule" and on that basis held that summary judgment on the aggravation claim was improper and the employee was permitted to amend his complaint to allege aggravation of the hearing loss. *Id.*

Here, Mr. Stephans suffered from bladder cancer, but his claim under the FELA for his initial diagnosis was time barred, similar to the plaintiff in *Polizzi.* However, because Mr. Stephans continued to work for Defendant and continued to be exposed to excessive amounts of diesel exhaust, asbestos, and secondhand smoke within the three-year period before he filed his complaint, his aggravation claim should not have been time barred, just as the *Polizzi* plaintiff's aggravation claims were not time barred. Plaintiff's expert, Dr. Rosenfeld, opined report that Plaintiff was exposed to above background levels of diesel exhaust, asbestos, and secondhand smoke throughout his employment with New York, Susquehanna & Western Railroad ("NYSW" or "Defendant") for approximately 23 years between 1994 to 1999 and 2004 through October 2021. That period includes the three-year period

before Plaintiff filed his initial complaint in this matter, which was filed in April of 2019. Pa68-Pa74. Dr. Levin, Plaintiff's medical causation expert, opined that Plaintiff's continued exposure to diesel exhaust, asbestos, and secondhand smoke while working for Defendant after he was diagnosed with bladder cancer increased his likelihood of the bladder cancer reoccurring and increased his likelihood of dying from a reoccurrence of that bladder cancer. Pa360-Pa361.

Plaintiff therefore presented competent evidence that his exposures to diesel exhaust, asbestos, and secondhand smoke aggravated his bladder cancer, and that this aggravation occurred within the three-year period before he filed his initial complaint. For this reason, a genuine issue of material fact exists as to whether Defendant's negligence did, in fact, aggravate Plaintiff's bladder cancer. The trial court disregarded this genuine issue of material fact when it found that Plaintiff had "no damages" that could be compensable under the FELA. T1 26-28. The trial court's grant of summary judgment on June 9, 2023, improperly resolved this genuine issue of material fact in favor of Defendant. The trial court's ruling also conflicts with established precedent in New Jersey regarding FELA aggravation claims, which are compensable as detailed in the *Polizzi* case. For these reasons, the trial court's order granting summary judgment in favor of Defendant constitutes reversible error.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT AS THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT WAS BASED ON A MISTAKE REGARDING A MATERIAL FACT. (Raised below Pa1-Pa2)

The trial court also erred when it denied Plaintiff's motion for relief from the trial court's order granting Defendant's second motion for summary judgment, as that ruling was based on a material mistake of fact, and Plaintiff presented new evidence that would have altered the trial court's ruling on Defendant's second motion for summary judgment.

Rule 4:50-1, in pertinent part, states:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons:
> (a) mistake, inadvertence, surprise, or excusable neglect;
> (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;
> . . .
> (f) any other reason justifying relief from the operation of the judgment or order.

When the parties are mistaken on a material point to the litigation, and the court provides relief based on that mistake of fact, *R.* 4:50-1(a) provides courts with discretion to reverse or correct that judgment. *DEG, LLC v. Township of Fairfield*, 198 N.J. 242, 262 (2009). Additionally, under *R.* 4:50-1(b), courts are empowered to reverse or correct a judgment when newly discovered evidence would probably

have changed the result had the court reviewed that evidence prior to entering the judgment in question. *Id.* at 264.

Here, the trial court abused its discretion in failing to grant Plaintiff's motion for relief from judgment as the court's June 9, 2023, order granting Defendant's motion for summary judgment was based on a mistake of material fact, and because Plaintiff presented new evidence to the court that would have certainly prevented the court from granting Defendants' motion for summary judgment.

When the trial court ruled on Defendant's second motion for summary judgment, it stated that Plaintiff's claims for his initial diagnosis for bladder cancer were time barred, according to the court's June 21, 2022 order. T1 26-28. The trial court also ruled that Plaintiff had failed to demonstrate a valid claim for aggravation under the FELA because his bladder cancer did not reoccur within the three years before he filed his complaint. T1 28:7-16. The court supported this ruling by stating that any aggravation claim must be based on a "reoccurrence of the cancer" and that "the plaintiff is cancer free. . . as a result, summary judgment is appropriate". T1 28:7-24. This is a clear mistake of fact.

On December 18, 2023, Dr. John F. Kerns, who was Todd Stephans treating urologist, provided an Affidavit confirming that Todd Stephans had a reoccurrence of his bladder cancer in April, 2021 based upon a pathology report dated April 27, 2021. Specifically, Dr. Kerns in his Affidavit in pertinent part states:

> In my medical records, I ordered and reviewed a diagnostic pathology report dated April 27, 2021 which revealed the following integrated cytomolecular diagnosis; "Abnormal. Although there are no significant morphologic findings, the positive (neoplasia-associated) karyotypic profile is suggestive of future or concurrent/recurrent urothelial dysplasia/neoplasia."
>
> . . .
>
> In my opinion, after reviewing my medical records, Todd Stephans suffered several recurrent bladder tumors subsequent to the initial diagnosis of bladder cancer on May 27, 2014.
>
> In my opinion, after reviewing my medical records including the diagnostic pathology report dated April 27, 2021, Todd Stephans was diagnosed with a concurrent/recurrent urothelial dysplasia/neoplasia on April 27, 2021.

Ca30-Ca31.

Dr. Kerns' Affidavit dated December 18, 2023[1], clearly shows that Plaintiff Todd Stephans sustained a reoccurrence of his bladder cancer in April 2021, which is after he filed his initial complaint in this matter on April 10, 2019. Pa68-Pa74. This reoccurrence was therefore within the statute of limitations period and shows that the trial court was mistaken about a material fact when it stated that Plaintiff

[1] As Plaintiff stated in his brief in support of his motion for relief from judgment, Plaintiff's counsel was unable to locate Dr. Kerns from August 4, 2023, through December 17, 2023, despite diligent efforts. Dr. Kerns retired from his urology practice prior to August of 2023, and Plaintiff was unable to locate him until Plaintiff's counsel hired a private investigator who was able to locate him in December of 2023.

was unable to provide any evidence of any reoccurrence of his cancer within that period. When the trial court was presented with clear evidence from Plaintiff's treating physician that the trial court's order granting summary judgment was based on a mistake of fact, the trial court should have granted Plaintiff's motion for relief from that order pursuant to *Rule* 4:50-1(a). Failing to do so was an abuse of discretion.

Additionally, the trial court should have granted Plaintiff's motion for relief from judgment based on Dr. Kerns' affidavit as this was new evidence that would have prevented the court from granting Defendant's second motion for summary judgment. *Rule* 4:50-1(b) affords a litigant relief from a judgment where "newly discovered evidence which would probably alter the judgment or order" is presented to the court. Here, Dr. Kerns' reviewed his medical records for Plaintiff and provided an affidavit on December 18, 2023, which was months after the trial court granted Defendant's second motion for summary judgment. Ca28-Ca31. This affidavit constitutes new evidence, and if the court had been aware of this evidence when it reviewed Defendant's second motion for summary judgment, it would have been clear to the court that Plaintiff did suffer a reoccurrence of his bladder cancer after he filed his complaint. *Id.* The court, if it had reviewed this evidence, could not have ruled as a matter of law that Plaintiff was unable to show any damages other than a "fear or possibility of bladder cancer returning in the future." T1 27.

Therefore, when Plaintiff presented this new evidence to the trial court in its motion for relief from judgment, the court should have granted that motion under *Rule* 4:50-1(b), as this new evidence would have prevented the trial court from granting Defendant's second motion for summary judgment. Instead of granting Plaintiff relief under *Rule* 4:50-1(b), the trial court denied Plaintiff's motion. This was reversible error.

CONCLUSION

For the foregoing reasons, this Honorable Court should find the trial court erred when it granted Defendant's second motion for summary judgment and abused its discretion when it failed to grant Plaintiff's motion for relief from the trial court's order granting Defendant's second motion for summary judgment and remand this matter for further proceedings.

BERN CAPPELLI, LLC

Dated: November 1, 2024

By: /s/ Thomas J. Joyce, III
THOMAS J. JOYCE, III, ESQ.

TODD STEPHANS, Plaintiff-Appellant, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILWAY, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002936-23T1 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT, LAW DIVISION BERGEN COUNTY Honorable David Nasta, J.S.C. Sat below

BRIEF FOR RESPONDENT, NEW YORK, SUSQUEHANNA & WESTERN RAILWAY

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PRELIMINARY STATEMENT

Plaintiff had five opportunities to address the statute of limitations issue in this case, and after failing to overcome this defense to his claims, he is now taking a sixth bite at the apple. However, Plaintiff is attempting to reargue issues that are, ironically, time barred from appeal. The only Order for which a timely appeal was filed is the trial court's April 12, 2024 Order denying Plaintiff's Rule 4:50-1(b) motion for relief based on alleged "new" evidence. The trial court correctly determined that there was no "new" evidence, and for the reasons set forth below, its April 12, 2024 Order must be affirmed.

PROCEDURAL HISTORY

Defendant calls the within additional procedural history to the Court's attention. The stipulation of dismissal of Plaintiff's initial action filed in Pennsylvania did not provide that the statute of limitations would be tolled as of the original filing date of 4/10/2019. It provided that "the filing date to be used for statute of limitation purposes in New Jersey will be April 10, 2019," provided Plaintiff refiled his action in New Jersey within 60 days of July 1, 2019. (Pa76) On 3/13/2020, Plaintiff's New Jersey action was dismissed for lack of prosecution. (Pa79) After the case had been dismissed for an entire year in which the statute of limitations was not tolled, Plaintiff filed a motion to reinstate and the action was reinstated by Order dated 4/1/2021. (Pa81-82) On 4/5/2021, Defendant filed an

Answer to the Complaint which asserted, *inter alia*, the affirmative defense of the statute of limitations. (Pa12)

Defendant filed its first motion for summary judgment on 5/27/2022, which was granted in part and denied in part by Order dated 6/24/22. (Da46) The court granted summary judgment based on the statute of limitations dismissing all claims arising out of Plaintiff's 2014 cancer diagnosis and treatment. (Pa46 and Pa65) However, the court *sua sponte* raised an argument Plaintiff had not made and invited Plaintiff to file a motion seeking leave to amend his complaint after the expiration of discovery to assert a claim for "aggravation" of the injury within the statute of limitations and seeking leave to obtain an expert report for that purpose, after the deadline for production of expert witness reports had passed with no motion to extend having been filed. (Da45-66) On 8/26/2022, the Court granted Plaintiff's motions for leave to file an amended complaint and to extend discovery from 8/15/2022 to 11/15/2022. (Pa87-88) Plaintiff filed an Amended Complaint, and Defendant filed an Answer asserting the statute of limitations defense, again. (Pa18-30) Plaintiff did not produce an expert report on an alleged "aggravation" of his 2014 cancer injury prior to the extended 11/15/2022 deadline.

Arbitration was scheduled for 2/15/2023 but was adjourned to 3/1/2023. Plaintiff did not produce an expert report on an alleged "aggravation " of his 2014 cancer injury prior to the arbitration. The case was dismissed for lack of

prosecution for a second time by Order dated 3/2/2023. (Pa99) The case was reinstated thirty days later, during which month the statute of limitations was not tolled, by Order dated 3/31/2022. (Pa100-101)

STATEMENT OF FACTS

Plaintiff has asserted as "fact" matters which are merely disputed opinions. This case never reached a determination of facts on the issue of negligent exposure or causation because it was dismissed based on the statute of limitations. Defendant disputes all allegations of negligent exposure and causation, none of which are relevant to this appeal and will not be addressed but are reserved in the event the case is remanded for further action, including a decision on the portions of Defendant's motion for summary judgment that were not reached.

The only material facts are: (1) Plaintiff was diagnosed with bladder cancer on May 27, 2014 (Pb3; Ca1); (2) Plaintiff did not first file suit until April 10, 2019, nearly four years later (Pa68-74); and (3) no *new* evidence of any "aggravation" of Plaintiff's bladder cancer within the applicable period of limitations was presented in support of Plaintiff's 3/22/2024 motion for relief from the 6/9/2023 summary judgment order dismissing his claims. (Pa419-451) Plaintiff testified at his deposition on 4/28/2022 that he was cancer free and had been cancer free since 2015. (Pa448-451) He also testified that during his visit with Dr. Kerns in April 2021 that Dr. Kerns informed him "everything was okay." (Pa447) No records of

treatment for recurring or new cancer after that time were produced in discovery or in opposition to Defendant's two summary judgment motions or in support of Plaintiff's two motions for reconsideration and subsequent motion for relief, with the exception of the May 6, 2021 report from Dr. Kerns/Urologic Specialties confirming Plaintiff's negative urinalysis. (Pa31-444)

On the contrary, Plaintiff testified on 4/28/2022, a year after the 4/22/2021 cysto, that he remained cancer free and was not scheduled for any cancer related treatment, including as follows:

> Q. **When was the last time you had an annual checkup with Dr. Kerns?**
> **A. I believe it was March or April of last year (2021).**
> Q. **What did he do for you at that time?**
> **A. Cystoscopy.**
> **Q. And what was the results of the cystoscopy?**
> **A. <u>Everything was okay at the time</u>.**
> Q. Do you – have you been back to see Dr. Alter, A-l-t-e-r, recently?
> A. No because he didn't feel it was necessary for me to come back.
> Q. Am I understanding your present status vis-à-vis bladder cancer is that you're presently cancer-free?
> A. At the present time, yes.
>
> ***
>
> Q: **<u>My understanding is that your bladder cancer has not re-emerged as of today; is that correct</u>?**
> A: **<u>As of today (4-28-22) it has not</u>.** But that doesn't mean it's not going to.
>
> ***
>
> Q: Did any of your doctors tell you what your future – what your future prognosis for recurrence is, like what is the likelihood it's going to recur?

A: I don't remember if they gave me a percentage, but they did indicate to me that if I keep doing the job I'm doing, it will most likely come back.
Q: All right. Well, you're not doing the job you used to be doing; is that correct?
A: That is correct.
Q: And the reason you're not doing the job that you're doing is you've been terminated by your employer; is that correct?
A: That is correct.
Q: And you were terminated because of a positive drug screen, a random drug screen?
A: That's –
MR. JOYCE: Just not my objection to this line of questioning.
Q: And was that the first drug screening you had failed?
THE WITNESS: Do I have to answer that?
MR. JOYCE: I'm making an objection for the record as to the line of questioning but you still have to answer, Todd.
A: No, that was the – it happened twice.

***

Q: Okay. And do you currently take any medication that – to prevent the recurrence of your bladder cancer of any kind?
A: There's no medication that I know of that would prevent that.
Q: Okay.
A: So no.
Q: All right. And you don't have any more BCG treatments scheduled; is that correct?
A: No.
Q: Any your – your repeat cystoscopies are annual or biannually now?
A: Right now it's annual.
Q: Have you been told there's a time it will go biannually?
A: It depends on what happens on the next cystoscopy.
Q: And that one's coming up later this year; is that correct?
A: It's coming up this year, yes.
Q: Other than that repeat cystoscopy in March or April – in May or – shortly, do you have any other upcoming appointments scheduled?
A: With the urologist, no.
Q: How about with Dr. Alter, no?
A: No. I have another one scheduled for my back, but that's completely different.

(Pa445-451) (emphasis added).

Nor was any evidence of *causation* of any alleged but undiagnosed and untreated "aggravation" injury produced in opposition to Defendant's Motion for Summary Judgment or in support of Plaintiff's two motions for reconsideration and subsequent Motion for Relief from the Summary Judgment Order. (Pa31-451) There are no specific facts or findings as to dates, types, and levels of exposure to bladder cancer causing substances between 4/28/2017 and the date of Plaintiff's termination for cause on 10/28/2021, after failing two drug tests on 5/17/2021 and 9/28/2021, and no evidence of specific acts of negligence by NYS&W which caused that exposure during that time. (Pa39-44, 102) Plaintiff's citation to expert reports that were not part of the summary judgment record and were, in fact, the subject of motions *in limine* for exclusion at the time summary judgment was granted on the basis of the statute of limitations (Pa371), is improper and such reports should not be considered.

Plaintiff also uses his Statement of Facts to mischaracterize the trial court's first order granting summary judgment, an order which is not at issue on this appeal. The definition of a "recurrence" of cancer is a medical term of art, and Defendant's expert disagrees that a "recurrence" is an "aggravation." In addition, Defendant disputed that an "aggravation" can save a FELA claim from the statute of limitations but will not address that as it is beyond the scope of the limited issue

on appeal, i.e., whether Plaintiff presented **admissible new** evidence of an alleged aggravation of his cancer within the applicable period of limitations in support of his 3/21/2024 Motion for Relief. The trial court correctly found he did not.

One fact Plaintiff overlooks is that the period of limitations for the unsupported "aggravation" claim is *not* the three years prior to his filing of the Pennsylvania action on April 10, 2019. The statute of limitations was not tolled and continued to run when this case was dismissed from 3/13/2020 through 4/1/2021 (383 days) and again between 3/2/2023 and 3/31/2023 (29 days). (Pa79-82, 99-100) Thus, adding 412 days to the 4/10/2016 bar date means that any alleged "aggravation" would have to have been caused by negligent exposure after 5/27/2017. Again, this is not material unless this case is remanded since the substantive issues of negligence and causation were not briefed. The only question on appeal is whether the trial court erred in denying Plaintiff's motion for relief under Rule 4:50-1(b) finding there was no "new" evidence to overturn the 6/9/2023 summary judgment Order in favor of Defendant.

The only alleged "new" evidence was an inadmissible, hearsay pathology report dated 4/27/2021 which Plaintiff had been in possession of since its inception (almost three years prior to his Motion for Relief), and which Defendant produced twice in discovery, on 11/16/2021 and again on 4/5/2023. (Pa407, 439, 414, 442; Ca32-33) Dr. Kerns' certification submitted to the court nearly one year after the

case was dismissed, referencing a three year old report (which he did not author) does not constitute "new" evidence. It is merely **late** evidence.

LEGAL ARGUMENT

I. PLAINTIFF'S APPEAL OF ANY ORDER OTHER THAN THE 4/12/2024 ORDER IS OUT OF TIME AND MUST BE DENIED. (Not raised below).

Plaintiff's Brief includes an argument that the trial court erred in granting Defendant's summary judgment motion based on the statute of limitations on 6/9/2023, as well as an argument that the court erred in denying its motion for relief from that Order based on alleged new evidence on 4/12/2024. The first argument must be rejected as out of time.

Plaintiff filed a Notice of Appeal on 5/24/2024. (Pa452). That is nearly one year after the 6/9/2023 Order granting summary judgment and well beyond the 45 day appeal period. Plaintiff cannot use his Rule 4:50 motion as a substitute for a timely appeal of the 6/9/2023 Order.

The timely filing of a notice of appeal is mandatory and jurisdictional. State v. Molina, 187 N.J. 531 (2006). An appeal must be filed within the forty-five-day period provided by Rule 2:4-4(a). When an appeal is untimely, the Appellate Division lacks jurisdiction to decide the merits of the appeal. In re Hill, 241 N.J. Super. 367 (App. Div. 1990). The filing of a motion for reconsideration or a motion for a new trial tolls the running of the time to appeal. Id. But a motion for

relief from a judgment or an order under Rule 4:50-1 cannot be used to toll the time to appeal or as a substitute for a timely appeal. Wausau Ins. Co. v. Prudential Property & Cas. Ins. Co. of N.J., 312 N.J. Super. 516, 519 (App. Div. 1998); In re Estate of Schifftner, 385 N.J. Super. 37, 43 (App. Div. 2006); Di Pietro v. Di Pietro, 193 N.J. Super. 533, 539 (App. Div. 1984). Because the rules make specific provisions for attack on erroneous findings and trial errors, Rule 4:50 may not be used to convert a "trial error" from which an appeal must be taken within 45 days into a "mistake," which may be corrected within one year. Hodgson v. Applegate, 31 N.J. 29 (1959). Courts are especially cautious when a litigant files a motion under Rule 4:50 as a substitute for a timely appeal, because allowing litigants to file a motion under 4:50 as a substitute for a timely appeal would essentially swallow the forty-five-day requirement to file an appeal. Estate of Grieco v. Schmidt, No. A-0756-16T4, 2018 N.J. Super. Unpub. LEXIS 205 (App. Div. Jan. 29, 2018).

In this case, Plaintiff filed a motion for reconsideration of the 6/9/2023 summary judgment order in favor of Defendant, which was denied on 8/4/2023. He had 45 days from that date to appeal the summary judgment order. He chose not to do so. He cannot revive the appeal period for that order by filing a Rule 4:50 motion for relief nearly a year later. Thus, Plaintiff's entire first argument should be stricken since the underlying 6/9/2023 Order granting summary judgment is not

before this court. The only timely appealed Order is the 4/12/2024 Order denying Plaintiff's motion for relief from the summary judgment order based on alleged new evidence, which Order should be affirmed.

II. PLAINTIFF'S ARGUMENT THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR RELIEF FROM SUMMARY JUDGMENT BASED ON A MISTAKE OF FACT CANNOT BE CONSIDERED SINCE IT WAS NOT RAISED BELOW. (Da1-8).

Plaintiff's argument that the trial court erred in denying Plaintiff's motion for relief based on a "material mistake of fact" cannot be considered, because any such argument was waived. Mistake of fact was not the basis for Plaintiff's motion for relief from the 6/9/2023 summary judgment order. The only basis for relief asserted in Plaintiff's motion for relief (which followed two unsuccessful motions for reconsideration) was *alleged new evidence* under Rule 4:50-1(b). (Da1-8)

Plaintiff's motion sought relief from summary judgment based solely on alleged "new" evidence, which was in fact just a new affidavit by Plaintiff's longtime treating physician, Dr. John F. Kerns, reciting very *old* evidence, i.e., an 4/27/2021 pathology report which was produced in discovery on 11/16/2021 and again on 4/5/2023 (prior to Defendant's two motions for summary judgment and prior to Plaintiff's two motions for reconsideration), which had been in Plaintiff's possession since its inception, and which was itself hearsay since it was not authored by Dr. Kerns. (Pa407, 439, 414, 442; Ca32-33) Plaintiff's motion for

relief did not raise R. 4:50-1(a). It raised only this alleged "new" evidence, which was not new. Plaintiff argued:

- Dr. Kerns' Affidavit provided **newly discovered evidence** of record…(Da3)
- Therefore, Defendant's Second Motion for Summary Judgment should be denied based upon Dr. Kerns' Affidavit which constitutes **newly discovered evidence**. (Da3)
- Defendant is in error when it suggests that there is no **newly discovered evidence** that satisfied Rule 4;50-1. On the contrary, Dr. Kern's Affidavit dated December 18, 2023 is, in fact, **newly discovered evidence**. (Da4)
- The **newly discovered evidence** that probably alters the Order dated June 9, 2023 is Dr. Kerns' Affidavit dated December 18, 2023. (Da5)

(Da1-8) (emphases added). The trial court's 4/12/2024 Order also expressly stated "Motion is DENIED…No new evidence presented." (Pa2)

Arguments not raised below are waived. State v. Nasir, 355 N.J. Super. 96, 103 (App. Div. 2002). Because Plaintiff did not raise an alleged "material mistake of fact" under R. 4:50-1(a) in his motion for relief from the 6/9/2023 summary judgment order, any such argument was waived and is not before this Court. The issue on appeal is narrow: Did the trial court err in denying Plaintiff's motion for relief under Rule 4:50-1(b) by finding that his treating physician's Affidavit dated 12/18/23 did not constitute new evidence justifying relief from the 6/9/2023 Order granting summary judgment? The answer is no.

III. THE TRIAL COURT CORRECTLY DETERMINED THERE WAS NO NEW ADMISSIBLE EVIDENCE TO SUPPORT RELIEF FROM ITS SUMMARY JUDGMENT RULING IN FAVOR OF DEFNEDANT. (Pa431-451).

A. The Standard of Review is Abuse of Discretion.

The standard of review for the trial court's April 12, 2024 Order denying Plaintiff's motion for relief under Rule 4:50-1(b) is a clear abuse of discretion.

> A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied. Hodgson v. Applegate, 31 N.J. 29, 37, 155 *A.*2d 97 (1959); Shammas v. Shammas, 9 N.J. 321, 328, 88 *A.*2d 204 (1952). The decision granting or denying an application to open a judgment will be left undisturbed unless it represents **a clear abuse of discretion**. Mancini v. EDS, 132 N.J. 330, 334, 625 A.2d 484 (1993); Court Inv. Co. v. Perillo, 48 *N.J.* 334, 341, 225 *A.*2d 352 (1966); Hodgson, supra, 31 N.J. at 37, 155 *A.*2d 97; Pressler, Current N.J. Court Rules, comment 1 on R. 4:50-1 (1993).

Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994) (emphasis added); see also U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (a trial judge's determination under Rule 4:50-1 "warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion"). Plaintiff has not established any abuse of discretion in the denial of its Rule 4:50-1(b) motion based on alleged "new" evidence, and the 4/12/2024 Order should be affirmed.

Relief under R. 4:50-1 is granted sparingly and only in exceptional circumstances. See Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994);

DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009) (quoting F.B. v. A.L.G., 176 N.J. 201, 207 (2003)). No such circumstances were present in this case. Rather, Plaintiff failed to obtain and present any expert testimony in support of the allegation that there was an "aggravation" of his bladder cancer at some point after 5/27/2017 (an allegation that arose only after the trial court granted Defendant's first motion for summary judgment based on the statute of limitations and suggested, *sua sponte*, after the close of discovery that Plaintiff seek leave to amend his Complaint to add an alleged "aggravation" injury, if warranted) in opposition to either of Defendant's summary judgment motions or in support of either of Plaintiff's motions for reconsideration.[1] Instead, Plaintiff waited until the after discovery had been extended several times, after the expert report deadline had passed several times, after two motions for summary judgment, after two motions for reconsideration, and almost a year after final summary judgment was granted to attempt to use an old 2021 pathology report that had been available throughout this litigation and was produced in discovery to establish an alleged "aggravation" of his cancer within the period of limitations.

[1] Although not germane to this appeal which related solely to the motion for relief from summary judgment based on the statute of limitations, and not the merits of the claim, Plaintiff also failed to present any expert testimony that the alleged "aggravation" was caused by negligent acts by Defendant after 5/27/2017. These alternate grounds for summary judgment would still be pending if the motion was not determined based on the statute of limitations.

The trial court correctly exercised its discretion in finding that Plaintiff could not take an old report produced years prior in discovery and make it new simply by attaching it to an affidavit from someone who was not even its author - particularly when he already had numerous chances to present this known evidence (in opposition to Defendant's first motion for summary judgment granted in part on 6/24/2022, in opposition to Defendant's motion for reconsideration of the order granting partial summary judgment and inviting Plaintiff to file a motion for leave to amend the complaint denied on 8/5/2022, in support of Plaintiff's motion to amend his complaint to assert "aggravation" at the suggestion of the court granted and extend discovery on 8/26/2022, in opposition to Defendant's second motion for summary judgment granted on 6/9/2023, or in support of Plaintiff's motion for reconsideration of the 6/9/2023 summary judgment order denied on 8/4/2023).

There are three elements to Rule 4:50-1(b) which plaintiff was required to establish for relief from the 6/9/2023 Order to be considered in the court's discretion. Plaintiff must first have proven that there was "new" evidence; second, that the new evidence was unobtainable by the exercise of due diligence; and third, that the new evidence would probably alter the judgment or order from which relief is sought and was not merely cumulative. See R. 4:50-1; Quick Chek Food Stores v. Springfield Tp., 83 N.J. 438, 445 (1980). The trial court did not abuse its discretion in determining that Plaintiff failed to satisfy these three requirements for

relief. The only "new" evidence cited by Plaintiff was an old diagnostic report dated 4/27/2021 which was produced twice in discovery and prior to both of Defendant's motions for summary judgment and both motions for reconsideration. The court correctly determined that the Plaintiff could not make an old report into "new" evidence simply by referring to it in a new expert report. Plaintiff could have retained an expert and produced a report based on the 4/27/2021 diagnostic report at any time between 4/27/2021 and the 6/9/2023 summary judgment ruling. Plaintiff, also, did not establish that the 4/27/2021 report or new affidavit referencing it would probably alter the summary judgment ruling, because neither of them address causation. Neither of them established an aggravation of Plaintiff's cancer (which does not exist according to his own testimony) after 5/27/2017 caused by exposure due to negligence by Defendant also occurring after 5/27/2017.

B. The Trial Court Did Not Abuse Its Discretion In Finding That Plaintiff Failed To Satisfy The Three Elements Required For Relief From A Judgment Based On Alleged "New" Evidence.

In his motion for relief, Plaintiff asserted that the court improperly relied on the representation of Defendant and its counsel during the motions for summary judgment that Plaintiff was cancer free as of 2015, but the Court did not rely on those representations. It relied on the evidence of record and lack thereof. Plaintiff's *own testimony* was cited in support of the fact that he remained cancer free throughout the period of limitations, and no medical records or expert report to

the contrary were produced at the time summary judgment was granted. Plaintiff waited until his motion for relief filed nearly a year later (and three years after the report on which he relied) to assert that *after* the summary judgment hearing on 6/9/23, Plaintiff's counsel reviewed additional supplemental medical records from Dr. Kerns, who was Plaintiff's treating urologist, which revealed that Plaintiff was diagnosed with several recurrences of his bladder cancer from 2014 through 2021. However, the "supplemental medical record" cited by Plaintiff was not new. The record is dated 4/27/2021, and it was produced *twice* in discovery by Defendant (on 11/16/2021 and again on 4/5/2023) *before* the summary judgment motion and *before* both of Plaintiff's motions for reconsideration of the 6/9/23 summary judgment order. (Pa407, 439, 414, 442; Ca32-33)

Setting aside the fact that the alleged "recurrence" of cancer based on the 4/27/2021 report is both disputed and *not* the equivalent of an aggravation caused by negligence during the statute of limitations[2], **Plaintiff failed to present any new evidence justifying relief under R. 4:50-1(b)**. Plaintiff could not make the

[2] Plaintiff presented no clinical evidence of an alleged "recurrence," no treatment for an alleged "recurrence," no repeat tests showing an alleged "recurrence," and no reports of cystoscopies showing an alleged "recurrence." Thus, Defendant reserved the arguments made in its initial motion for summary judgment and motion for reconsideration of the order entered on 6/24/22 regarding the FELA's statute of limitations bar on disguising a continuing tort theory or "breath by breath" theory of accrual as a recurrence and/or aggravation claim, but that issue was not determined in the motion for relief and is still pending should there be a remand. See, e.g., White v. Mercury Marine, 129 F. 3d 1428 (11th Cir. 1997); Urie v. Thompson, 337 U.S. 163, 170, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)

4/27/2021 report new merely by raising it in a 12/2023 affidavit. This evidence had existed and been available to Plaintiff (it is his own medical record) since 2021 and was produced in discovery by Defendant on 11/16/2021, more than two years before Plaintiff alleged it was "new" in his motion for relief, prior to Defendant's June 2022 motion for summary judgment, prior to Defendant's June 2023 motion for summary judgment, prior to Plaintiff's August 2023 motion for reconsideration, and prior to Plaintiff's January 2024 second motion for reconsideration. There was no new evidence which could not have been produced at the time of any of the prior motions.

The trial court correctly found that Plaintiff's proffered excuse for failing to timely submit the alleged "new" evidence of an "aggravation" of his cancer was without merit. Plaintiff's assertion that his treating physician, Dr. Kerns, could not be located until December 2023 to provide an affidavit on "recurrence" (not aggravation) was without any evidentiary support. This assertion was made in a brief, not in a certification, and it was not evidentiary. There was no evidence of what specific steps were taken to locate Dr. Kerns, no certification from the alleged investigator or Plaintiff's counsel detailing these steps, no documentation of these steps, no evidence of returned mail, nothing. The deadline for production of expert reports passed multiple times without production of any reports opining that there was an aggravation or recurrence of Plaintiff's cancer during the period of

limitations. Plaintiff never applied for relief from the expert report deadline claiming he could not locate a needed expert. And Plaintiff offered no excuse for failing to simply retain another qualified expert to review the three-year-old 4/27/2021 diagnostic report (which was not authored by Dr. Kerns*)* on which he relied as the sole basis for his motion for relief from summary judgment and provide an opinion on the pivotal issue in this case – a cause of action arising within the period of limitations. This was not a new issue. Defendant raised the statute of limitations defense at every step of this action dating back to 2019, and it was the basis for both summary judgment rulings.

Plaintiff's motion for relief also ignored the absence of causation evidence in opposition to Defendant's motion for summary judgment. Setting aside the fact that a recurrence of cancer is not the equivalent of an "aggravation" of an existing injury and setting aside the fact that a neither a recurrence nor an aggravation can revive a claim barred by the FELA statute of limitations, Plaintiff must still prove negligence and causation. Whatever it is labeled (recurrence or aggravation), its existence is not enough, alone, to change the summary judgment ruling. Even if a recurrence or aggravation could eliminate the FELA statute of limitations bar, and even if Plaintiff could prove that an aggravation of his cancer occurred after 5/26/2017 (despite his own testimony admitting that he had remained cancer free since 2015), he did not produce any expert evidence to establish causation due to

negligent acts by Defendant during the period of limitations. That evidence was due at the time the summary judgment motion was heard, and it was not produced. The Court cannot speculate on medical causation. Plaintiff's motion for relief from the summary judgment order did not set forth any "new evidence" on exposure (dates, types, levels, etc.) or negligence. Rather, he stated merely that he was working for Defendant between 2017 and 2021 and asked the Court to speculate that any alleged recurrence must be due to Defendant's negligence. The trial court did not abuse its discretion in failing to grant relief from the Order granting summary judgment based on conclusory and speculative allegations.

CONCLUSION

A railroad employee must bring a FELA action within three years from the day the cause of action accrued. 45 U.S.C. §56. Summary judgment was granted on 6/9/2023 based on Plaintiff's failure to file his action within three years of his cancer diagnosis (the cause of which remains disputed). Following two motions for reconsideration and a motion for relief filed in the trial court, Plaintiff is now seeking relief from this Court, but the only Order timely appealed and only matter before this court is whether the trial court 4/12/2024 Order denying Plaintiff's motion for relief based on alleged new evidence under 4:50-1(b) was a clear abuse of discretion. The record shows it was not.

Plaintiff waived any direct appeal of the 6/9/2023 Order granting summary judgment by failing to file a notice of appeal within 45 days of the Order, or within 45 days of the 8/4/2023 Order denying his motion for reconsideration of the Order. He cannot revive the appeal period anew by filing a motion for relief nearly a year later. Rather, his only timely appeal is of the 4/12/2024 Order denying his motion for relief. Plaintiff also cannot appeal the 4/12/2024 Order denying his motion for relief based on an alleged mistake regarding a material fact, because no such argument was made in his 3/21/2024 motion for relief. Thus, that argument was waived.

The sole basis for Plaintiff's motion for relief was alleged "new" evidence under Rule 4:50-1(b), and Plaintiff fails to establish a clear abuse of discretion by the trial court in determining that Plaintiff failed to present any "new" evidence, which was unobtainable prior to his 3/21/204 motion for relief, and which would probably alter the court's 6/9/2023 ruling. On the contrary, Plaintiff relied solely on an old, hearsay, pathology report that had been in his possession since 4/27/2021 and had also been produced twice in discovery by Defendant. Plaintiff offered no evidence in support of his argument that he could not have obtained an expert report based on this 4/27/2021 pathology report at some time between 4/27/2021 and the date on which summary judgment was granted over two years later on 6/9/2023. He offered no evidentiary proof of efforts to contact Dr. Kerns

and no evidence whatsoever of efforts to retain a different expert to review the 4/27/2021 pathology report if needed. There was no abuse of discretion by the trial court in denying Plaintiff's Rule 4:50-1 motion, and the 4/12/2024 Order should be affirmed.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.

Dated: December 11, 2024

By: /s/ *Laura M. Danks*
Laura M. Danks, Esq.
Counsel for Defendant, New York, Susquehanna & Western Railway

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002936-23 T1

TODD STEPHANS,

Plaintiff-Appellant

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY,

Defendant-Respondent

CIVIL ACTION ON APPEAL FROM:

SUPERIOR COURT, LAW DIVISION - BERGEN COUNTY

Honorable David Nasta, J.S.C.
Sat below

APPELLANT'S REPLY BRIEF

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PROCEDURAL HISTORY

Todd Stephans ("Plaintiff" or "Mr. Stephans"), originally filed his Complaint on April 10, 2019, in the Philadelphia County Court of Common Pleas, Philadelphia, PA, pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*. Pa67-Pa74. Specifically, Plaintiff alleged Defendant, New York, Susquehanna and Western Railway failed to provide him with a reasonably safe place to work as required under the FELA and that Defendant's negligence, in whole or in part, caused or contributed to his development of bladder cancer. *Id.* On July 1, 2019, Plaintiff and Defendant agreed to a Stipulation of Dismissal without prejudice on the condition that Plaintiff refile his complaint in New Jersey within sixty (60) days, and with the agreement that the statute of limitations would be deemed tolled as of the original filing date of Plaintiff complaint. Pa76. On August 29, 2019, Plaintiff refiled his complaint in the Superior Court of New Jersey, Bergen County, Law Division, which was within the sixty (60) day period established by the parties' stipulation. Pa3-Pa9. Defendant answered Plaintiff's complaint on April 5, 2021. Pa10-Pa17.

On May 27, 2022, Defendant filed a motion for summary judgment, arguing that Plaintiff's claims were not filed within the statute of limitations. Pa47-Pa66. On June 24, 2022, the court granted Defendant's motion for summary judgment in part and denied it in part. *Id.* Specifically, the court granted the Defendant's motion for summary judgment to the extent it related to "any injury which existed in 2014", but

denied the motion to the extent it related to any "aggravation of plaintiff's alleged injury/cancer within the period of the statute of limitations." Pa65-Pa66.

On July 13, 2022, Defendant filed a motion for reconsideration of the court's June 24, 2022, order on Defendant's motion for summary judgment. Pa119-141. On August 5, 2022, the court denied Defendant's motion to reconsider its June 24, 2022, order on Defendant's motion for summary judgment. *Id.*

On August 4, 2022, Plaintiff filed a motion to extend discovery and to amend his complaint, which the court granted on August 26, 2022. Pa87-Pa88. On September 6, 2022, Plaintiff filed his amended complaint. Pa18-Pa24. Defendants answered Plaintiff's amended complaint on September 7, 2022. Pa25-Pa30.

On April 5, 2023, Defendant filed a second motion for summary judgment. Pa33-Pa44. On June 9, 2023, the court granted Defendant's motion for summary judgment and dismissed Plaintiff's amended complaint with prejudice. Pa371, T1.

On June 22, 2023, Plaintiff filed a motion for reconsideration of the court's order granting Defendant's second motion for summary judgment. Pa364-Pa369. The court denied this motion on August 4, 2023, without prejudice and instructed Plaintiff to file another motion for reconsideration with a certification from Plaintiff's treating physician. Pa394-Pa396.

On January 18, 2024, Plaintiff refiled his motion for reconsideration of the court's order granting Defendant's second motion for summary judgment. Ca35-

Ca42. The court denied this motion on February 16, 2024, stating it was untimely under *R.* 4:49-2. Pa429-Pa430.

On March 21, 2024, Plaintiff filed a motion for relief from judgment regarding the court's order granting Defendant's second motion for summary judgment. Ca43-Ca51. The court denied this motion on April 12, 2024. Pa1-Pa2.

The present appeal was taken by the filing of a Notice of Appeal on May 24, 2024. Pa452-Pa456. A Court transcript request form pursuant to R. 2:5-3(a) was also attached to the Notice of Appeal. The transcript from the proceeding in this case is designated as follows:

T1 – Transcript of Oral Argument Held on June 9, 2023

STATEMENT OF FACTS

I. Todd Stephans' Claims

Mr. Todd Stephans worked for the Defendant New York, Susquehanna and Western Railway from 1994 to 1999 and 2004 through October 2021 as a car inspector and locomotive mechanic. Pa458-Pa461. During this time, he was exposed to excessive amounts of diesel exhaust, asbestos, and second hand smoke from diesel locomotives, cranes and from asbestos on the pipes in the railroad buildings and facilities. Pa152-Pa164, Pa330-Pa341. Mr. Stephans was first diagnosed with bladder cancer in May of 2014, and subsequently underwent treatment for his bladder cancer. Pa349. Mr. Stephans returned to work after his diagnosis and

treatment for bladder cancer, and continued to be exposed to diesel exhaust, asbestos and second hand smoke until October of 2021. Pa161-Pa164, Pa326-Pa328, Pa508-Pa511. After his initial diagnosis in May of 2014, Mr. Stephans' bladder cancer has reoccurred. Mr. Stephans' was diagnosed with a reoccurrence of his bladder cancer on the following dates: October 21, 2014, December 22, 2015, February 11, 2016, March 8, 2016, October 4, 2016, and on April 27, 2021. Ca28-Ca31.

II. Plaintiff's Experts' Testimony and Reports

Plaintiff retained Dr. Mark Levin, M.D., to establish medical causation in this action. Pa347-Pa362. Dr. Levin reviewed Plaintiff's medical records, and relied on the opinions of Plaintiff's other experts, including Plaintiff's Industrial Hygienist Hernando Perez, Ph.D., MPH, CIH, CSP, and Plaintiff's Environmental Risk Assessor Paul Rosenfeld, Ph.D., to understand the levels of diesel exhaust, asbestos and second hand smoke Plaintiff was exposed to while working for Defendant. *Id.* Based on his review of this evidence, and his application of the Bradford Hill criteria and a differential diagnosis of etiology to Plaintiff's bladder cancer, Dr. Levin opined:

> In my opinion, it was the combination of Todd Stephans' exposure to diesel exhaust, asbestos and second hand smoke at the railroad that caused or contributed to his development of bladder cancer. In my opinion, Mr. Stephans' continued exposure to diesel exhaust, asbestos and second hand smoke at the railroad after being diagnosed with bladder cancer increased his risk of reoccurring bladder cancer. In my opinion, his continued

> exposure to diesel exhaust, asbestos and second hand smoke at the railroad post diagnosis of bladder cancer increased his risk of dying as a result of bladder cancer.

Pa361.

III. The Lower Court's Ruling

As indicated above, on June 9, 2023, the trial court granted Defendant's second motion for summary judgment and dismissed Plaintiff's amended complaint with prejudice based on the court finding that, because it was undisputed that Plaintiff was currently cancer free, "there is no damage here that can be proved." Pa371, T1 28:17-18.

The court's ruling was premised on an earlier ruling by the court, from June 21, 2022, wherein the court partially granted Defendant's first motion for summary judgment based on a statute of limitations argument. T1 26-27. In that order, the trial court ruled that Plaintiff's claim for bladder cancer under the FELA was barred by the statute of limitations, because Plaintiff developed bladder cancer in May of 2014, and became aware of the causal connection between that cancer and his work for Defendant, but his complaint was not filed until April 10, 2019. Pa40-Pa60. As FELA claims must be filed within three years of the discovery of the injury and knowledge of the connection between those injuries and the negligence of the defendant, the court ruled that Plaintiff's FELA claims for his initial diagnosis of bladder cancer were time barred. *Id.* However, in its June 21, 2022, order, the court

allowed Plaintiff to amend his complaint to pursue FELA claims against Defendant for any aggravation of his bladder cancer that was caused within the three years prior to his filing of his complaint, citing the aggravation rule explained in *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 359 (3d Cir. 1986). *Id.*

When the trial court ruled on Defendant's second motion for summary judgment, it stated that Plaintiff's claims for his initial diagnosis for bladder cancer were time barred, according to the court's June 21, 2022, order. T1 26-28. The trial court also ruled that Plaintiff had failed to demonstrate a valid claim for aggravation under the FELA because his bladder cancer did not reoccur within the three years before he filed his complaint. T1 28:7-16. The court supported this ruling by stating that any aggravation claim must be based on a "reoccurrence of the cancer" and that "the plaintiff is cancer free. . . as a result, summary judgment is appropriate". T1 28:7-24. In its ruling, the court disagreed with Plaintiff's argument that he had a valid claim under the FELA for aggravation due to his increased risk of his bladder cancer reoccurring, and an increased risk of dying from bladder cancer, due to his exposures to toxic substances after he returned to work for Defendant after his bladder cancer diagnosis. *Id.*

On June 22, 2023, Plaintiff filed a motion for reconsideration of the court's order granting summary judgment on the grounds that the court's order was based on a mistake of fact: Specifically, that the evidence produced in discovery did show

that Plaintiff's bladder cancer did reoccur within the three-year period before he filed his complaint. Pa364-Pa369. In support of that motion, Plaintiff identified portions of Plaintiff's medical records that showed that his bladder cancer reoccurred several times after his initial diagnosis, including within the three-year period before Plaintiff filed his original complaint. *Id.* As this reoccurrence of his bladder cancer occurred within the three-year statute of limitations, Plaintiff argued it would be a valid basis for an aggravation claim according to the court's order granting Defendant's motion for summary judgment. *Id.*; T1 28:7-24.

On August 4, 2023, the trial court denied this order without prejudice on the grounds that Plaintiff's motion failed to include a certification from Plaintiff's treating physician "confirming whether Plaintiff in fact had a reoccurrence of new diagnosis of his bladder cancer after April 10, 2016." Pa395-Pa396. The court further ruled that Plaintiff could file another motion for reconsideration, but the motion should include such a certification. *Id.*

On January 8, 2024, Plaintiff refiled his motion for reconsideration and included a certification from Plaintiff's treating physician, Dr. John F. Kerns, M.D. Ca35-Ca42. In that certification, Dr. Kerns stated that Plaintiff suffered several reoccurring bladder tumors after his initial diagnosis of bladder cancer in May of 2014, and that he diagnosed Plaintiff with concurrent/recurrent urothelial dysplasis/neoplasia on April 27, 2021. Ca28-Ca31. Instead of considering this

evidence, the trial court denied this motion on February 16, 2024, as untimely. Pa430.

On March 21, 2024, Plaintiff filed a motion for relief from judgment regarding the trial court's order granting Defendant's motion for summary judgment, and raised the same arguments contained in Plaintiff's prior two motions for reconsideration of that order. Ca43-Ca51. Plaintiff argued that the record evidence and the certification from Dr. Kerns clearly showed that the court's grant of summary judgment was based on a mistake of material fact, as Plaintiff did suffer a reoccurrence of his bladder cancer within the three-year period before he filed his complaint. *Id.* The trial court rejected this argument in a short order that only stated:

> Motion is DENIED. Plaintiff moves for relief and reconsideration of the Court's Order dated 6/9/23 that has been reviewed and readdressed for reconsideration on 2/16/24. No new evidence presented.

Pa1-Pa2.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT AS APPELLANT PRESENTED NEW EVIDENCE THAT HIS CANCER DID REOCCUR WITHIN THE STATUTE OF LIMITATIONS PERIOD.
(Raised below Pa1-Pa2)

When Plaintiff filed his motion for relief from judgment with the trial court, he provided new evidence that would have prevented the trial court from granting

Defendant's second motion for summary judgment had the court considered it at that time. The trial court's failure to grant Plaintiff's motion based on this new evidence was reversible error.

Rule 4:50-1(b) affords a litigant relief from a judgment where "newly discovered evidence which would probably alter the judgment or order" is presented to the court. *R.* 4:50-1 is "'designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" *Triffin v. Maryland Child Support Enf't Admin.*, 436 N.J. Super. 621, 629 (App. Div. 2014) (quoting *Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n*, 132 N.J. 330, 334 (1993)).

Defendant states numerous times in its brief that Plaintiff never presented any "new evidence" to the trial court when Plaintiff filed his motion for relief from judgment. Appellee's Brief at pp. 7, 11, 15, 16. This is simply incorrect, as Plaintiff provided the testimony of Dr. John F. Kerns in the form of a certification. This new evidence was not available until after the trial court granted Defendant's second motion for summary judgment and would certainly have prevented the trial court from granting that motion.

As Plaintiff stated in his brief in support of his motion for relief from judgment, Dr. Kerns retired from his urology practice prior to August of 2023, and Plaintiff was unable to locate him until Plaintiff's counsel hired a private investigator

who was able to locate him in December of 2023. Da5. Dr. Kerns then reviewed Plaintiff's medical records, from his office and from other medical providers, and provided a certification that Plaintiff was diagnosed with a concurrent/recurrent bladder cancer on April 27, 2021. Ca28-Ca31. That certification was dated December 18, 2023, which is after the trial court granted Defendant's second motion for summary judgment. *Id.* It was therefore new evidence that the trial court should have considered under *R.* 4:50-1(b). It was also evidence that would have prevented the trial court from granting Defendant's second motion for summary judgment.

Before granting Defendant's second motion for summary judgment, the trial court made several findings:

1) Plaintiff's initial diagnosis for bladder cancer in 2014 was outside the statute of limitations period for Plaintiff's FELA claims raised in this case. T1 26-27.
2) Plaintiff's bladder cancer did not return or recur since his initial diagnosis in 2014. T1 27.
3) Plaintiff's only claim for damages within the statute of limitations period was Plaintiff's fear of his cancer recurring at some point in the future. T1 27-28.
4) Plaintiff's fear of his bladder cancer recurring at some point in the future was also barred by the statute of limitations, as it flowed from his initial diagnosis for bladder cancer in 2014. T1 28.
5) Therefore, Plaintiff presented no viable claim for damages that was not barred by the statute of limitations. T1 28.

Essential to the trial court's ruling was its determination that all of Plaintiff's damages were barred by the statute of limitations. The trial court was unequivocal

that if Plaintiff did have a reoccurrence of his cancer, then his claims would be viable:

> So, certainly the plaintiff is not barred from any claim in the future, God forbid that he gets cancer, whether it's bladder cancer or any other cancer that can be related to his exposure here. But based upon the facts presented this Court, nor can a jury, speculate as to any damages and any damages [that] would flow from the reoccurrence of cancer. . . It's undisputed that, thankfully, the plaintiff is cancer free. If the plaintiff does incur another bout of cancer certainly . . . a claim can be filed and pursued. . .

T1 28: 7-24. Dr. Kerns's certification shows that the trial court's ruling was erroneous, as Plaintiff's bladder cancer did reoccur within the statute of limitations period. Ca28-Ca31. The trial court's explanation of its ruling makes one thing certain: Had the trial court reviewed Dr. Kerns's certification prior to ruling on Defendant's second motion for summary judgment, the trial court would not have granted that motion.

The United State Supreme Court has repeatedly stated that FELA cases should be decided on the merits. The FELA represents a legislative departure from the principles of common law motivated by "the special needs of railroad workers who are daily exposed to risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 329 (1958). Under the FELA, the right to a jury trial on the question of whether a defendant's negligence caused a plaintiff's injury is viewed as an integral part of the

remedy Congress fashioned for railroad workers. *Bailey v. Central Vermont Railroad Co.*, 319 U.S. 350 (1943).

When the trial court learned that its order granting Defendant's second motion for summary judgment was erroneous, it should have acted under *R.* 4:50-1(b) to avoid the clear injustice of dismissing Plaintiff's FELA claims based on a mistake of fact. When the trial court failed to rectify this injustice, it abused its discretion and committed reversible error.

CONCLUSION

For the foregoing reasons and the reasons put forth at length in Appellant's initial brief, this Honorable Court should find the trial court erred when it granted Defendant's second motion for summary judgment and abused its discretion when it failed to grant Plaintiff's motion for relief from the trial court's order granting Defendant's second motion for summary judgment and remand this matter for further proceedings.

BERN CAPPELLI, LLC

Dated: December 31, 2024

By: /s/ Thomas J. Joyce, III
THOMAS J. JOYCE, III, ESQ.