SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003198-23

MYRTLE PACKAGING, LLC, *Plaintiff/Appellee*, vs BERKS PLANT DESIGN & MAINTENANCE, INC., EDWARD F. LEH, JOHN DOES, ABC PARTNERSHIPS & XYZ CORPORATIONS, JOINTLY, SEVERALLY AND/OR IN THE ALTERNATIVE *Defendants/Appellant.*	:	CIVIL ACTION ON APPEAL FROM ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CUMBERLAND COUNTY Docket No.: CUM-L-719-19 SAT BELOW: Hon. James R. Swift, J.S.C.

CORRECTED BRIEF OF DEFENDANT-APPELLANT, EDWARD F. LEH

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PRELIMINARY STATEMENT

Faced with a serious health condition, and suffering from the aftereffects of surgery, Defendant, Edward Leh ("Defendant" or "Leh"), was unable to participate in the defense of this case. Ultimately, as a result of his incapacity, a Judgment in the amount of $26,542,825.00 was entered against him ("the Judgment").

The Judgment was preceded by a "Consent Order" granting his prior counsel's motion to be relieved as counsel. That Consent Order, drafted and submitted by counsel for Plaintiff, also had the effect of orchestrating a process resulting in the striking of the Defendant's Answer and Counterclaims – pursuant to an oral motion – ultimately resulting in the Judgment.

The primary basis for striking the Defendant's Answer and Counterclaim was Leh's purported failure to provide the Court with a note from his doctor explaining why he was unable to participate in the trial. However, because the requested information was provided by Leh a few hours after the hearing that resulted in the striking his Answer and Counterclaim, and mere minutes after the note was received by Leh from his doctor, and because a second note from Leh's doctor was provided to the trial court days before the proof hearing giving rise to the Judgment, the decision by the trial court to proceed to enter Judgment against him was an improper abuse of discretion. For that reason, the Judgment should be vacated and the case remanded for a trial on the merits. Otherwise, the

requirements of *Rule* 1:1-2, that the court rules should be "construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" will be thwarted.

PROCEDURAL HISTORY

On November 20, 2019, Plaintiff filed its Complaint against Defendants Leh and Berks Plant Design & Maintenance, Inc. ("Berks"). (Da1). On February 12, 2020, Defendants filed their Answer and Counterclaim. (Da.16). On February 24, 2020, Plaintiff filed its Answer to Defendants' counterclaim. (Da39).

On November 29, 2021, the Court entered the parties' Consent Order allowing Plaintiff to file an Amended Complaint. (Da48). Thereafter, on December 1, 2021, Plaintiff filed its Amended Complaint. (Da51). On December 17, 2021, Defendants filed their Answer and Counterclaim against Plaintiff. (Da73). Then, on January 21, 2022, Plaintiff filed its Answer to Defendants' Counterclaim. (Da101).

On May 18, 2023, counsel for the Defendant and Berks filed a Suggestion of Bankruptcy advising that Berks had filed for bankruptcy protection on May 17, 2023. (Da110). On June 6, 2023, the trial court dismissed without prejudice Plaintiff's claims. (Da116). On July 6, 2023, the court vacated the portion of its Order dated June 6, 2023, as to Defendant Leh as he had not filed for bankruptcy

protection. (Da117). The Order also stated that the then current discovery end date would remain. (*Id*.)

On November 8, 2023, Defendant's then counsel filed a Motion for Leave to Withdraw as Counsel ("the Motion to Withdraw"). (Da119).

On November 15, 2023, the trial court entered an Order setting an in-person settlement conference for November 16, 2023. (Da133).

On January 25, 2024, the trial court signed a "Consent Order" submitted by counsel for Plaintiff. (Da135).

On March 28, 2024, the trial court held a hearing on the Motion to Withdraw.[1] (1T). Counsel for Plaintiff and counsel for Leh appeared at the hearing. (*Id*.) The Motion to Withdraw was granted. (Da143). Also on that day, based on an oral motion to strike, the trial court struck Leh's Answer and Counterclaim. (1T22-12). The next day, on March 29, 2024, counsel for Plaintiff submitted a 5-day Order to the court (Da144) and the Order was entered by the court on April 4, 2024. (Da148).

On April 29, 2024, the trial court conducted a proof hearing.[2] (2T). On May 1, 2024, Plaintiff's counsel submitted the proposed Order. (Da151). On May

[1] 1T = transcript of March 28, 2024.
[2] 2T = transcript of April 29, 2024.

2, 2024, the trial court entered the Final Judgment in the amount of $26,542,825.00. (Da154).

STATEMENT OF FACTS

Following extensive pre-trial discovery and due to a break-down of the attorney-client relationship between Leh and this counsel, on November 8, 2023, Leh's counsel filed the Motion to Withdraw. (Da119). In response to the Motion to Withdraw, on November 15, 2023, the trial court entered an Order setting an in-person settlement conference for November 16, 2023. (Da133).

Following the unsuccessful settlement conference, and to resolve the Motion to Withdraw, on January 25, 2024, the trial court signed a "Consent Order" that was drafted by counsel for Plaintiff. (Da135). Pursuant to the text of the Order, it was submitted "with the consent of counsel for Plaintiff and Defendant Leh" and provided that oral argument on the Motion to Withdraw would occur on February 5, 2024. (Da136). The Order does not state that Leh consented to the provisions of the "Consent Order".

The "Consent Order" required Leh to participate in the argument on the Motion to Withdraw and subsequent court proceedings "unless Defendant Leh provides an acceptable signed and current letter from his actual surgeon(s) that justifies any alleged inability to participate in person or, in the alternative, remotely." (*Id.*) The "Consent Order" further stated the following:

> If Defendant Leh (i) fails to appear in person or remotely for oral argument on the Motion to Withdraw, (ii) fails to appear in person or remotely for the pretrial conference, (iii) fails to timely submit any pre-trial exchange of information pursuant to R. 4:25-7, or (iv) fails to appear in person for trial, and Defendant Leh fails to timely provide a signed and current letter from his actual surgeon(s) as required by this Consent Order and which the Court determines is acceptable, and upon Certification from counsel for the Plaintiff, Defendant Leh's Answer to Amended Complaint and Restated Counterclaims shall be stricken and entry of judgment shall be entered in favor of the Plaintiff and against Defendant Leh, in accordance with R. 1:2-4.

Consent Order at ¶ 6 (Da138).

On February 16, 2024, a court notice was issued setting a case management conference for March 28, 2024, which was an adjournment from February 29, 2024. (Da139).

On March 28, 2024, the Court held the hearing on the Motion to Withdraw. Counsel for Plaintiff and counsel for Leh appeared at the hearing. The trial judge placed a telephone call to Defendant Leh but was unable to reach him and left a message. (1T4-16; 5-4). The trial judge then recounted the history of the case including that the "case got close to trial" and that "several months ago we had an in-person settlement conference to try to resolve the case", but that it was unsuccessful. (*Id*. at 6-11;6-18). The trial judge then acknowledged the following:

> At that settlement conference and probably prior to, the Court was made aware that Mr. Leh has some medical issues going on, that he had an upcoming surgery, and his availability to participate in these proceedings was kind of unclear.

(*Id*. at 6-16; 6-22).

The trial court then stated that "Mr. Leh has not provided either Mr. Glaser [his then current counsel] or I an update as to this medical condition and his ability to participate." (*Id*. at 7-23; 7-25).

The trial court then recounted the fact that the hearing originally scheduled for February 5, 2024, pursuant to the "Consent Order" had been delayed due to Leh needing additional time to recover from his medical condition:

> So there was an order entered and I think this is the last order that I entered, I'm pretty sure, on January 26th of 2024. Well, actually it's dated January 25th of 2024 which basically says oral argument on the motion to withdraw will take place on February 5th and that was the date that we got this note that he was unable to appear for that particular conference and that was the -- the doctor's note that said he's going to take about three months to recover and so I rescheduled that February 5th date to today's date which would be -- which would allow him that three months of recovery. ***I didn't foreclose that Mr. Leh could present additional medical information that indicated that he could not maybe participate in the future***, but we haven't gotten any as Mr. Glaser certainly has requested it.

Id. at 8-9; 8-24 (emphasis added).

At the hearing, Leh's counsel advised the trial court that he had reiterated to Leh the importance of obtaining a new note from his doctor to the extent additional delays were needed. (*Id*. at 11-16; 12-7). In response to a question from the trial court as to when was the last time counsel had contact with Leh, counsel advised that he received an email from Leh two days prior stating that his surgeon was in

the process of providing Leh with an updated note regarding Leh's ability to participate:

> THE COURT: When was the last time you actually heard from him?
>
> MR. GLASER: I got an email from -- let's see. It's a good question, Your Honor. Give me a second. The last email I got was Tuesday, two days ago, 4:50 p.m. ***He was talking about he has a PDF on the way from the court***. He called 20 minutes ago to expedite everything, h [sic] just stopped. Nothing ever should have been scheduled.
>
> THE COURT: He has a PDF, what's that mean?
>
> MR. GLASER: I think -- I asked him to send a doctor's note as a PDF.
>
> THE COURT: Oh, okay. I got you.
>
> MR. GLASER: ***He got it, so he said he has a PDF on the way.***
>
> THE COURT: All right.

(Id. at 12-10; 12-25 (emphasis added)).

Given that the trial court was unable to reach Leh, and given that the Motion to Withdraw had been pending since November 8, 2023, the trial court stated that he was going to grant the Motion to Withdraw. (*Id*. at 16-4). The trial court then stated: "You know, what's going to happen if Mr. – if we get – if I hang up the phone and we get some letter from Mr. Leh saying he can't participate, I don't know, but at this point we don't have it." (*Id*. at 16-7; 16-11).

At that point in the hearing, the trial court stated that, at the present time, he was not in a position to strike Leh's answer:

> The -- ***there has been an answer filed, you know, obviously on his behalf. I really can't – I don't feel that I'm in a position to strike his answer at this point in time, but I'm going to make April 29th the trial date***. Obviously I think it's really most likely going to be a proof hearing. I don't want plaintiff to expend a lot of money preparing for a trial. I'd rather him prepare for a proof hearing, and because I think, you know, it's kind of the same thing. He's got to get his client here and we're going to go through some of the documents and some of the testimony, and should Mr. Leh show up on the 29th, he needs to be prepared to try the case. If he shows up on the 29th, we'll figure out what we're going to do going forward, but we'll just have to see what happens on the 29th, but I don't want to delay the case any longer for the plaintiff. I -- I just -- ***I know what's going to happen. I know we're going to get this letter as soon as we hang up the phone, but then we'll deal with it.*** But I'm going to send notices out to Mr. Leh.

(*Id*. at 16-13; 17-7) (emphasis added).

Although the trial court had determined that it was not in a position to strike Leh's Answer on March 28, 2024, following the trial court's statement on the record, counsel for Plaintiff made an oral motion to strike Leh's Answer and Counterclaim and argued that the "Consent Order" – drafted by counsel for Plaintiff – provided the trial court with a sufficient basis to do so at that time. (*Id*. at 19-5; 22-11). In an acknowledgment that the "Consent Order" was constructed to result in the striking of Leh's Answer and Counterclaim, counsel stated:

> The reason I referred to that, Your Honor, is because my -- my client and -- and -- and my firm had a serious concern that we were going to find ourselves in this position and, you know, ***we wanted to put together or set forth a framework to address what we firmly believe is Mr. Leh's failure to pay reasonable attention to this case and allow it to -- to proceed in -- in due course,*** and that is, in fact, what happened.
>
> * * *
>
> So, Your Honor, it's our position that if Mr. Leh is in violation of paragraph 6 of the court's order and ***we would respectfully request that the Court strike Mr. Leh's answer to the amended complaint and restated counter-claims, and enter judgement*** so we don't have to waste anymore time or resources by my client, but more importantly of -- of the Court and Your Honor's gracious time today and throughout this matter, that's what the order, you know, provides for.

(*Id*. at 20-2; 20-9; 21-22; 22-6) (emphasis added).

Following Plaintiff's counsel's argument, the trial court reconsidered its prior oral decision and granted the oral motion to strike Leh's Answer and Counterclaims. (*Id*. at 22-12).[3] The trial court then said that a proof hearing would be held, advised Plaintiff's counsel to select either April 18 or April 29 for the hearing, and requested that Plaintiff's counsel provide an Order memorializing the trial court's decision. (*Id*. at 24-23). The next day, on March 29, 2024, Plaintiff's

[3] Despite the fact that Paragraph 6 of the Consent Order states that Leh's Answer may be stricken "upon Certification from counsel for the Plaintiff", no such Certification was made by Plaintiff's counsel.

counsel provided the requested proposed Order to the trial court. (Da144). On April 4, 2024, the trial court entered the Order. (Da148).

However, only a few hours after the conclusion of the hearing at 1:20 p.m. on March 28, 2024, Leh provided the requested doctor's note to his then former counsel. (Da140). Leh's former counsel then forwarded the email and doctor's note to both the trial court and Plaintiff's counsel. (Da140-41). Although the doctor's note stated that it was printed on March 28, 2024, at 13:16 EDT (only 4 minutes before it was sent by Leh to his former counsel), it concerned a doctor's visit on March 19, 2024, and stated the following:

> EDWARD LEH was seen today. HE UNDERWENT SURGERY FOR A SEVERE CHRONIC DISEASE ON 12/29/23 AND CONTINUES TO HEAL WOUNDS FROM THIS. WITHIN A REASONABLE DEGREE OF MEDICAL CERTAINTY, I ESTIMATE HE WILL NOT BE FULLY HEALED FOR AT LEAST 3 MORE MONTHS AND CANNOT RULE OUT THE NEED FOR ADDITIONAL SURGERY. HE WILL BE SEEN BACK IN JUNE/JULY.

(Da142)(emphasis in original).

On April 29, 2024, the trial court conducted a proof hearing. At the start of the proof hearing, the trial court acknowledged receiving a letter from counsel for Berk's counsel forwarding a letter from Leh's doctor dated April 16, 2024. (2T4-11). The trial court summarized Leh's doctor's letter as follows:

> And it goes -- and I'm not going to read it into the record because it has personal information of Mr. Leh's. However, it indicates as we knew previously, that Mr.

> Leh had undergone a surgery, a significant surgery at the end of December. And that he's -- at least it sounds like he's doing well. ***But the process is expected to last -- and I'm quoting -- last -- expected to last months as of his last visit on 3-19 of '24. He still had open wounds. Sitting for long periods of time is unreasonable. And he's under the care of a chronic pain specialist***. He anticipates that June or July further surgery is going to be necessary. That's what the letter says.

(*Id*. at 4-22; 5-9) (emphasis added).

The trial court then proceeded with the proof hearing at which time testimony from two witnesses on behalf of Plaintiff was received by the court. Following the proof hearing, and determining that Leh's actions constituted consumer fraud, the trial court asked Plaintiff's counsel to submit a proposed Order entering final judgment. (2T69-9). On May 1, 2024, Plaintiff's counsel submitted the proposed Order. (Da151). On May 2, 2024, the trial court entered the Final Judgment in the amount of $26,542,825.00 against Leh. (Da154).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT PROCEEDED WITH THE PROOF HEARING ON APRIL 29, 2024, WHEN IT HAD RECEVIED TWO NOTES FROM LEH'S SURGEON AS REQUIRED BY THE JANUARY 25, 2024, CONSENT ORDER INDICATING THAT LEH WAS UNABLE TO PARTICIPATE IN COURT PROCEEDINGS. (Issue Not Raised Below)

The trial court's decision to proceed with a proof hearing on April 29, 2024, despite the fact that it had received two reports from Leh's surgeon as required by

the terms of the "Consent Order" dated January 25, 2024, was an abuse of discretion.

First, at the time the hearing on March 28, 2024, commenced at 10:15 a.m., the trial court had not received the note from Leh's surgeon as required by the Consent Order dated January 25, 2024. However, a letter from Leh's surgeon, printed by the surgeon's office on March 28, 2024, at 1:16 p.m., detailing the notes from a visit on March 19, 2024, was received by Leh's counsel (then former counsel) at 1:20 p.m. on March 28, 2024. (Da140-44). Thereafter, the letter was sent by Leh's counsel to the trial court later that day at 4:43 p.m. (Da140). In that note, the doctor indicated that Leh was still healing from the surgery and still had open wounds. (Da142).

Second, at the proof hearing on April 29, 2024, the trial court acknowledged receiving a second letter from Leh's surgeon on the prior Friday (which would have been April 26, 2024) that was dated April 16, 2024. (2T4-22; 5-9).

The trial court summarized the letter as follows:

> Mr. Leh had undergone a surgery, ***significant surgery at the end of December. And that he's – at least it sounds like he's doing well. But the process is expected to last – and I'm quoting – last – expected to last months as of his last visit on 3-19 of '24. He still has open wounds. Sitting for long periods of time is unreasonable. And he's under the care of a chronic pain specialist***. He anticipates that June or July further surgery is going to be necessary. That's what the letter says.

Id. (emphasis added).

Despite receiving two notes from Leh's surgeons as required by the January 25, 2024, Consent Order, the trial court proceeded with the proof hearing resulting in a judgment in excess of $26 million dollars being entered against Leh. Proceeding with the case despite notice from Leh that he was unable to participate in the proceedings as required by the Consent Order was an abuse of discretion.

"The right of a trial court to manage the orderly progression of cases before it has been recognized as inherent in its function." *Castello v. Wohler,* 446 N.J. Super. 1, 25, 139 A.3d 1218 (App. Div. 2016) (*quoting Casino Reinvestment Dev. Auth. v. Lustgarten,* 332 N.J. Super. 472, 488, 753 A.2d 1190 (App. Div.), *certif. denied*, 165 N.J. 607, 762 A.2d 221 (2000)).

The Appellate Division generally defers to a trial judge's disposition unless the trial court "has abused its discretion or its determination is based on a mistaken understanding of the applicable law." *Id*., (quoting *Rivers v. LSC P'ship,* 378 N.J. Super. 68, 80, 874 A.2d 597 (App. Div.), *certif. denied*, 185 N.J. 296, 884 A.2d 1266 (2005); *see also Santos v. Estate of Santos,* 217 N.J. Super. 411, 415, 526 A.2d 223 (App. Div. 1986) ("Where a question which calls for the exercise of judicial discretion is properly presented, it is the duty of the court to consider and determine that question so that the rights of the parties may be fairly protected in an orderly manner." (citation omitted)).

Under that standard, an abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *Flagg v. Essex Cty. Prosecutor,* 171 N.J. 561, 571, 796 A.2d 182 (2002) (*quoting Achacoso-Sanchez v. Immigration & Naturalization Serv*., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Rule 1:2-4, which provided the basis for the trial court's decision to strike Leh's answer, provides a wide range of sanctions that may be imposed for a party's failure to appear without "just excuse." Those sanctions include many options other than the striking of an answer and the entry of judgment against a party. However, when ordering sanctions under that Rule, trial courts "must remain mindful of *Rule* 1:1-2, which declares that the court rules are to be 'construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." *Pathri v. Kakarlamath,* 462 N.J. Super. 208, 220, 225 A.3d 559, 566 (App. Div. 2020). "Procedural dismissals are not favored." *Connors v. Sexton Studios, Inc*., 270 N.J. Super. 390, 95, 637 A.2d 232 (App. Div. 1994).

In this case, the Consent Order dated January 25, 2024, set forth a process whereby Leh's answer would be stricken pursuant to *R*. 1:2-4 if he failed to appear at either the argument on the Motion to Withdraw, a pre-trial conference or at trial, ***and*** if Leh failed to provide an acceptable note from his surgeon. (Da130). While

Leh admittedly did not provide the required note prior to the argument on the Motion to Withdraw on March 28, 2024, he did provide it to his then former counsel later that day – and mere minutes after the note was printed by Leh's surgeon's office. (Da140-42). In addition, the trial court acknowledged that Leh provided a second note from his surgeon, by sending it to counsel for Berks, the Friday before the proof hearing on April 9, 2024, when the Judgment in the amount of $26,542,825.00 was entered against him.

Given the fact that Leh had complied with the terms of the Consent Order dated January 25, 2024 – although a few hours late on March 28, 2024 – and given the fact that the trial court received a second letter from Leh's doctor on April 26, 2024, the trial court's decision to proceed to enter judgment against Leh on April 29, 2024, was an abuse of discretion. The trial court's decision to proceed with the proof hearing on April 29, 2024, and to enter Judgment against Leh simply because the doctor's note was a few hours late on March 28, 2024, ultimately resulted in a Judgment in excess of $26 million dollars against Leh. Respectfully, the decision to proceed with the proof hearing, and to reject Leh's doctor's note because it was submitted three hours late, is simply unjust and an abuse of discretion.

In *Martin v. Robbins,* No. A-3000-14T1, 2016 N.J. Super. Unpub. LEXIS 1954 (App. Div. Aug. 25, 2016) (Da173), this Court confronted a case in which Plaintiff's complaint was dismissed with prejudice after the trial had been

adjourned ten (10) times, including numerous trial listings that were "try or dismiss dates." *Id*. at *3. At the call of the case for trial, the plaintiff was not present in court because she was caring for her husband who was unexpectedly discharged from the hospital and she had to care for him. *Id*. at *3 - *4. For that reason, the trial court dismissed with prejudice plaintiff's claims.

In deciding that the trial court's decision to dismiss plaintiff's complaint with prejudice for failing to appear at the trial was an abuse of discretion, this Court was sympathetic to the trial court's situation:

> The facts at hand depict a struggle repeated frequently in courtrooms around the state. On the one hand, a judge has a strong interest and designated responsibility to manage the progress of litigation to assure trial concludes in a timely manner. On the other hand, a party has an interest in his or her "day in court" to obtain an adjudication of a dispute on the merits, despite an unforeseen circumstance disrupting scheduled trial dates. *Kosmowski v. Atlantic City Med. Ctr*., 175 N.J. 568, 574, 818 A.2d 319 (2003). Although understanding the frustration arising from the inability to finalize this matter, we conclude the judge disregarded reasonable available alternatives and the decision to dismiss this action with prejudice rises to an abuse of discretion.
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> * * *
>
> Although aged, this principle remains a timeless guide for our courts: [C]ourts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their

> time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective.

Martin, at *5 -*6 *quoting Allegro v. Afton Village Corp.,* 9 N.J. 156, 161, 87 A.2d 430 (1952) (*citing Pepe v. Urban*, 11 N.J. Super. 385, 78 A.2d 406 (App. Div. 1951)).

Just like in *Martin*, it is clear that the trial court had grown frustrated with the progress of this case. "So, this is a case that's kind of going around and around and around." (1T6-2). In addition, after Leh's counsel filed the Motion to Withdraw, the trial court attempted to resolve the matter by ordering a settlement conference with the parties to no avail. Moreover, the trial court entered the "Consent Order" giving Leh an opportunity to present the doctor's note advising whether and when Leh would be able to participate in the case. Although Leh was a few hours late in providing the doctor's note on March 28, 2024, by the time the proof hearing occurred on April 29, 2024, the trial court had received two updates from Leh's surgeon advising of the continuing nature of Leh's recovery and the fact that he still had open wounds from the surgery.

Given that the trial court had received notice of Leh's medical condition as required by the Consent Order – a fact that pursuant to the terms of the Consent Order should have precluded the striking of his Answer[4] – it was an abuse of

[4] Paragraph 6 of the Consent Order states that if certain hearings and court

discretion for the trial court to strike his answer on March 28, 2024, and to proceed with a proof hearing on April 29, 2024. For that reason, Leh respectfully requests that the Judgment be vacated, and the case be remanded to the trial court for a hearing on the merits.

II. THE TRIAL COURT ERRED WHEN IT ENTERED THE "CONSENT ORDER" DATED JANUARY 25, 2024, GIVEN THAT THERE IS NO RECORD EVIDENCE THAT LEH CONSENTED TO THE RELIEF GRANTED THEREIN. (Issue Not Raised Below)

The trial court erred and abused its discretion when it entered the "Consent Order" dated January 25, 2024, given that there is no record evidence that Leh ever consented to the relief sought therein. In fact, by its own terms, it states that the "Consent Order" was being entered "with the consent ***of counsel*** for the Plaintiff and Defendant Leh…." (Da136). There is no indication that Leh ever consent personally to the relief granted by the Order. Moreover, given that Leh's counsel's Motion to Withdraw was pending, the fact that there is no record evidence that Leh himself consented to the relief granted in the Consent Order is even more troubling. Given that the Consent Order was the beginning of the end of the process whereby a Judgment of over $26 million dollars was entered against Leh,

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appearances are missed ***"and"*** the note from the doctor is not provided, Leh's Answer shall be stricken – meaning that the failure to provide the note was a condition precedent to the striking of the Answer. Because the note was provided, albeit it late Leh substantially complied with the Consent Order.

the fact that there is no record evidence that he ever consented to the process set forth therein is reversible error.

The "Consent Order" was drafted by counsel for Plaintiff, despite the fact that it was ostensibly to deal with the then currently pending Motion to Withdraw that had been filed by Leh's counsel. In addition to dealing with the scheduling of the hearing on the Motion to Withdraw, the Consent Order further scheduled a pre-trial conference and the actual trial date, and provided Leh four (4) weeks to search for and engage new counsel after the Motion to Withdraw was decided. The Order further provided that Leh was to appear in person for the pre-trial conference and at trial unless he provided "an acceptable signed and current letter from his actual surgeon(s) that justifies any alleged inability to appear in person." Finally, and most importantly for the purposes of this appeal, Paragraph 6 of the Consent Order provided the following:

> If Defendant Leh (i) fails to appear in person or remotely for oral argument on the Motion to Withdraw, (ii) fails to appear in person or remotely for the pretrial conference, (iii) fails to timely submit any pre-trial exchange of information pursuant to R. 4:25-7, or (iv) fails to appear in person for trial, ***and Defendant Leh fails to timely provide a signed and current letter from his actual surgeon(s) as required by this Consent Order and which the Court determines is acceptable***, and upon Certification from counsel for the Plaintiff, Defendant Leh's Answer to Amended Complaint and Restated Counterclaims shall be stricken and entry of judgment shall be entered in favor of the Plaintiff and against Defendant Leh, in accordance with R. 1:2-4.

Consent Order at ¶ 6 (emphasis added).

When the hearing on the Motion to Withdraw was held on March 28, 2024, Leh did not appear. Moreover, at the time the hearing commenced at 10:15 a.m., the Court had not received the letter from Leh's surgeons as required by the terms of the Consent Order.[5] Then, after the Court ruled on the Motion to Withdraw, counsel for Plaintiff made an oral motion for the trial court to strike Leh's Answer and Counterclaims.

Importantly, at the time the Consent Order was consented to by Leh's counsel, counsel had a pending Motion to Withdraw. And nowhere in the record is there any indication that Leh actually consented to the Consent Order. Moreover, there was no representation in the text of the Consent Order that Leh consented to it. Nor was there any indication at the hearings on March 28, 2024, or April 29, 2024, that Leh had consented to the terms of the Consent Order, such as a colloquy with counsel as to whether Leh had actually consented.

In *In re Linder Irrevocable Trust*, No. A-0634-10T1, 2011 N.J. Super. Unpub. LEXIS 509 (App. Div. Mar. 3, 2011)(Da177), the Court considered whether a consent order forwarding a settlement agreement that was not signed by the party was enforceable against that party. In agreeing to vacate the consent

[5] However, the required letter from Leh's surgeons was received by Leh's counsel at 1:20 p.m. on that day and was forwarded to the trial court later in the day on March 28, 2024, after the hearing. (Da140-142).

order, the trial court observed that the consent order did not include the signatures of the parties or their respective counsel, and contained no recital that the parties had each assented to the terms of a settlement agreement that was attached to the consent order. *Id*. at *5. For that reason, among others, the trial court vacated the consent order.

On appeal, this Court reversed the trial court's decision. However, the reversal was not because of the trial court's decision to vacate the consent order to which it was clear the parties did not consent. Rather, the trial court's decision was reversed because, at the hearing to determine whether the parties had consented, the opposing party did not have access to purportedly privileged emails between the party objecting to the consent order and that party's counsel – key evidence as to whether the objecting party had consented to the consent order.

Here, from the record evidence, there is no indication that Leh ever consented to the relief ordered in the "Consent Order." Given that the "Consent Order" was, by its terms, entered only with "the consent of counsel for the Plaintiff and Defendant Leh", because there was no colloquy with Defendant Leh's counsel whether Leh had consented to the "Consent Order", and because there is no other record evidence regarding Leh's consent to the "Consent Order", the Judgment arising from the Consent Order should be vacated and the case remanded to the trial court for a determination as to whether Leh consented to the Consent Order.

Reversal is particularly appropriate when, at the time the Consent Order was consented to by Leh's former counsel, the Motion to Withdraw was pending.

CONCLUSION

Therefore, Defendant Leh respectfully requests that the Judgment entered against him on May 2, 2024, be vacated and that this matter be remanded to the trial court for trial on the merits.

Respectfully submitted,

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Dated: December 6, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003198-23

MYRTLE PACKAGING, LLC, Plaintiff-Respondent, v. BERKS PLANT DESIGN & MAINTENANCE, INC., EDWARD F. LEH, JOHN DOES, ABC PARTNERSHIPS & XYZ CORPORATIONS, JOINTLY, SEVERALLY AND/OR IN THE ALTERNATIVE, Defendants-Appellants.	CIVIL ACTION ON APPEAL FROM ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CUMBERLAND COUNTY Docket No.: CUM-L-719-19 SAT: BELOW: Hon. James R. Swift, J.S.C.

BRIEF OF PLAINTIFF-RESPONDENT, MYRTLE PACKAGING, LLC

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I. PRELIMINARY STATEMENT

Myrtle Packaging, LLC ("Myrtle") is a family owned and operated business which was manipulated and taken advantage of by Edward F. Leh, III ("Leh"), the owner of Berks Plant Design & Maintenance, Inc. ("Berks") (collectively, the "Defendants"). The undisputed facts of the case, its procedural history, and well-established case law all fall in Myrtle's favor, which is why the Trial Court correctly found in Myrtle's favor below. Notably, nothing in the present appeal seeks to challenge these facts or the law applied below. Leh's present appeal fails to even attempt to counter Myrtle's persuasive evidence again him.

Notwithstanding the Trial Court's cogent findings is the fact fatal to Leh's present appeal: Leh failed to raise any of the issues before the Trial Court that he attempts to bring now. In fact, Leh chose to not attend the proof hearing in any format (in-person, virtually, or telephonically). At the proof hearing, the Trial Court thoroughly considered the testimony, expert reports, and evidence supplied and properly entered judgment against Leh. In the absence of any ability to alter the Trial Court's cogent findings, Myrtle submits that the Appellate Division should upheld Judge Swift's findings in full.

However, even if the Court considers Leh's newly raised arguments that he did not raise below, the Court should still affirm Judge Swift's findings. Initially, Judge Swift's credibility findings must be given great weight. Leh's credibility, or

lack thereof, is crucial as he made countless deceptive acts including, but not limited to, bait and switch tactics, misrepresentations, fabricated his credentials, and other falsehoods. Leh, by way of his attorney, agreed to the Consent Order, which he is now objecting to. Such objection is barred by the doctrine of invited error. Moreover, the evidence below shows that Leh was well aware of the Consent Order and its obligations, but he chose to ignore it. Simply put, the Court should not reward or encourage gamesmanship.

Taking all of this together, Myrtle respectfully submits that the Court should affirm Judge Swift's cogent decision below because, when applied to the relevant law and facts adduced, Leh is clearly liable to Myrtle.

II. PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Myrtle is a family owned and operated business that operates a food production and packaging plant that primarily manufactures "Hank Sauce ®", a line of hot sauce personally developed by internal members of Myrtle over ten (10) years ago. (T2 10:1-20)[2]. As a company with humble beginnings, Myrtle started off its production by bottling thousands of sauces by hand; however, as sales and demand

[1] Because they are closely related, the procedural and factual histories are combined to avoid repetition and for the Court's convenience.

[2] "T1" refers to the transcript dated March 28, 2024, and "T2" refers to the transcript dated April 29, 2024. Additionally, "Da" refers to the Defendant's appendix and "Db" refers to Defendant's brief. R. 2:6-8.

for Hank Sauce grew, so did the need for a quicker, more automated method of cooking and packaging. (T2 10:7-15; 11:4-25). Thus, Myrtle developed its Millville facility in order to improve capacity and automation as well as to facilitate further growth. (T2 11:11-24). As part of this expansion, and given that the members of Myrtle were new to this line of business, Myrtle searched for an expert to put together a production line that was suitable for its expected growth. (T2 12:1-22). The Defendants held themselves out as such an expert and assured Myrtle that all of its needs would be met. (T2 13:20-25- 14:1-15). As a result, Myrtle contracted with Berks and Leh in early 2016 to provide a "turnkey" packaging line (the "Line") to increase overall efficiency and product output. (T2 13:17-19).

During the discovery period, Myrtle produced two (2) expert reports, which detailed the Defendants' liability and Myrtle's damages. (T2 36:9-14). The first report (the "Goldman Report") was issued by Global Innovation Professions LLC, Jim Goldman, CPP, who is a mechanical engineer, certified packing professional with over 40 years of experience in the food and beverage industry. (T2 36:15-25). The Goldman Report estimated the total damages Myrtle incurred was $13,056,984.00. (T2 49:1-3). The second report (the "Marcum Report") was issued by Marcum Accounts and Advisors, Michael A. Saccomanno, CPA/ABC/CFF,

CVA and focused mainly on economic damages. (T2 49:8-24; 50:20-25 – 51:1-5)[3]. The Marcum Report examined the Goldman Report and rendered its opinion, within a reasonable degree of accounting certainty, that Myrtle sustained damages amounting to $8,764,275.00. (T2 52:18-19).

Then, after years of protracted litigation, the discovery period finally concluded on September 11, 2023. See (Da117) (July 6, 2023 order by Judge Swift confirming the "DED" will remain set at September 11, 2023). Shortly thereafter, in November 2023, Leh's second attorney, Offit Kurman, sought leave to withdraw as counsel for Leh. (T1 6:23-25). Despite the pending motion, Judge Swift noted that counsel for Leh remained on for an extended period of time to assist with settlement discussions. (T1 6:16-25, 7:1-6). In January 2024, while Leh was still represented by Offit Kurman, Leh and Myrtle filed a consent order, which was entered by the Court on January 25, 2024. (The "Consent Order") (Da135-138).

More specifically, the Consent Order required a number of items including, but not limited to, the timeframe for Leh to object to the motion to withdraw (Da136 ¶ 2), the timeframe for Leh to obtain new counsel (Da137 ¶ 4), the manner in which Leh was required to appear (unless he provided a signed and current letter from his actual surgeon(s), which detailed his inability to appear in person or remotely) as

[3] The Goldman Report and the Marcum Report may be collectively referred to herein as the "Reports".

well as a schedule of any future medical procedures, a timetable for when Leh could appear in Court in person and remotely for any future proceedings within the next three (3) months and any alleged reasons why he could not participate in any future Court proceedings remotely such as via Zoom (Da136-137 ¶¶ 4-5). Notably, this was all done with the consent of Leh's counsel while counsel was still representing Leh in January of 2024. (T1 8:9-11); see also (Da135-138).

Despite His Honor's best efforts, the matter did not resolve, and Judge Swift eventually heard Leh's counsel's motion to withdraw on March 29, 2024. (T1 6:23-25). The original return date for the motion to withdraw was scheduled in 2023 and was adjourned multiple times, even again in February 2024 to accommodate Leh. (T1 8:9-24). The adjournment until March 29, 2024 was expressly for the benefit of Leh and a result of the parties' negotiation regarding the January 25, 2024 Consent Order. (T1 8:9-20). Notably, Judge Swift "didn't foreclose that Mr. Leh could present additional medical information that indicated that he could not maybe participate in the future, but we haven't gotten any . . .". (T1 8:20-23). Leh's attorney detailed all of the notices provided to and conversations he was able to have with, Leh, including speaking to Leh on "Tuesday, two days ago" meaning March 26, 2024. (T1 12:10-15). Per the Court's request, Leh's counsel also confirmed the contact information that he had been using to communicate with him. (T1 13:2-7).

At that hearing, "the Court conclude[d] that [Leh's] just trying to avoid this case" and permitted Offit Kurman to withdraw. (T1 16:2-12).

Pursuant to the Consent Order, Judge Swift simultaneously heard a request for an Order to Strike Leh's Answer and Counterclaims for his continued violation of the Court's Consent Order. (T1 pp. 18-22). However, the Court noted that it would not "enter judgement without taking proofs . . . [s]o I'm still going to need to have a proof hearing." (T1 22:14-19). The Court's striking of Leh's Answer and Counterclaims was "subject to reinstatement" if Leh complied with the Consent Order and ordered Myrtle's counsel to submit a corresponding order. (T1 23:5-7). No objection was raised, and the Court entered the Order on April 4, 2024 setting the date for the proof hearing for April 29, 2024 (the "April 4 Order") (Da148-150). The last requirement for Offit Kurman was to send Leh a copy of the Order, which Leh's former counsel confirmed he would do. (T1 26:1-9).

Thereafter, a proof hearing was held on April 29, 2024, which Leh was invited to attend or participate in-person, virtually (i.e. Zoom) or telephonically but failed to appear in any format. (T2 6:4-13). The Court began by acknowledging a letter received by the Court on Friday, April 26, 2024 (the "April 26 Letter"). (T2 4:11-13). Judge Swift correctly did not read the entire April 26 Letter into the record out of a concern for Leh's personal information, but noted that it reiterated the Leh had surgery in December 2023 and that "he's doing well." (T2 4:22 – 5:1-2). Further,

Judge Swift noted that the April 26 Letter "certainly doesn't suggest that he couldn't appear virtually" and, moreover, "it doesn't ask for an adjournment." (T2 6:6-12). Leh was able to ensure the doctor's note was provided to the Court, but the note did not provide any new information that was of import. (T2 6:2-3). As there was no objection to the April 4, 2024 Order or the proof hearing itself and because Leh failed to attend or participate in any way, Judge Swift properly moved forward with the proof hearing. (T2 6:14-15); see (T2 6:16-24) (detailing that all notices and Orders were sent to Leh via email and by way of certified mail, return receipt requested, and regular mail).

Judge Swift carefully considered the testimony of Myrtle's principals, Pietro Pittaluga ("Mr. Pittaluga") and Joshua Jaspan as well as the Reports. Judge Swift held that, "based upon the testimony, which I find believable and all the documentation which certainly comports with the testimony I find that plaintiff has proven his cause of action." (T2 66:8-11). Judge Swift also expressly found that both Reports were credible but that His Honor would accept the lower figures from the Marcum Report because it "is a[n] economic report prepared by accountants". (T2 66:8-19). The remainder of Judge Swift's decision was a stinging indictment of Leh's fraudulent acts, in part, holding that "Leh certainly made material misrepresentations" (T2 67:22-23) and "[t]hese were all material misrepresentations, fraud against Myrtle Packaging. And these were perpetuated directly by Mr. Leh."

(T2 68:4-7). Judge Swift properly trebled the damages and awarded attorneys' fees, which is mandated under the New Jersey Consumer Fraud Act (the "Act") (N.J.S.A. 56:8-19; Cox v. Sears Roebuck, 138 N.J. 2 (1994)) and entered an Order for Final Judgment against Leh in the amount of $26,542,825.00 to Myrtle (the "May 2 Order") (Da154-155).[4]

III. ARGUMENT

A. THE NIEDER STANDARD CONTROLS AND BARS ANY LATE OBJECTION BY LEH

Questions or issues that should have been, but were not, properly presented at the time of hearing should not be presented for appellate review. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see State v. Robinson, 200 N.J. 1, 19 (2009) ("Appellate Review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves."). Moreover, permitting "late-blooming issues . . . to be raised for the first time on appeal" only serves to incentivize "game-playing" by litigants. Robinson, 200 N.J. at 19 (internal citations omitted). The only exceptions to this long-standing principle are whether the question goes to the "jurisdiction of the trial court or concern[s] matters of great public interest." Nieder, 62 N.J. at 234. Leh is unable to satisfy either of these exceptions.

[4] The April 4 Order and the May 2 Order may be referred to collectively herein as the "Orders".

Here, Leh readily acknowledges he failed to raise any objection and failed to appear, despite the Court offering for him to appear telephonically, virtually, or in any other manner. See (T2 5:20-24) (providing Leh with the ability to "participate in some type of Zoom hearing or any other -- you know, whatever other accommodation that we could grant him to make this happen."). The Trial Court met with, observed and interacted with Leh on numerous occasions, as Judge Swift held several settlement conferences with the parties in an effort to resolve this matter. Judge Swift spared no effort to accommodate Leh and His Honor's unrefuted decisions about Leh's credibility, or the lack thereof, is entitled to great deference. State v. Yohnnson, 204 N.J. 43, 62 (2010) ("credibility determinations are entitled to deference and those factual findings must be sustained as long as they are supported by sufficient, credible evidence in the record.")

Here, any objections that Leh could have raised, addressed, or objected to below, but willfully failed to do so, cannot properly be raised for the first time during this appeal. This is fatal to Leh's present appeal. Leh's brief improperly attempts to gloss over the numerous accommodations and great lengths the Trial Court went to, for Leh's benefit, in order to provide him with every opportunity to participate in the proceedings below. This included, but was not necessarily limited to the following:

- Judge Swift adjourned the matter on several occasions (T1 7:1-25);
- Judge Swift called Leh directly (T1 7:22-25);

- Judge Swift provided Leh with an easy and clear method for reinstatement of his Answer and Counterclaims (T1 23:5-6);
- Judge Swift required former counsel to provide a copy of the April 4 Order to Leh (T1 26:1-9); and
- Judge Swift permitted Leh to participate in the proof hearing in-person, virtually or otherwise (T2 6:4-5).

Instead of taking advantage of the numerous opportunities listed, Leh strategically sat on his rights and only after a judgment was entered against him did he file the present appeal and seek to raise issues never before raised below.

Crucially, Leh failed to raise any issue with Judge Swift's cohesive Orders below, request an adjournment, or provide any contemptuous medical documentation that indicated he was unable to participate virtually, telephonically, or otherwise, and his arguments must be rejected by the Appellate Division. See Nieder, 62 N.J. at 234; see also R. 1:7-2. In fact, the record clearly establishes (1) Leh was able to communicate with the Court when he chose to do so, including providing physician's notes, but that he avoided the Court's calls and emails from counsel, (2) the note provided from his physician's office actually said that "he's doing well" (T2 5:2), and (3) he was informed and aware of the relevant orders, timelines, and requirements as he had been in direct communication with his former counsel. (T1 10:11-25 to 13:1-19).

In the end, Leh cannot claim that the Trial Court somehow prevented him from attending or participating in the proof hearing. Rather, the Trial Court went out

of its way on numerous occasions to attempt to have Leh participate in any manner possible and provide ". . . whatever other accommodation that we could grant for him to make this happen." (T2 5:22-24). Instead, Leh now attempts to raise "late-blooming issues" for the first time on appeal, which our precedent warns would only serve to incentivize "game-playing" by litigants. Robinson, 200 N.J. at 19 (internal citations omitted). Thus, the Court should affirm the Trial Court's decision in full.

B. THE LOWER COURT PROPERLY CONSIDERED THE SALIENT FACTS AND RELEVANT LAW AND ITS THOROUGH DECISION SHOULD BE UPHELD BY THE APPELLATE DIVISION

The above facts and procedural history are well established. Taking all of this together, Myrtle respectfully submits that the Appellate Division should affirm Judge Swift's cogent decisions because, when applied to the relevant law, Leh is clearly liable to Myrtle for the damages as established by the Reports.

This is not a matter whereby an appeal could ever seek to alter the outcome of the case. Discovery remains closed and Leh has failed to produce any expert report. See (Da117) (July 6, 2023 order by Judge Swift confirming the "DED" will remain set at September 11, 2023); see also State v. Baum, 224 N.J. 147, 159 (2016) (while Myrtle disputes that there was any error, Baum holds that an error is harmless and thus not reversible if it did not lead the trier of fact "to a verdict it otherwise might not have reached").

Judge Swift's initial decision, on April 4, 2024, was to strike Leh's Answer and Counterclaims and this Order expressly provided a manner by which Leh could apply for reinstatement of the same. Yet, Leh chose to do nothing.

Thereafter, Leh again chose to not attend the April 29, 2024 proof hearing in any format (in-person, virtually, or telephonically). The transcript clearly reveals that the Court thoroughly considered the testimony and evidence supplied and properly entered judgment against Leh. Even in this appeal, to date, Leh has offered no counter to Myrtle's persuasive evidence against him. Because the outcome at the lower level has no realistic possibility of changing in any way, this Court should uphold the Trial Court's decision. See BV001 REO Blocker, LLC v. 53 West Somerset Street Properties, LLC, 467 N.J. Super. 117, 125 n.3 (App. Div. 2021) (explaining "a meritorious defense is required so that 'there is some possibility that the outcome' after restoration 'will be contrary to the result achieved by the default'") (quoting 10A Charles A. Wright et al., Federal Practice & Procedure § 2697 (4th ed. 2020)). Leh was given every opportunity to challenge, address or object to the prior Court Orders (some of which were entered by way of consent of his counsel while he was represented) but sat on his rights below.

Even if the Court substantively evaluates the claims against Leh, Myrtle would still be successful. Myrtle moved against Leh under the Act. The Act makes any act, use or employment by **any person** of any unconscionable commercial

practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has, in fact, been misled, deceived, or damaged thereby, an unlawful practice. "Person" is broadly defined within the Act to include "any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof." N.J.S.A. 56:8-1. In short, the Act was intended to and fully applies to people such as Leh.

At the proof hearing, Mr. Pittaluga credibly testified to a number of discussions directly with Leh and how Leh made numerous false affirmative statements and promises regarding the quality, condition and functionality of the to-be-provided turnkey Line and the equipment for the Line. (T2 13:20-25- 14:1-2). One of the most salient misrepresentations that Leh made to induce Myrtle into business with him was that he used his father's name (Edward Leh, Jr.) and his post nominals "P.E." (Leh's father was a licensed engineer) to misrepresent to clients that he was an engineer, when in fact, he had not graduated from college. (T2 14:8-25 - 15:1-14; T2 29:24-25- 30:1-18). Leh also knew that the equipment provided to

Myrtle was not as promised when sold, and his conduct violates N.J.A.C. 13:45A-9.2(2)(ii), which makes it unlawful for an advertiser to not designate which merchandise items, if any, are damaged or in any way less than first quality condition. Additionally, Leh blatantly attempted to deceive Myrtle by reporting an inaccurate serial number through invoices that did not align with the equipment it was labeled for. In doing so, Leh tricked Myrtle into believing that it was receiving brand new or much newer equipment than it was given when, in reality, some of the equipment Leh delivered had been discontinued over a decade ago and was ineligible for repairs or had serial numbers removed. (T2 22:4 through T2 28:22). This obvious bait and switch tactic violates N.J.A.C. 13:45A-9.2(2)(iii), which makes it unlawful for an advertiser to fail to specifically designate merchandise as discontinued. Moreover, Leh clearly misrepresented the status of the Line during the funding stage to invoke a quicker payment without providing any working machinery. Representations that the Line was "75% … together and working" prior to delivery were lies, as evidenced by the necessary and significant assembly and repair expenses incurred by Myrtle thereafter. Further, Leh's affirmative statements that the Line was pre-tested at Berks' facility prior to delivery was also untrue, as evidenced by Leh's own deposition testimony and the countless repairs and replacements the equipment needed to undergo immediately after delivery. (T2 28:4-22). These violations and unconscionable practices have led to an ascertainable loss

by Myrtle in the form of lost profits, additional labor and unnecessary servicing expenses more clearly detailed within the Reports.

In the absence of any ability to alter the Trial Court's cogent findings and the well-reasoned Reports, the Court should uphold the Trial Court's findings in full.

C. LEH'S ARGUMENTS REGARDING THE CONSENT ORDER ARE RED HERRINGS AS THEY ARE BARRED BY THE DOCTRINE OF THE INVITED ERROR AND BECAUSE HE CANNOT CREDIBLY CLAIM THAT HE COMPLIED WITH THE CONSENT ORDER, WHICH HE DID NOT, WHILE SIMULTANEOUSLY ASSERT HE WAS UNAWARE OF IT

The Court should not accept Leh's attempt to deceive the Court by claiming (without any affidavit against his former counsel) that he (1) complied with the terms of the Consent Order (Db15), but (2) was simultaneously unaware of the Consent Order (Db18). This is directly contrary to the doctrine of invited error and, moreover, neither of these new arguments, which were raised for the first time via this appeal, aligns with any of the evidence established below. As a result, Leh's appeal should be rejected by this Court.

1. The Doctrine Of Invited Error Is A Bar Of Leh's New Argument As His Counsel Expressly Consented To The Consent Order

The Consent Order, which was consented to by Leh's counsel, was extremely detailed. Its preamble expressly states: "this action commenced in 2019, the trial having been adjourned multiple times, and the goal to secure a

just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay . . . and [is entered into] with the consent of counsel for the Plaintiff and Leh". As an initial matter, this conclusively establishes that Leh may not complain of the Consent Order as it is barred by the doctrine of invited error.

"The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 447 (App. Div. 2021) (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996)). Moreover, a "a defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial." State v. Jenkins, 178 N.J. 347, 358 (2004) (citations and internal quotation marks omitted). This is because the doctrine "is based on considerations of fairness and preservation of the integrity of the litigation process." Brett, 144 N.J. at 503.

Our courts have applied the doctrine of invited error in a wide variety of situations. State v. Kemp, 195 N.J. 136, 155 (2008) (applying invited error doctrine because defense counsel agreed to officer's testimony); Brett, 144 N.J.

at 503 (stating that defendant barred by doctrine of invited error from contesting application of Ski Statute); State v. Corsaro, 107 N.J. 339, 345 (1987) ("Trial errors which were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal[.]") (internal citations and quotation marks omitted); Titus v. Lindberg, 49 N.J. 66, 78 (1967) (noting that Board of Education was barred from asserting error in jury charge it requested); Mack-Cali Realty Corp., 466 N.J. Super. at 447 (App. Div. 2021) (applying the doctrine to procedures during motion practice that the plaintiffs advocated for); State v. Baluch, 341 N.J. Super. 141, 194-95 (App. Div. 2001) (noting that defendant was barred by doctrine of invited error from claiming error in failing to excuse juror when defendant argued at trial to keep juror); Spedick v. Murphy, 266 N.J. Super 573, 593 (App. Div. 1993) ("A party who consents to, acquiesces in, or encourages an error cannot use that error as the basis for an objection on appeal."); Venuto v. Lubik Oldsmobile, Inc., 70 N.J. Super. 221, 229 (App. Div. 1961) (holding that party may not raise as plain error admission of evidence where party agreed to its admission at trial).

Here, Leh with and through his counsel, consented to the streamlined process. Leh's counsel apprised him of all upcoming deadlines but Leh chose to not attend the motion to withdraw or the proof hearing. In fact, Leh failed to ever even request an adjournment. Rather, he supplied documentation that he

was doing well and the same documentation did not provide any hint that he was unable to appear via virtual, telephonic, or other remote means. In the end, Leh agreed to the Consent Order and thereafter, wholly avoided the Consent Order's obligations. Seeking to have the Trial Court reversed because of the Consent Order that he agreed to is barred by the doctrine of invited error.

2. Leh Did Not Actually Comply With The Consent Order

Contrary to Leh's conclusory statement, stating he complied with the Consent Order while simultaneously failing to cite the actual wording of the same (should the Court even find it necessary to consider this argument) in examining the plain language of the Consent Order, it is clear that Leh did not comply with the Consent Order.

Leh's brief acknowledges he sent a self-serving letter from his doctor but fails to recognize the letter omitted any detail other than the fact that "he's doing well." (T2 5:2). The actual Consent Order expressly details, what Leh was required to do in paragraphs four (4), five (5) and six (6).

Paragraph four (4) states in full:

> Unless oral argument scheduled for February 5, 2024 is postponed by the Court, Trial shall commence on Monday March 4, 2024. No further adjournments shall be allowed without a demonstration of exceptional circumstances in accordance with the Rules Governing the Courts of the State of New Jersey and applicable law. In the event the Motion to Withdraw is granted on February 5, 2024, this trial date provides sufficient time for Defendant Leh to search for and engage new counsel it being the intent to provide Defendant Leh with approximately four

> (4) weeks to search for and engage new counsel after any ruling is made. Defendant Leh is required to appear at trial in person unless Defendant Leh provides an acceptable signed and current letter from his actual surgeon(s) that justifies any alleged inability to appear in person. Such letter shall also include (i) a schedule of any future medical procedures for Defendant Leh, (ii) a timetable for when Defendant Leh can appear in Court in person and remotely for any future proceedings within the next three (3) months and (iii) any alleged reasons why Defendant Leh cannot participate in any future Court proceedings remotely such as via Zoom.

Paragraph five (5) states in full:

> A pre-trial conference shall take place on Thursday, February 29, 2024, at 2:30 PM. Defendant Leh is required to appear in person unless Defendant Leh provides an acceptable signed and current letter from his actual surgeon(s) that justifies any alleged inability to appear in person. Such letter shall also include (i) a schedule of any future medical procedures for Defendant Leh, (ii) a timetable for when Defendant Leh can appear in Court in person and remotely for any future proceedings within the next three (3) months and (iii) any alleged reasons why Defendant Leh cannot participate in any future Court proceedings remotely such as via Zoom. If Defendant Leh can participate but cannot appear in person, the pre-trial conference shall be conducted remotely.

And paragraph six (6) states in full:

> If Defendant Leh (i) fails to appear in person or remotely for oral argument on the Motion to Withdraw, (ii) fails to appear in person or remotely for the pre-trial conference, (iii) fails to timely submit any pre-trial exchange of information pursuant to R. 4:25-7, or (iv) fails to appear in person for trial, and Defendant Leh fails to timely provide a signed and current letter from his actual surgeon(s) as required by this Consent Order and which the Court determines is acceptable, and upon Certification from counsel for the Plaintiff, Defendant Leh's Answer to Amended Complaint and Restated Counterclaims shall be stricken and entry of judgment shall be entered in favor of the Plaintiff and against Defendant Leh, in accordance with R. 1:2-4.

These paragraphs are crucial and the contents of which cannot be ignored. Contrary to what Leh would have the Court believe, his letter simply stating that "he's doing well" (T2 5:2) was not sufficient and failed to meet the Consent Order's requirements. In part, this was why the Court continued its efforts to contact Leh on a number of occasions and why Leh actively avoided responding to the Court.

Leh's attempted citation to Connors v. Sexton Studios, Inc., 270 N.J. Super. 390 (App. Div. 1994) is inapposite. There, the plaintiff was late due to traffic in the Lincoln tunnel and parking difficulties, but the trial court dismissed the plaintiff's suit with prejudice. The Appellate Division held that the trial judge never determined whether there was an excuse for the late appearance or if a lesser sanction could have sufficed. Here, Leh actively avoided the Trial Court and he failed to provide any lesser sanction available for the Trial Court or even to argue that a lesser sanction could suffice. In reality, Leh has failed to identify how his presence at the proof hearing would somehow have altered the outcome of this case.

The record below is clear that Leh was more than capable of communicating to and with the Court when it was on his terms. However, when it came to following the Consent Order's detailed requirements, Leh deliberately failed to follow these expressed instructions. For example, he was required to note whether he could appear in-person or virtually, which he did not. If he could not appear in-person, virtually, or telephonically, Leh was required to have his physician provide a

timetable within the next three months of when that could change and when Leh could appear in-person, virtually or telephonically. Leh did not do this either. In fact, Leh's most recent physician note did not say that Leh needs or requests any adjournment. As a result, the Court properly struck his answer, *albeit*, with a clear and expressed method of how to reinstate his pleading.[5] Leh's physician's note wholly ignored the requirements for proceeding in-person, virtually, or telephonically and did not include any timetable for when he could proceed either in-person, virtually, telephonically. Thus, Leh's argument that he complied with the Consent Order is false and misleading and should be rejected by this Court.

3. Leh Was On Notice Of The Consent Order

Leh's newest argument, asserted for the first time and without any evidential support, is that he allegedly lacked notice of the Consent Order. (Db 18). This new argument is purely speculative and unfounded at law and in the evidence below. Curiously, despite Leh's entire appeal based upon arguments that were not raised below, he can only offer mere speculation as to whether there may be evidence regarding whether Leh consented to the Consent Order,

[5] Leh briefly and incorrectly asserts that no certification was made by counsel for Myrtle in support of the Court's decision to strike Leh's answer. (Db9 n. 3). However, this argument attempts to wholly ignore the record evidenced in the transcript whereby Counsel for the Plaintiff, as an officer of the Court, made the certification to the Court orally. See (T1). The Consent Order did not require a "written" certification, which Leh appears to imply. Thus, Leh's argument is no more than a distinction without a difference.

which was negotiated on his behalf by his former attorney. This last-ditch argument screams of improper gamesmanship.

Leh's argument is **not** that he did not consent to the Consent Order, only that there is no supposed evidence that he consented to it. See (Db 18) ("there is no record evidence that Leh ever consented to the relief"); id. ("[t]here is no indication that Leh ever consent personally to the relief granted by the Order"); id. ("there is no record evidence that Leh himself consented to the relief granted"); id. at 20 ("nowhere in the record is there any indication that Leh actually consented to the Consent Order."); id. at 21 ("there is no indication that Leh ever consented to the relief"). This distinction is without nuance and clearly reeks of subterfuge. Leh seeks to use the attorney-client privilege as both a sword and a shield and fails to provide any affidavit from himself or his former counsel to support his never-before-raised argument that there is no evidence that he consented to the Consent Order. This argument runs in direct contradiction to the expressed language of the Consent Order, stating that he in fact did consent to the Consent Order.

Leh's citation of the unpublished case of In re Linder Irrevocable Trust, No. A-0634-10T1 2011 N.J. Super. Unpub. LEXIS 509 (App. Div. Mar. 3, 2011) (Db 20) (Da117) is also misplaced. There, the trial court reviewed a consent order to

enforce a settlement[6] that was not signed by the defendant and vacated the settlement. The defendant argued that he expressly objected to the terms of the proposed consent order to his attorney but no longer had access to purportedly privileged emails and would not reveal privileged emails except for a select portion of them directly to the trial court, in camera. The Appellate Division reviewed the matter and held that the defendant could not use the attorney-client privilege as a "sword and a shield." It held that the plaintiff should have been able to review all of the relevant emails and then the trial court should have held a plenary hearing to test the defendant's credibility.

Likewise, here, Leh is attempting to feign ignorance while failing to produce any affidavit swearing, under penalty of perjury, that he was unaware of the Consent Order. This is fatal to his argument. Moreover, the competent evidence is established the contrary: his former counsel detailed all of the notices provided to and conversations he was able to have with Leh, including speaking to Leh on "Tuesday, two days ago" meaning March 26, 2024. (T1 12:10-15). It is evident that Leh was aware of Consent Order and its obligations but deliberately chose to avoid the Court's communications and Court-Ordered deadlines when he knew that his case was finally coming to an inevitable conclusion.

[6] It is clear that Leh inappropriately is attempting to mislead the Court by using "Consent Order" in an attempt to draw similarities to the present matter but the "Consent Order" in Linder related to settlement as compared to the present case relating to court scheduling deadlines. The distinction between the two should not be lost on the Court.

D. LEH'S REQUESTED RELIEF WOULD AMOUNT TO THE COURT CREATING NEW LAW AND WOULD ONLY SERVE TO ENCOURAGE GAMESMANSHIP AND SHOULD BE REJECTED, ESPECIALLY WHEN CONSIDERED AGAINST THE STANDARD OF REVIEW

Notably, Leh has not claimed that he raised or filed any malpractice claim against his former counsel. Even if he eventually does raise this issue against his former counsel, this would not somehow bar Myrtle from being successful in its own case against Leh, as those two matters would be entirely separate. At best, this would be an alleged malpractice dispute between two separate parties and there is no case law or Court Rule that would permit this to impede upon Myrtle's rights. Titus v. Mercedes Benz of North America, 695 F.2d 746, 757 n.4 (3d Cir. 1982) (Garth, J. dissenting) ("the adversary system would rapidly break down if an attorney's actions, or inaction, could not bind his client. The client's recourse for perceived legal malpractice lies in an action against his attorney.")

The alleged actions and inaction of Leh's former attorney, whether good or bad in retrospect, bind Leh. The United States Supreme Court rejected the notion that any alleged improper acts or omissions of an attorney could be reversible, stating as follows:

> Petitioner voluntarily chose this attorney as his representative in this action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed bound by the acts of his lawyer-agent and

> is considered to have notice of all facts, notice of which can be charged upon the attorney.

Link v. Wabash R.R., 370 U.S. 626, 633 (1962) (internal quotes omitted).

Regardless, the record is clear regarding Leh's deliberate actions below. Leh was merely seeking to deny, delay and avoid the case in its entirety. See (T1 16:2-3) ("the Court concludes that [Leh's] just trying to avoid this case"). Leh intended to improperly have the Court and Myrtle wait indefinitely for Myrtle to have its day in Court. Simply put, Leh's strategy was to avoid the Court unless and until a decision he found unfavorable was rendered against him. Only then did he file this appeal.

Further, the merits of this case have been fully fleshed out by Myrtle and Leh was given all the opportunities possible to participate in the hearing below. Myrtle prosecuted its case thoroughly and fairly. Leh's late-blooming appeal fails to offer even a scintilla of evidence or even argument that would change the outcome below.

Crucially, this is not a case where a litigant was barred from participation by the trial court. See e.g., Georgis v. Scarpa, 226 N.J. Super. 244, 249, 255-56 (App. Div. 1988) (reversing trial court when the trial court expressly "barred defendant from participating in the proof hearing"). In Georgis, the Appellate Division reversed a trial court because the lower court **barred** the litigant from even participating in the proof hearing. That is not the case here. Leh was continually included and notified of upcoming deadlines and his obligations. Leh deliberately

ignored these and failed to participate below. It is respectfully submitted that the Court should not allow Leh yet another bite at the apple and should dismiss his appeal.

IV. CONCLUSION

What is evident, as the transcripts clearly demonstrate, is that the Court provided every opportunity for Leh to object, seek an adjournment, or otherwise participate in the matter below and entered judgment only after Leh sat on his rights and made no objection or request for an adjournment below. The Court thoroughly considered the testimony and evidence supplied and properly entered judgment against Leh. Thus, this frivolous appeal should be dismissed in its entirety.

For the reasons set forth herein, it is respectfully submitted that the Court should not permit Leh to raise new arguments for the first time during this appeal but, rather, should dismiss the appeal in full.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

By:_____
David R. Dahan

Dated: February 5, 2025

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March 7, 2025

Via eCourts Appellate
Joseph Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, NJ 08625

Re: *Myrtle Packaging, LLC v. Berks Plant Design & Maintenance, Inc., Edward F. Leh, John Does, ABC Partnerships & XYZ Corporations, Jointly, Severally and/or in the Alternative,* Appellate Docket No. A-3198-23;

Civil Action: On Appeal from a final Order from Judge James R. Swift, J.S.C.

Appellant, Edward F. Leh's Reply Brief in Further Support of Appeal

Trial Court Docket No. CUM-L-719-19

Dear Mr. Orlando:

Please accept this letter Reply Brief on behalf of Appellant, Edward H. Leh ("Appellant" or "Leh"), in further support of Appellant's appeal.

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TABLE OF AUTHORITIES

I. LEGAL ARGUMENT

A. The *Nieder* Standard is Not Applicable

In its Brief, Myrtle asserts that Leh's appeal should be dismissed because he failed to raise any objections with the trial court as to the process whereby Judgment was entered against him and cites *Nieder v. Royal Indem. Ins. Co*., 62 N.J. 229, 234 (1973) for the proposition that the only exceptions to the requirement that objections must be raised and preserved with the trial court is when (1) the

trial court is without jurisdiction or (2) the question at issue "concerns matters of great public interest." (Pb8) (quoting *Nieder*).

However, Myrtle's argument ignores the fact that Leh was unable to assist in his defense or otherwise participate in the case given his serious medical condition – and the fact that the Court was well aware of Leh's medical situation. How could Leh have participated in the proceedings when as late as April 16, 2024, Leh still had open wounds from his surgery. Moreover, the pace of events from the striking of Leh's Answer following an oral motion on April 8, 2024, to the entry of final judgment on May 2, 2024, was extraordinarily fast and occurred while Leh was without counsel and otherwise unable to participate in the proceedings. This rapid series of events created a situation where no objection by Leh was possible.

Given that Leh was continuing to suffer the effects of a major surgery, and given that his relationship with his prior counsel had deteriorated to the point that counsel had filed a motion for leave to withdraw, it is Leh's contention on appeal that the striking of his answer was improper. Moreover, based upon the appellate record, the Consent Order was entered apparently without Leh's consent and with only the consent of his counsel all while the Motion for Leave to Withdraw was pending.

As the Appellate Division stated in *Georgis v. Scarpa*, 226 N.J. Super. 244, 254, 543 A.2d 1043, 1048 (App. Div. 1988), "our primary focus in the administration of justice is the delivery of quality justice; the elements of which are (1) adequate

pretrial preparation and a fair trial, which in effect is due process; (2) expeditious disposition, and (3) economically effective operation. The court must balance these elements and never favor the latter two above the first, fair play."

In *Georgis*, in deciding to reverse the trial court's decision to suppress the defendant's answer, the Court stated: "We recognize some dereliction by defendant in his defense of this action. His conduct was less than commendable. But with due regard for the equities, we think the suppression of defendant's answer under these circumstances is too drastic, especially where such action deprives defendant of an adjudication on the merits and involves exposure to substantial liability." *Id.*

Just like in *Georgis*, the suppression of the Defendant's answer here, and ultimately the entry of Judgment in an amount in excess of $26,000,000.00, is not the delivery of quality justice. Given Leh's demonstrated health concerns that precluded him from participating in the defense of this matter, entry of a default judgment for such an excessive amount cannot be deemed the delivery of quality justice. Therefore, Appellant requests that the Judgment be vacated and that the case be remanded for further proceedings as such time as Leh is able to participate in the proceedings.

B. The Invited Error Doctrine is Not Applicable

Myrtle argument that Leh's appeal should be dismissed based upon the invited error doctrine should also be rejected. As Leh's opening brief makes clear, the

gravamen of Leh's argument is that there is no record evidence that he – as opposed to his counsel – consented to the entry of the Consent Order. If the record on appeal contained evidence that Leh, in fact, consented to the Consent Order, Myrtle's argument might find footing. However, because Leh's appeal makes clear that there is no record evidence of his consent – as opposed to his counsel's consent – the invited error doctrine is simply not applicable. If there is no record evidence that Leh consented to the entry of the Consent Order, then it is impossible for Myrtle to successfully argue that the invited error doctrine precludes Leh's appeal.

In addition, Myrtle attempts to argue that Leh is inconsistently arguing that (1) he complied with the Consent Order but (2) that he was simultaneously unaware of the Consent Order. (Pb15). Again, Myrtle's argument ignores that point of Leh's appeal – there is no record evidence that he consented to the Consent Order. In addition, Myrtle's argument that Leh contends he complied with the Consent Order is disingenuous. Leh's brief only states, as a fact, that Leh did provide a doctor's note on March 28, 2024, but after the Motion to Withdraw was already decided earlier in the day. Simply providing a doctor's note is not proof that Leh knew of the Consent Order or complied with it.

Therefore, for all of these reasons, the invited error doctrine is not applicable here.

C. Informal Request for Stay of Briefing and Argument

Finally, given Leh's continuing health issues, counsel has been unable to discuss the arguments raised in Myrtle's brief in detail with Leh. It is for that reason, on February 18, 2025, counsel requested a two-week extension of the deadline to submit this Reply in the hopes that Leh would be able to assist in the appeal.

Since Myrtle's brief was filed, undersigned counsel was unable to speak with Leh until March 4, 2025. In addition, the day prior, on March 3, 2025, Leh provided to counsel a letter dated February 3, 2025, from Dr. Tony Vanetesse, D.O., of the Pain Management Center of Ephrata. (Da185). In the letter, Dr. Vanetesse advised that "existing and future pain from the variety of medical procedures required, as well as his extensive prescription regiment is and will continue to compromise his mental acuity." *Id.*

Therefore, based upon the fact that counsel has been unable to communicate with Leh, Leh is requesting that the case be stayed for at least three (3) months so that he can recuperate from his most recent surgery and cooperate in this appeal to the fullest extent possible when his mental acuity is restored.

II. CONCLUSION.

Myrtle's position ignores and seeks to minimize the gravamen of Leh's argument: that the record on appeal contains no evidence that Leh – as opposed to his attorney – consented to the entry of the Consent Order. Given that the Consent

Order began the process by which a Judgment in excess of $26,000,000.00 was entered against him, the case should be remanded to the trial court for a hearing to determine whether Leh, in fact, consented to the Consent Order.

Therefore, Leh respectfully requests that the Judgment be reversed and the case remanded for further proceedings before the trial court.

Respectfully submitted,

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Dated: March 7, 2025