FRANK CASTELLA and CAROLINE RUBANO CASTELLA,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003817-23
Plaintiffs-Appellants,	On Appeal From: SUPERIOR COURT OF NEW JERSEY
vs.	LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-1554-22
GERALD J. LEPIS, ESQ., THE LAW OFFICE OF GERALD J. LEPIS, HUDSON REALTY ABSTRACT COMPANY, INC., JOHN DOES 1-100 (Names being fictitious and unknown).	Sat Below: Hon. JOSEPH A. TURULA, P.J.CV.
Defendants-Respondents.	

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS FRANK CASTELLA AND CAROLINE RUBANO CASTELLA

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INTRODUCTORY STATEMENT

Plaintiffs-Appellants look to this Court to litigate their case on the merits. Plaintiffs-Appellants' counsel candidly concedes that he erred in not moving to extend discovery and providing answers to interrogatories on behalf of his client in this matter. The Court indicated that at a hearing dated February 8, 2024, Plaintiffs-Appellants could serve the expert report as he already provided answers to Defendants-Respondents' Interrogatories, the Court would restore the matter.[1] Thereafter, Plaintiffs-Appellants obtained an expert report, but nonetheless the Court dismissed the Complaint pursuant to R. 4:23-5.

Plaintiffs-Appellants now look to this Court for justice and ask that the Court impose a lesser sanction than Dismissal with Prejudice for the tardiness in providing this discovery.

1 The transcript of this hearing was inadvertently not ordered and shall be filed with the Court as soon as it is received.

PROCEDURAL HISTORY

This matter was instituted by Plaintiffs-Appellants on the eve of the Statutes of Limitations by a Complaint dated May 10, 2022 (Pa001). An Amended Complaint was filed the same day (Pa010). Defendants-Respondents filed an Answer on July 1, 2022 (Pa018). Plaintiffs-Appellants served an Affidavit of Merit on August 15, 2022 (Pa030). Defendants-Respondents filed a Motion to Dismiss Plaintiffs-Appellants' case with prejudice, which was returnable September 22, 2023 which was granted (Pa032). Defendants-Respondents requested the Interrogatories which were served on Plaintiffs-Appellants (Pa0084). Defendants-Respondents indicated they would be filing a Motion to Dismiss Plaintiffs-Appellants Complaint (Pa058) and Plaintiffs-Appellants filed a Motion to Restore which was accompanied with responsive discovery (Pa062). Defendants-Respondents filed an opposition to said motion on January 2, 2024. Plaintiffs-Appellants supplemented their motion by way of certification dated January 17, 2024 and January 18, 2024 (Pa079-Pa084). On February 29, 2024, Plaintiffs-Appellants wrote to the Court regarding the service of the expert report (Pa088) and forwarded said expert report on March 13, 2024 (Pa089). Defendants-Respondents Motion to Dismiss was granted by

Order dated April 4, 2024 (Pa102). Plaintiffs-Appellants Motion to Restore was denied by Order dated April 4, 2024 (Pa104).

Plaintiffs-Appellants then filed a Motion to Reconsider on April 24, 2024 (Pa106). Defendants-Respondents opposed said motion on May 2, 2024. Plaintiffs-Appellants' Motion to Reconsider was denied by Order dated June 28, 2024 (Pa946). Plaintiffs-Appellants filed a Notice of Appeal on August 5, 2024 (Pa951).

FACTS

This matter arises out of Plaintiffs-Appellants' purchase of property real estate in Jersey City on November 29, 1995. Plaintiffs-Appellants' were represented by the Defendants-Respondents in this transaction and the property was acquired in their own name. Plaintiff-Appellant, Frank Castella (hereinafter referred to as "Frank" or "Plaintiff") first became of the availability of the property in question through his father-in-law, who indicated this property was an estate sale and looked like it was a good deal. At the time Frank was looking for an office to open his chiropractic practice. The property was in need of extensive renovation it was "completely gutted out". He purchased it for eighty-thousand dollars.

Thereafter, the Plaintiff spent approximately another eighty-thousand dollars renovating the property. Frank retained the Defendant-Respondent, Gerald J. Lepis (hereinafter referred to as "Lepis") in the purchase upon the recommendation of his father-in-law Joseph Rubano. Defendant-Respondent, Lepis handled the purchase for Plaintiffs-Respondents but did not give the Plaintiffs any advice on the risks of the transaction. Frank was aware that the property was used as a dry cleaner.

Lepis should have been aware of the prior use, but Lepis did not give any advice to the Plaintiff about the former use as a dry cleaner. Plaintiffs-Appellants received a letter from the NJDEP in 2016. As Plaintiffs-Appellants has rented out the property to a day care center, upon receiving this letter, Plaintiffs were alarmed and hired an environmental attorney named Douglas Eilender. Ultimately, Plaintiffs-Appellants filed a claim for compensation under the Spill Act, but the DEP denied the claim, stating that the Plaintiffs-Appellants knew or should have known of the potential risk.

Plaintiff operated his chiropractor practice at the location but was never given any advice about forming a corporation or other business entity to take title to the property.

There are currently about hundreds of thousands of dollars of potential liability for the cleanup. Plaintiffs-Appellants also incurred legal expenses.

Plaintiffs-Appellants indicated had they had been appropriately advised they would have formed a corporation to take the property and once the environmental problems were discovered, would have declared bankruptcy and abandoned the property rather than face the massive costs that they have incurred.

Plaintiffs-Appellants further states had they been advised to do an environmental study prior to purchasing the property and been advised of the risks of their liability for environmental cleanup they would have followed any advice given to them by the Defendant, including not going forward with the purchase. It is noted that the property is located in downtown Jersey City, in an area that has been developed for commercial use for many decades, and in particular that a dry cleaner was on the premises, which should have given rise to the need for an environmental study, that would have found ground pollution.

Barry Levine, Esquire, an experienced real estate attorney offered an opinion that:

> "Gerald J. Lepis represented the Plaintiffs in this transaction. As an inexperienced and unsophisticated purchaser, Plaintiff retained Defendant for his advice. In this context, to bring a legal malpractice action against Lepis the Plaintiff must satisfy three

essential elements (1) the existence of an attorney-client relationship creating a duty of care by the attorney (2) the breach of that duty by the attorney and (3) proximate causation of the damage claimed by the Plaintiff. Jerista v. Murray, 185 NJ 175 (2005).

In order to set forth a claim for malpractice, a client must establish that the attorney deviated from accepted standards of practice and as a proximate cause thereof the plaintiff was damaged. As observed by Carol M. Boman in the ABA's publication, *Environmental Aspects of Real Estate Transactions*: The undeniable impact that environmental laws have had in recent years on real estate owners and on business and real estate transactions has led to the development of an entirely new industry, one composed of experts in the field of environmental due diligence. Because of the importance of taking environmental laws and regulations into account when structuring an acquisition, sale, leasing, or financing transaction, the parties need to know whether the underlying real estate is contaminated and what effect that contamination will have on the economics of the transaction.

Environmental due diligence has become important for a number of reasons. Buyers, for example, need to assess potential costs that may be associated with environmental contamination, such as leakage from an underground fuel storage tank. *Environmental Aspects of Real Estate Transactions*, James B. Witkin, Editor, American Bar Association (1995).

As noted by Stewart M. Saft, in his treatise, *Commercial Real Estate Transactions* (Thomson Reuters (3d Ed. 2018)):

Environmental concerns have become significantly important in our daily lives and nowhere more so than in the acquisition, operation, financing, and disposition of real estate. . .

Every purchaser must assure itself that a property being considered for purchase complies not only with all the existing statutory and regulatory requirements, but also with those likely to develop in the future since environmental laws are usually applied retroactively. This will not only avoid difficulties and violations after the closing, but will prepare the purchaser for the day when the purchaser will be selling the property and will have to represent to the purchaser

that the property complies with the laws and regulations then in effect.

Due to the proliferation of these laws, the purchaser should ascertain that the property will comply with the most stringent of the existing state laws.

This review should identify whether prior owners or tenants utilized the property in such a way as to create a future environmental problem. Environmental problems can be caused by the use to which the property was put, what was stored on the property, what was used to kill termites or crabgrass, or materials used in the construction of the property (i.e., asbestos). When considering environmental issues, one must remember that things which were valid and legal at the time they were done may have become improper or illegal. 5-2 – 5-2.1.

Saft further notes:

The potential liability for remediating an environmental hazard that occurred on property long before it was acquired, leased, or financed by a current purchaser, tenant, or mortgagee makes it imperative that a full environmental due diligence investigation be undertaken prior to the acquisition, leasing, or financing of the property. 5-17.

In this case, it is clear that Mr. Lepis was retained by Plaintiff to represent him in this transaction. The question that must be addressed is whether any action or inaction by Lepis could be considered the proximate cause of the damage suffered by Mr. Castella.

Malpractice in furnishing legal advice is a function of the specific situation and the known predilections of the client. An attorney in a counselling situation must advise a client of the risks of the transaction in terms sufficiently clear to enable the client to assess the client's risks. The care must be commensurate with the risks of the undertaking and tailored to the needs and sophistication of the client. Conklin v. Hannoch Weisman, 145 N.J. 395, 413 (1996). Lepis acknowledged at his deposition that he was unsure what his obligation was in terms of determining Plaintiff's sophistication. He confessed that he did not know if Castella had any experience in

purchasing commercial real estate. Lepis had a duty to ascertain Castella's sophistication and to advise him that he was exposing himself to risks in the purchase of the property without the appropriate inspections or an inquiry regarding the property's history. He did neither.

The facts in this case show that there was ample warning of the problems resulting from the prior use as a dry cleaner.

Plaintiff was a chiropractor, and there was no indication he had sufficient knowledge or sophistication to investigate the possibility of contamination. He had the right to rely on his attorney in this regard.

When environmental contamination is found, the liability falls on the party responsible for the contamination. However, if the responsible party cannot be located, as was the case here, or has insufficient assets to remediate the contamination, the current owner becomes responsible. Therefore it is extremely important that the prospective purchaser conduct "environmental due diligence" The buyer must understand the operating condition and compliance history of the business to be acquired prior to the completing of the transaction. (New Jersey Practice Series Section 48.8). Even if the transaction is not subject to ISRA, the buyer should conduct environmental due diligence. (New Jersey Practice Series, Section 48.9)

Based on the Federal and State statutes concerning environmental contaminants in effect at the time of this closing, and the ramifications of the failure to locate and identify and environmental hazard, Mr. Lepis had an affirmative obligation to advise his client to take necessary steps to make sure that the property he was purchasing was free from environmental contaminants. This is true today, and was also the standard of care in 1995, when this closing occurred.

Here, as a result of not being aware of the environmental contaminants, Plaintiff incurred attorney's fees and cleanup costs.

In my opinion, to a reasonable degree of certainty, Mr. Lepis erred in not instructing his clients that the prior owners may have used hazardous substances in the course of their ownership. He also

> deviated from the standard of care in failing to counsel the Castellas about the risks in not performing an appropriate inspection. This failure to do these inspections and render this advice prior to closing was the proximate cause of the damages suffered by the Plaintiffs. He also should have advised his clients to purchase the property with a corporate entity, to shield themselves from personal liability for the subsequent environmental problems.
>
> As a result of the malpractice of the attorney in this case, Plaintiffs has been involved in the environmental cleanup of the subject property for many years. They have incurred substantial costs to remediate the contamination and remove the tanks. They are therefore entitled to recover against the attorney defendant in this case for any losses they have suffered and will suffer, including all fees and costs incurred in or arising from this litigation (including but not limited to fees and costs incurred in pursuing the legal malpractice claims pursuant to Saffer v. Willoughby, 143 N.J. 256 (1996)).”

Despite the service of this expert report and all outstanding discovery, the Court nevertheless dismissed Plaintiffs-Appellants’ Complaint with Prejudice.

ARGUMENT

I. THE TRIAL COURT SHOULD NOT HAVE DISMISSED PLAINTIFFS-APPELLANTS’ COMPLAINT WITH PREJUDICE AS PLAINTIFFS-APPELLANTS PROVIDED THE DISCOVERY AND A LESSER SANCTION SHOULD BE IMPOSED; THIS COURT SHOULD ALLOW PLAINTIFF-APPELLANT HIS DAY IN COURT. (APPEALING THE ORDERS DATED APRIL 4, 2024 AND JUNE 28, 2024 FOUND AT PA102 AND PA946)

This Court reviews dismissal of a complaint with prejudice for failure to permit discovery for abuse of discretion but will not permit such discretion to

produce a manifest injustice. Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 *N.J.* 499, 520 (1995); St. James AME Dev. Corp. v. City of Jersey City, 403 *N.J. Super.* 480, 484 (App. Div. 2008). The Trial Judge has discretion regarding sanctions to be imposed for violation of the discovery rules but "the sanction must be just and reasonable." Mauro v. Owens-Corning Fiberglas Corp., 225 *N.J. Super.* 196, 206 (App. Div. 1988), aff'd, 116 N.J. 126 (1989).

Regarding the ultimate sanction of dismissal with prejudice, our Supreme Court has struck a balance by instructing trial courts to impose that sanction "only sparingly:. Zaccardi v. Becker, 88 *N.J.* 245, 253 (1982). "The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or whether the refusal to comply is deliberate and contumacious". Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 *N.J.* 499, 514 (1995) (quoting Lang v. Morgan's Home Equip, Corp., 6 *N.J.* 333, 339 (1951)). In addition, because "dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault". Abtrax, supra, at 514, (quoting Zaccardi, supra, at

253); accord., Irani v. K-Mart Corp., 281 *N.J. Super.* 383, 387 (App. Div. 1995); Crispin v. Volkswagenwerk, A.G., 96 *N.J.* 336, 345 (1984).

"It is neither necessary nor proper to visit the sins of the attorney upon his blameless client". Jansson v. Fairleigh Dickinson Univ., 198 *N.J. Super*. 190, 196 (App. Div. 1985); *see also* Parker v. Marcus, 281 *N.J. Super*. 589, 594 (App. Div. 1995); Burns v. Belsfsky, 326 *N.J. Super.* 462, 471 (App. Div. 1999), *aff'd* 166 N.J. 466 (2001); SWH Funding Corp. v. Walden Printing Co., 399 N.J. Super, 1, 10 (App. Div. 2008).

The decision to deny a motion to reinstate a complaint dismissed for failure to provide discovery lies within the discretion of the motion judge. St. James AME Dev. Corp. v. City of Jersey City, 403 *N.J.Super.* 480, 484 (App. Div. 2008); Cooper v. Consol. Rail Corp., 391 *N.J.Super.* 17, 22 (App. Div. 2007).

It is well-established that the main objective of the two-tier sanction process in *Rule* 4:23–5 is to compel discovery responses rather than to dismiss the case. *See* Sullivan v. Coverings & Installation, Inc., 403 *N.J.Super.* 86, 96 (App.Div.2008); Pressler and Verniero, *supra,* comment 1.1 on *R.* 4:23–5(a). A & M Farm & Garden Ctr. v. Am. Sprinkler Mech., L.L.C., 423 N.J. Super. 528, 534 (App. Div. 2012).

Rule 4:23–5 continues to reflect the ultimate objective to encourage resolution of disputes on the merits. The Trust Co. of New Jersey v. Sliwinski, 350 *N.J.Super.* 187, 192 (App.Div.2002) (citing Aujero v. Cirelli, 110 *N.J.* 566 (1988)). At the same time, the rule affords a party aggrieved by dilatory discovery tactics a remedy to compel production of the outstanding discovery and the right to seek final resolution through the two-step dismissal process.

In Zimmerman [*supra*, 260 *N.J.Super.* at 375], we made it clear that 'client notification ... is at the heart of the dismissal with prejudice practice' set out in *Rule* 4:23–5(a)(2). Klajman v. Fair Lawn Estates, 292 *N.J.Super.* 54, 59 (App.Div.), *certif. denied,* 146 *N.J.* 569 (1996).

In A & M Farm & Garden Center, *supra,* 423 *N.J.Super.* at 540, the court reversed an order issued pursuant to *Rule* 4:23–5(a)(2), that dismissed the plaintiff's action with prejudice. Basing its reversal on a failure to adhere to the notice requirements of that rule, the court held that when a court considers a motion to dismiss or suppress a pleading with prejudice, and there is nothing before the court showing that a litigant has received notice of its exposure to the ultimate sanction, the court must take some action to obtain compliance with the requirements of the rule before entering an order of dismissal or suppression

with prejudice. Further, the court must set forth what effort was made to secure compliance on the record or on the order.

Here, Plaintiffs-Appellants asks this Court to reverse this dismissal and remand to the Trial Court for consideration of a lesser sanction.

CONCLUSION

This matter should be remanded to the Trial Court for trial on the merits.

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Dated: January 13, 2025

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FRANK CASTELLA and CAROLINE RUBANO CASTELLA Plaintiffs-Appellants, vs. GERALD J. LEPIS, ESQUIRE; THE LAW OFFICE OF GERALD J. LEPIS; AND HUDSON REALTY ABSTRACT COMPANY, INC. Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-003817-23 On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No: HUD-L-1554-22 Sat Below: Honorable Joseph A. Turula, P.J.Cv. Date Submitted: March 11, 2025

BRIEF OF DEFENDANTS-RESPONDENTS GERALD J. LEPIS, ESQUIRE; THE LAW OFFICE OF GERALD J. LEPIS; AND HUDSON REALTY ABSTRACT COMPANY, INC.

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PROCEDURAL HISTORY

The procedural history of this case is germane to the issues on appeal.

This complex legal malpractice action was filed by way of an amended complaint for legal malpractice in the matter of Frank Castella and Caroline Rubano Castella v. Gerald J. Lepis, Esquire; The Law Offices of Gerald J. Lepis; and Hudson Realty Abstract Company, Inc., in the Superior Court of New Jersey, Law Division, Hudson County, under Docket No: HUD-L-1554-22. (Pa010). Defendants filed their answer on July 1, 2022. (Pa018).

On September 6, 2023, defendants filed a motion to dismiss plaintiffs' complaint without prejudice pursuant to R. 4:23-5(a)(1). (Pa045). On September 22, 2023, the trial court entered an order dismissing plaintiffs' complaint without prejudice, pursuant to R. 4:23-5(a)(1), for plaintiffs' failure to answer discovery. (Pa032).

On December 1, 2023, defendants filed a motion to dismiss with prejudice, pursuant to R. 4:23-5(a)(2). (Pa034).

On December 28, 2023, plaintiffs filed a motion to restore the complaint. (Pa062).

On January 2, 2024, defendants filed their letter memorandum in opposition to plaintiffs' motion to restore the complaint. The interrogatories

were not fully and responsively answered, and plaintiffs failed to serve expert reports at that time. (Pa066).

On January 4, 2024, the trial court adjourned the hearing on the motions. All motions were then made returnable January 19, 2024. (T2:8:1-19). The trial court sent out a notice on January 3, 2024 ordering everyone to appear in person on January 5, 2024. Mr. Thyne advised the court that he was unable to get his clients there, so the court adjourned the motions to January 19, 2024. Plaintiffs got more time to comply with the discovery requests.

All counsel appeared before the trial court on Thursday, February 8, 2024. As a result of that hearing, the trial court then scheduled argument on the motion to dismiss for March 1, 2024, via Zoom. (T2:8:4). At that point, the court did not restore the case. However, the court advised Mr. Thyne that the whole thing came down to an expert report, and that plaintiffs would have until March 1, 2024 to get a report. At that point, plaintiffs' counsel told the court that this was his fault, not the clients' fault, and that he should be sanctioned.

The argument was then scheduled for Friday, March 15, 2024, at 2:00 p.m., via Zoom. (T2:8:4-5). Plaintiffs produced an expert report authored by Barry Levine of March 8, 2024. (Pa092). That was reviewed by the trial court. Although the expert mentioned damages, he did not state what they were, and no computation or analysis was provided.

On March 15, 2024, the trial court conducted a motion hearing. (T1).

Defendants objected to restoring the case, and also objected to vacating the order of dismissal without prejudice. (T1:7-1-5).

The trial court, after hearing argument, reserved decision. (T1:10:24-25).

The trial court entered its decision on the record on April 4, 2024. (T2). In its decision, the court noted that the case had a discovery end date of November 23, 2023. (T2:4:13-15)

The trial court further observed that, on December 20, 2023, plaintiffs served answers to interrogatories and documents. (T2:5:4-7). Plaintiffs then filed a motion to reinstate. (T2:5:8). An affidavit was not filed certifying that plaintiffs' counsel notified the plaintiffs of the motion under R. 4:23-5(a)(2). (T2:5:10-14). The trial court noted that more than 60 days had passed since the September 22, 2023 order. There was no compliance, so the motion to dismiss with prejudice was filed. (T2:5:20-22).

On April, 4, 2024, the trial court held argument in connection with the motion to dismiss with prejudice, and plaintiffs' motion to restore the complaint. On April 4, 2024, the trial court granted defendants' motion to dismiss with prejudice, and denied plaintiffs' motion to restore as moot. (Pa102 and Pa104).

On April 4, 2024, the trial court entered an order dismissing the complaint, with prejudice, pursuant to R. 4:23-5(a)(2), for failure to answer discovery. (Pa102). Also, on April 4, 2024, the trial court entered an order denying as moot plaintiffs' motion to restore the complaint. (Pa104).

On April 24, 2024, plaintiffs filed a motion seeking an order reconsidering the order of the trial court of April 4, 2024, which dismissed the complaint with prejudice. (Pa106).

On June 28, 2024, plaintiffs' motion for reconsideration was denied by the trial court. (Pa104).

STATEMENT OF FACTS

This complex legal malpractice action was filed by way of an amended complaint for legal malpractice in the matter of Frank Castella and Caroline Rubano Castella v. Gerald J. Lepis, Esquire; The Law Offices of Gerald J. Lepis; and Hudson Realty Abstract Company, Inc., in the Superior Court of New Jersey, Law Division, Hudson County, under Docket No: HUD-L-1554-22. (Pa010). Defendants filed their answer on July 1, 2022. (Pa018).

On July 1, 2022, defendants propounded discovery to be answered by plaintiffs. (Pa041).

On October 24, 2022, defendants served their certified answers to interrogatories on plaintiffs' counsel. (Pa43). Those responses included not

only the certified answers to interrogatories on behalf of defendants, but also a response to plaintiffs' demand for production of documents on behalf of defendants. (Pa043). The defendants were not in default of any discovery obligations.

On June 28, 2023, defense counsel sent a letter to Kenneth Thyne requesting plaintiffs' answers to interrogatories within 7 days, together with plaintiffs' damages summary. (Pa931).

On July 18, 2023, defense counsel sent another letter to Mr. Thyne advising of the discovery end date, and demanding plaintiffs' answers to interrogatories by the end of the week, together with plaintiffs' damages calculations. Defense counsel explained to Mr. Thyne that the defendants needed the discovery responses so they could proceed with depositions. (Pa933).

Then, on July 24, 2023, Mr. Thyne consented to an extension of discovery in this matter. (Pa935). On July 26, 2023, defendants filed the appropriate request with the Clerk to extend discovery for 60 days, bringing the new discovery end date to November 24, 2023. (Pa938).

On July 26, 2023, defense counsel sent an email to Mr. Thyne, again requesting plaintiffs' answers to interrogatories and document production within 7 days, in order to avoid a discovery motion. (Pa940).

On September 6, 2023, defendants filed their discovery motion to dismiss the complaint without prejudice. (Pa32).

Once the order to dismiss without prejudice was entered, plaintiffs' counsel's office called defense counsel asking for the discovery requests which had previously been propounded. On September 26, 2023, at 11:13 a.m., the legal assistant to Mr. Thyne sent defense counsel an email confirming the telephone conversation, and asking that defendants provide their discovery requests to her and Mr. Thyne. (Pa048).

In response to Ms. Donis' request, on September 26, 2023, at 11:19 a.m., defense counsel's legal assistant provided to Ms. Donis, with a copy to Mr. Thyne, the interrogatories and document requests previously propounded. (Pa051). Then, on September 26, 2023, Ms. Donis acknowledged receipt of the discovery which she requested. (Pa054).

At that point, the order entered by the court on September 22, 2023 had not been vacated. Also, at that point, plaintiffs had not answered the discovery which was re-sent to them on September 26, 2023. (Emails of September 26, 2023, (Pa048, Pa051 and Pa054).

Accordingly, since more than 60 days had elapsed since the entry of the trial court's order of dismissal of September 22, 2023, and since plaintiffs had not answered the discovery which was the subject of the motion which resulted

in the order of September 22, 2023, on December 1, 2023, defendants filed a motion to dismiss with prejudice, pursuant to R. 4:23-5(a)(2). (Pa034).

Prior to filing the motion, defense counsel contacted Mr. Thyne's office to advise that discovery was not answered, and that, as a result, defendants were proceeding with the motion to dismiss with prejudice. Despite that call and follow-up email, defense counsel still did not receive plaintiffs' fully responsive answers to interrogatories and document production.

Also, when defense counsel called Mr. Thyne's office on December 1, 2023, defense counsel was told that the office would convey the message to Mr. Thyne. However, at that point, defense counsel did not hear back from Mr. Thyne, or his paralegal, despite defense counsel's call and email.

In any event, on December 1, 2023, defendants filed their motion to dismiss, with prejudice, pursuant to R. 4:23-5(a)(2). (Pa034).

Also, the trial court noted that on one of the return dates of the motions, Mr. Castella was on the hearing, and was aware, made on the record, that the motion was pending, and that it could in fact be entered. (T2:8:13-18).

In the certification of plaintiffs' counsel in support of the motion for reconsideration, plaintiffs' counsel stated that he appeared for oral argument on April 4, 2024. (Pa079). However, that was not accurate. Rather, the matter

was heard, via Zoom, on April 4, 2024, and there was no argument. It was simply a matter of the court reading the decision into the record.

On Thursday, February 8, 2024, the trial court gave plaintiffs more time, and adjourned the motion to March 1, 2024, to be heard via Zoom. On February 8, 2024, Mr. Thyne advised the court that this was his fault, not the clients' fault, and that he should be sanctioned. However, Mr. Thyne did not tell the court that plaintiffs were not aware of anything, and that he did not give them advice and warning.

In addition, the certification of Mr. Thyne in support of the motion for reconsideration stated that Mr. Thyne informed the clients of the hearing on plaintiffs' motion to reinstate, and defendants' motion to dismiss with prejudice.

Counsel for defendants noted that the motion involved more than simply the failure of plaintiffs to serve an expert report. Rather, there were key interrogatories which were part of the motion. Specifically, interrogatory #16 demanded plaintiffs' damages, the calculation of damages, and the documents reflecting the damages. (T1:5:16-25). The answer to interrogatory #16 simply stated that the information would be supplied. (T1:5:25-6:1).

In addition, the plaintiffs' expert report did not provide any damages calculation or analysis. There was no computation of damages in the expert

report in connection with damages, or the future loss claim by plaintiffs. (T1:6:3-16).

The trial court noted that the motion to dismiss was filed on December 1, 2023. (T1:7:16-20). The trial court further noted that plaintiffs had three and a half months, yet nothing changed. (T1:7:22-25). In addition, the trial court pointed out that there was another 60 days where the defense was demanding the information, and that the defendants had been seeking information for six months. (T1:8:1-5).

The defendants pointed out that the case was a year and a half old, and plaintiffs still could not state what there damages were, and could not provide a computation of the damages. In addition, their expert was unable to do it as well, and it was not in the expert report. (T1:8:19-25). The defendants needed the damages number and calculation. (T1:9:12-13). In addition, the defendants pointed out that this was not an exceptional circumstance situation where plaintiffs were sick or ill, or could not get around to answering the discovery. (T1:9:15-22).

On September 22, 2023, the trial court had entered an order dismissing the complaint, without prejudice, for failure to provide answers to discovery, pursuant to R. 4:23-5(a)(1). (T2:4:17-18). The trial court found that plaintiffs were delinquent in providing responses to interrogatories and the request for

documents which had been served on July 1, 2022. (T2:4:17-22). The discovery requests were re-sent to plaintiffs' counsel on September 26, 2023. Accordingly, once 60 days had passed since the trial court's order of September 22, 2023, on December 1, 2023, defendants filed their motion to dismiss, with prejudice, pursuant to R. 4:23-5(a)(2). (T2:4:22-25).

The trial court noted that plaintiffs served an expert report, but that expert did not address damages. In addition, plaintiffs did not address damages in their answers to interrogatories. (T2:6:9-15). Accordingly, the trial court dismissed with prejudice. (T2:4:16-22).

The trial court noted that the delinquent parties filed and served an affidavit indicating that the clients were previously served of notice of dismissal without prejudice, and were served with additional notice as required by Appendix 2B, by 7 days before the return date of the motion. (T2:6:24-25). Citing, Salazar v. MKGC Design, 45 N.J. Super. 551, 562 (App. Div. 2019). The trial court found that the answers to interrogatories served by plaintiffs were not fully responsive. They failed to provide defendants with the necessary expert reports with the nature of the amount of damages plaintiffs were seeking. (T2:7:10-16).

In addition, the trial court found that plaintiffs did not satisfy the exceptional circumstances standard because there was not sufficient

information provided by plaintiffs to determine what plaintiffs' efforts had been to provide responses to discovery requests. (T2:7:18-21).

The trial court also noted that the motion to dismiss with prejudice had been filed on January 5, 2024, and was carried to January 17-19, 2024. (T2:7:22-25). Both motions were carried, including the motion to reinstate. (T2:8:1-4). The motions were then carried to February 2, 2024, and then carried again to March 1, 2024. The motions were then carried again to March 15, 2024, at which time argument took place. (T2:8:3-5). The trial court stated:

> And I will note for the record that on one of the return dates of the motion that the client was -- Mr. Frank Castella was on the hearing and was aware -- made on the record that this motion was pending. It could in fact be entered. …

(T2:8:12-19).

Accordingly, the trial court entered the order dismissing the complaint with prejudice. (Pa102). Accordingly, plaintiffs' motion for reconsideration was properly denied. (Pa104).

ARGUMENT

I. SINCE THE PLAINTIFFS DID NOT SATISFY THE STANDARD FOR RECONSIDERATION, THE APPELLATE DIVISION SHOULD AFFIRM THE TRIAL COURT'S JUNE 28, 2024 ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION (Pa946)

The order dismissing the case with prejudice of April 4, 2024 was the final order in the case. It was not interlocutory. Likewise, the order denying plaintiffs' motion to reinstate was not interlocutory.

The plaintiffs failed to satisfy the standard for reconsideration of a final order under R. 4:49-2. That rule, which applied in this instance, states:

> Except as otherwise provided by R. 1:13-1 … a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters and controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion if any.

In this case, the order of dismissal with prejudice was final. Also, the filing of a motion for reconsideration does not provide the plaintiffs with an opportunity to raise new legal issues that were not presented to the court in the underlying motion. See, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Rather, motions for reconsideration under R. 4:49-2 are reserved

for "cases which fall into that narrow corridor" where the prior decision was "based on a palpably incorrect, irrational basis," where the court failed to consider or appreciate "the probative, competent evidence," or where "a litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application[.]" D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

This is not a case where the information was not available, or could not have been presented the first time around on the motion to dismiss with prejudice. Accordingly, the arguments advanced by plaintiffs on the motion for reconsideration were simply an afterthought. More importantly, those arguments were not advanced at the time the motion to dismiss with prejudice was argued.

This was not a case where the court abused its discretion, and issued a decision without a "rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002).

The trial court made particular findings at the time of its decision. This is not a case where the court entered an order which was in error, or in which this court entered an order which ceased to permit a fair and efficient proceeding, or where error correction was necessary. See, McBride v. Minstar,

Inc., 283 N.J. Super. 471 (Law Div. 1994), aff'd, McBride v. Raichle Molitor, USA, 283 N.J. Super. 422 (App. Div. 1995). Likewise, this is not a case where the court was faced with an order entered by another judge which needed to be corrected.

At the time of the argument, and at the time the decision was entered on April 4, 2024, each and every procedural event was analyzed by Judge Turula. Therefore, the plaintiffs failed to properly address the holding and reasoning supporting the court's decision. Of course, the Motion for Reconsideration was not a substitute for an appeal.

Also, attention is called to the plaintiffs' certification. This certification, was before the trial court. In their certification, plaintiffs did not state that their attorneys did not advise them of the rules, the necessity to comply with the same, and the necessity to be present in Court. None of that was set forth in the Certification of the Castellas of April 24, 2024. (Pa079).

In addition, as noted in the transcript of April 4, 2024, at p. 8, lines 13-16, plaintiffs were advised, and Mr. Castella was actually present on the hearing. (T2:8:13-16).

Also, the argument advanced by plaintiffs' counsel in his Certification, at paragraph 3, lacked merit. (Pa083). Mr. Thyne assumed that the reason why the expert, Levine, was not specific in his report was because the clients were

uncertain as to the amount of damages. However, that made no sense. After all that time, plaintiffs came before the Court, and argued that they were uncertain about the damages. It was the duty and obligation of the expert to analyze that in his report, and he failed to do so. See, Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023). The afterthought argument about being uncertain about damages made no sense considering the fact that this was an environmental cleanup case, in which an environmental expert attorney was necessary to analyze the damages, and the proofs regarding the same. In this case, Levine failed to do it, despite extensions granted by the trial court.

As previously noted, the trial court observed that Mr. Castella was on the hearing, and that an order could be entered. (T2:8:12-19). Plaintiffs' counsel advised the court of the situation when counsel was before this court on motions. The trial court explained the situation to plaintiffs' counsel, and plaintiffs' counsel stated that he would comply, and get the clients to court. Here, the court took significant efforts to be sure that plaintiffs' counsel understood. In addition, the plaintiffs did not state in their Certification that they were not informed of anything along the way, or that they were unaware of their attorneys' missteps. Mr. Castella was present and was aware, as noted in the transcript of April 4, 2024. (T2:8:13-18). That is all missing from the

Certification and, therefore, for that reason alone, the motion for reconsideration was properly denied.

II. THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED BECAUSE PLAINTIFFS' EXPERT FAILED TO MEET HIS BURDEN OF PROOF (Pa102 and Pa946)

To establish a *prima facie* case of legal malpractice, plaintiffs must demonstrate: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney to the plaintiffs; (2) the breach of that duty by the attorney; and (3) that such breach was a proximate cause of the damages sustained by the plaintiffs. Jerista v. Murray, 185 N.J. 175, 190-91 (2005); Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023).

It has been held that, "[t]he client bears the burden of proving by a preponderance of the competent, credible evidence that injuries were suffered as a proximate consequence of the attorney's breach of duty." Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996)(citing, Lieberman v. Employer's Ins. of Wausau, 84 N.J. 325, 342 (1980)) (an attorney who breaches his or her duty of care to the client is liable only for losses caused by such a breach); 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 487 (App. Div. 1994). "To establish the requisite causal connection between the defendant's negligence and plaintiff's harm, the plaintiff must present

evidence to support a finding that defendant's negligent conduct was a 'substantial factor' in bringing about plaintiff's injury, even though there may be other concurrent causes of the harm." Froom v. Perel, 377 N.J. Super. 298, 313 (App. Div. 2005). "The burden of proving a causal relationship rests with the client, and cannot be 'satisfied by mere conjecture, surmise or suspicion.'" Sommers v. McKinney, 287 N.J. Super. at 10.

It is fundamental that plaintiffs must "prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate." Damage awards may not be based on mere speculation. See, American Sanitary Sales Co. v. State, 178 N.J. Super. 429 (App. Div.), certif. denied, 87 N.J. 420 (1981). "The law abhors damages based on mere speculation." Lewis v. Read, 80 N.J. Super. 148, 174 (App. Div. 1963). It has been held that "[a] jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience." See, Kelly v. Berlin, 300 N.J. Super. 256 (App. Div. 1997):

> Expert testimony was necessary to determine the fair settlement value of plaintiff's motor vehicle accident claim … Without expert testimony, a jury simply does not have the knowledge, training, or experience to decide the settlement value of plaintiff's claim. While juries may generally determine damages in the ordinary case, the trial court properly concluded that laypersons do not have

> the knowledge, from their common experience, to evaluate and determine damages in a case of this kind …

Also, in Kelly the Appellate Division held that the expert was required to establish damages.

In addition, in Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97 (App. Div. 2001), the Appellate Division stressed that it is plaintiffs' burden to prove the nature and amount of losses proximately caused by the negligence of the defendant attorneys through expert report and opinion. In Kaplan, the court held that expert testimony is required to establish the value of the claim. See also, Kelly v. Berlin, 300 N.J. Super. 256, 269 (App. Div. 1997)(finding expert testimony is necessary to enable a jury to determine "… the amount of damages plaintiff sustained …"

Here, Levine did not properly opine on damages in his report. There was nothing in the Levine report regarding damages, and tying the same to any act of malpractice. It was plaintiffs' burden, through their expert, to show what injuries were suffered as a proximate consequence of the attorney's breach of duty. 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478 (App. Div. 1994). That burden must be met "by a preponderance of the competent, credible evidence and is not satisfied by mere 'conjecture, surmise or suspicion.'" Ibid.

Attention is called to the Appellate Division's most recent decision on this issue. In Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023), plaintiffs' expert opined that the defendant attorneys breached the applicable standard of care. However, the plaintiffs' expert, in his report, did not opine on damages. Accordingly, the Trial Court granted defendants' Motion for Summary Judgment. In Morris Properties, the Appellate Division affirmed, noting that in a legal malpractice action, the plaintiffs "must demonstrate that he or she would have prevailed, or would have won materially more … but for the alleged substandard performance." Morris Properties (citing, Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003)).

In addition, the Morris Properties Court, in their recent decision, held that the causal relationship between the attorneys' alleged malpractice and plaintiffs' asserted loss is not "so obvious that the trier of fact [could have] resolve[d] the issue as a matter of common knowledge" without the assistance of expert testimony. Morris Properties (citing, Sommers v. McKinney, 287 N.J. Super. at 11). Likewise, the Morris Properties Court cited Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103-04 (App. Div. 2001), in which the Appellate Division held that, in a legal malpractice action, expert testimony is required to establish the value of the claim.

Of course, in the Appellate Division's decision in Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023), the plaintiffs' expert opined that the defendant attorneys breached the applicable standard of care. However, the plaintiffs' expert, in his report, did not opine on damages. Accordingly, the trial court granted the defendants' motion for summary judgment. In Morris Properties, the Appellate Division affirmed, noting that, in a legal malpractice action, the plaintiffs "must demonstrate that he or she would have prevailed, or would have won materially more … but for the alleged substandard performance." Morris Properties (citing, Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003)).

Also, in Morris Properties, the court cited Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103-04 (App. Div. 2001), in which the Appellate Division held that, in a legal malpractice action, expert testimony is required to establish the value of the claim.

In addition, the Morris Properties court referred to Kelly v. Berlin, 300 N.J. Super. 256, 269 (App. Div. 1997), in which the Appellate Division held that expert testimony was necessary on the issue of damages. In Morris Properties, the plaintiffs' expert did not opine on the damages. No number was given in his report that was sufficient to satisfy the standard. Accordingly, because the expert in Morris Properties failed to set forth an opinion in his

report specifically analyzing the damages, and establishing the amount of the same, the Appellate Division affirmed the Trial Court's Order for Summary Judgment. In this case, the Levine report was not sufficient to satisfy the standards set forth in Morris Properties.

Also, the the Levine report served by plaintiffs was not sufficient in any event. It was plaintiffs' burden to show, through their expert report, the nature and amount of losses proximately caused. They failed to do so, and they failed to properly amend their answers to interrogatories in connection with the damages claim. According, plaintiffs could not satisfy their burden through the report of Barry Levine. Without a competent expert report, the trial court, as gatekeeper, could not permit a jury to guess regarding the amount of damages. It was plaintiffs' burden, through their expert, to establish the amount of the loss proximately caused. See, Morris Properties, supra. They failed to do that in their answers to interrogatories, and failed to do that in their expert report.

Accordingly, even if the trial court granted the motion for reconsideration, the case would be dismissed because it was not supported by a competent expert report.

III. THE COURT SHOULD REJECT PLAINTIFFS' ARGUMENT THAT A LESSER SANCTION WAS AVAILABLE (Pa946)

In choosing the appropriate sanction, the trial court must consider "[t]he varying levels of culpability of delinquent parties." Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988). "The extent to which [one party] has impaired [the other's] case may guide the court in determining whether less severe sanctions will suffice." Williams v. Am. Auto Logistics, 226 N.J. 117, 125 (2016)(quoting, Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 116 (2005)).

Whether a dismissal is appropriate requires courts to "assess the facts, including the willfulness of the violation, the ability of plaintiff to produce the [evidence], the proximity of trial, and prejudice to the adversary." Casinelli v. Manglapus, 181 N.J. 354, 365 (2007). It has been held that "… when the plaintiffs disregard of a court order impairs 'the defendant's ability to present a defense on the merits,' the defendant will be deemed to have suffered irreparable prejudice." Gonzalez, 185 N.J. at 116 (quoting, State v. One 1986 Subaru, 120 N.J. 310, 315 (1990)); see also, Moschou v. DeRosa, 192 N.J. Super. 463, 466-67 (App. Div. 1984)(requiring dismissal where defendant's disposal of records after statute of limitations had run prejudiced his case).

In Gonzalez, our Supreme Court examined how a party's course of conduct "enter[s] into the calculus in determining the appropriate sanction." 185 N.J. at 116. (An entry of default was entered against defendants who engaged in a course of conduct that frustrated discovery)(citing, Merck & Co. v. Biorganic Laboratories, Inc., 82 N.J. Super. 86, 88, 91 (App. Div. 1964)).

In this case, defendants challenged plaintiffs' inaction early and often. Given the extent of plaintiffs' actions, the amount of time plaintiff was given to provide the discovery, as well as counsel's concession that he had been less than fully diligent in the prosecution of the case, it is clear that there was no abuse of discretion in the dismissal of plaintiffs' complaint with prejudice. Of course, competent expert testimony is necessary to sustain a legal malpractice claim. See, Buchanan v. Leonard, 428 N.J. Super. 277, 288-89 (App. Div. 2012). Plaintiffs continued to provide unsatisfactory answers, and also provided an unsatisfactory expert report.

Accordingly, Judge Turula's reasons for dismissing with prejudice are amply supported by the record. Given the prejudice faced by defendants, plaintiffs' lack of compliance with orders, and plaintiffs' continuance inability to evince meritorious claims for damages during the discovery process, there was no abuse of discretion in the dismissal of plaintiffs' complaint against defendants with prejudice.

IV. THE TRIAL COURT'S ORDERS SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION (Pa102 and Pa946)

It has been held that the Appellate Division's review of a judge's discovery ruling is under the abuse of discretion standard. Brugaletta v. Garcia, 234 N.J. 225, 240 (2018); Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 471-72 (App. Div.), rev'd on other grounds, 185 N.J. 290 (2005). In State in Int. of A.B., 219 N.J. 542, 219 N.J. 542, 554 (2014), the court held that Appellate Courts should "generally defer to a trial [judge's] resolution of a discovery matter, provided its determination is not so wide of the mark or is not 'based on a mistaken understanding of the applicable law.'" (Quoting, Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 334, 371 (2011)).

It has been held that absent an abuse of discretion, or a misunderstanding of the applicable law, the Appellate Division defers to the motion judge's decision. See, Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)(citing, Pomerantz Paper Corp., 207 N.J. at 371). An abuse of discretion occurs when "the court's order was 'made without a rational explanation inexplicably departed from established policies, or rested on an impermissible basis.'" Lipsky v. N.J. Ass'n of Health Plans, Inc., 474

N.J. Super. 447, 463-64 (App. Div. 2023)(quoting, Wear v. Selective Ins. Co., 455 N.J. Super. 440, 459 (App. Div. 2018)).

Accordingly, since the Law Division provided a rational explanation for its decision, and did not depart from established policies, and did not decide the case on an impermissible basis, the Appellate Division should affirm. Judge Turula did not mistakenly exercise his discretion, and did not misapprehend applicable law in connection with the orders which are the subject of this appeal.

V. PLAINTIFFS FAILED TO SATISFY THE STANDARD FOR RECONSIDERATION; THEREFORE, THE APPELLATE DIVISION SHOULD AFFIRM THE ORDER OF THE TRIAL COURT WHICH DENIED PLAINTIFFS' MOTION FOR RECONSIDERATION (Pa946)

The order dismissing the case with prejudice of April 4, 2024 was a final order in this case. (Pa102). It was not interlocutory. Likewise, the order denying plaintiffs' motion to reinstate was not interlocutory. (Pa104).

Plaintiffs failed to satisfy the standard for reconsideration pursuant to R. 4:49-2. That rule states:

> Except as otherwise provided by R. 1:13-1 … a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the

> matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

In this case, the Order of this Court was final. Also, the filing of a Motion for Reconsideration does not provide the plaintiffs with an opportunity to raise new legal issues that were not presented to the Court in the underlying Motion. See, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Rather, Motions for Reconsideration under R. 4:49-2 are reserved for "cases which fall into that narrow corridor" where the prior decision was "based upon a palpably incorrect irrational basis," where the Court failed to consider or appreciate "the probative, competent evidence," or where "a litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application[.]" D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

This is not a case where the information was not available or could not have been presented the first time around on the Motion to Dismiss with prejudice. The arguments advanced by plaintiffs on this Motion are simply an afterthought. More importantly, these arguments were not advanced at the time the Motion to Dismiss with prejudice was argued. This is not a case where this Court abused its discretion, and issued a decision without a "rational

explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002).

This Court made particular findings at the time of its decision. This is not a case where the Court entered an Order which was in error, or in which this Court entered an Order which ceased to permit a fair and efficient proceeding where error correction was necessary. See, McBride v. Minstar, Inc., 283 N.J. Super. 471 (Law Div. 1994), aff'd, McBride v. Raichle Molitor, USA, 283 N.J. Super. 422 (App. Div. 1995). Likewise, this is not a case where the Court was faced with an Order entered by another judge which needed to be corrected.

At the time of the argument, and at the time the decision was entered on April 4, 2024, each and every procedural event was analyzed by this Court. At this point, the plaintiffs have failed to properly address the holding and reasoning supporting the Court's decision. In addition, a Motion for Reconsideration is not a substitute for appeal.

Attention is called to the Certification of the plaintiffs. In their Certification, they do not state that their attorneys did not advise them of the rules, the necessity to comply with the same, and the necessity to be present in

Court. None of that is set forth in the Certification of the Castellas of April 24, 2024.

In addition, as noted in the transcript of April 4, 2024, at p. 8, lines 13-16, plaintiffs were advised, and Mr. Castella was actually present on the hearing. (T2:8:13-16).

Also, the argument advanced by Mr. Thyne at paragraph 3 of his Certification should not be accepted by this Court. Mr. Thyne assumed that the reason why Levine was not specific in his report was because the client was uncertain as to the amount of damages. This makes absolutely no sense. After all this time, plaintiffs came before the Court and argued that they were uncertain about the damages? This was the duty and obligation of the expert to analyze damages (the loss incurred) in his report, and he failed to do so. See, Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023). This afterthought argument about being uncertain about damages makes absolutely no sense considering the fact that this is an environmental cleanup case, in which an environmental expert attorney was necessary to analyze the damages, and the proofs regarding the same. In this case, Levine failed to do it, despite extensions granted by this Court.

In addition, the unpublished Opinion of the Appellate Division in Anello v. Ingber, A-2055-22 (App. Div. April 8, 2024) does not support plaintiffs'

argument. In Anello, the Court dismissed the Complaint, with prejudice, pursuant to R. 4:23-5(a)(2). In that case, the Appellate Division was concerned because the Trial Court did not make sufficient efforts to obtain plaintiffs' compliance with the rule. That is not what happened here. The plaintiffs here were given extension after extension before this case was dismissed with prejudice. Plaintiffs' counsel indicated to this Court that, with those extensions, he would comply, and obtain his clients' cooperation, as well as produce an expert report. This was not a situation where the Court did not grant extensions, and did not make efforts to obtain plaintiffs' compliance with the rule. Therefore, Anello is inapposite and, in addition to the fact that it is not published, is distinguishable on its facts. In this case, the defense followed the two-step process under R. 4:23-5.

Also, in Anello, the plaintiffs did not file a Motion to Vacate the previously entered Order of Dismissal without prejudice. In this case, plaintiffs did file the Motion to Vacate and Reinstate. In addition, in Anello, the plaintiffs were unaware of their attorneys' multiple missteps. There is no Affidavit or Certification from the plaintiffs to that end in this case. In addition, this Court previously noted that Mr. Castella was on the hearing, and that an Order could be entered. (T2:8:12-19). Plaintiffs' counsel advised the Court of the situation when counsel was before this Court on Motions. This

Court explained the situation to counsel, and counsel stated that he would comply and get the clients to Court. In Anello, the plaintiffs' attorney failed to comply with those obligations to inform plaintiffs of the efforts to dismiss their lawsuit. There, the Trial Court's efforts to obtain the attorneys' compliance was insufficient. That is not this case. This Court took pains to be sure that plaintiffs' counsel understood. In addition, the plaintiffs do not state in their Certifications that they were not informed of anything along the way, or that they were unaware of their attorneys' missteps. Plaintiff was present and was aware, as noted in the transcript of April 4, 2024. (T2:8:13-18). That was missing from the Certification and, for that reason alone, the Motion for Reconsideration did not satisfy the standard.

In the alternative, even if the court were to apply the more liberal standard, under R. 4:42-2, the order of the trial court should still be affirmed.

On July 1, 2024, defendants propounded discovery to be answered by plaintiffs. (Pa041).

On October 24, 2022, defendants served their certified Answers to Interrogatories on plaintiffs' counsel. (Pa51). The defendants were not in default of any discovery obligations.

On June 28, 2023, defense counsel sent a letter to Mr. Thyne requesting plaintiffs' Answers to Interrogatories within seven (7) days, together with plaintiffs' damages summary. (Pa931).

On July 18, 2023, defense counsel sent another letter to Mr. Thyne advising of the discovery end date, and demanding plaintiffs' Answers to Interrogatories by the end of the week, together with plaintiffs' damages calculations. Defense counsel explained to Mr. Thyne that the defense needed the discovery responses so that we could proceed with depositions. (Pa933).

Then, on July 24, 2023, Mr. Thyne consented to an extension of discovery in this matter. (Pa935). On July 26, 2023, defendants filed the appropriate request with the Clerk to extend discovery for 60 days, bringing the new discovery end date to November 24, 2023. (Pa938).

On July 26, 2023, defense counsel sent an email to Mr. Thyne, again requesting plaintiffs' Answers to Interrogatories and document production within seven (7) days in order to avoid a discovery Motion. (Pa940).

On September 6, 2023, defendants filed a Motion to Dismiss plaintiffs' Complaint without prejudice pursuant to R. 4:23-5(a)(1). (Pa045).

On September 22, 2023, this Court entered an Order dismissing plaintiffs' Complaint without prejudice, pursuant to R. 4:23-5(a)(1), for the failure of plaintiffs to answer discovery. (Pa032).

Once the Order to dismiss without prejudice was entered, defense counsel received a call from Helen Donis, legal assistant to Mr. Thyne, asking for the discovery requests which had previously been propounded. On September 26, 2023, at 11:13 a.m., the legal assistant to Mr. Thyne, sent defense counsel an email confirming the telephone conversation, and asking that defendants provide their discovery requests to her and Mr. Thyne. (Pa51). In response to Ms. Donis' request, on September 26, 2023, at 11:19 a.m., defense counsel's legal assistant, Lisa Evans, provided to Ms. Donis, with a copy to Mr. Thyne, the Interrogatories and document requests previously propounded. (Pa54). Then, on September 26, 2023, Ms. Donis acknowledged receipt of the discovery which she requested. (Pa54).

At that point, the Order entered by the Court of September 22, 2023 had not been vacated. Also, at that point, plaintiffs had not answered the discovery which was re-sent to them on September 26, 2023. (Pa51 and Pa54). Accordingly, since more than 60 days had elapsed since the entry of this Court's Order of Dismissal of September 22, 2023, and since plaintiffs had not answered the discovery which is the subject of the Motion which resulted in the Order of September 22, 2023, on December 1, 2023, defendants filed a Motion to Dismiss, with prejudice, pursuant to R. 4:23-5(a)(2). (Pa58). The

plaintiffs did not oppose the Motion to Dismiss the Complaint without prejudice.

However, prior to filing the Motion, defense counsel contact Mr. Thyne's office to advise that the discovery was not answered, and that, as a result, defendants were proceeding with the Motion to Dismiss with prejudice. Despite that call and follow-up email (Pa58), defense counsel still did not receive plaintiffs' fully responsive Answers to Interrogatories and document production.

Also, when defense counsel called Mr. Thyne's office on December 1, 2023, defense counsel was told that the office would convey the message to Mr. Thyne. However, at that point, defense counsel did not hear back from Mr. Thyne, or his paralegal, despite defense counsel's call and email.

In any event, at that point, on December 1, 2023, defendants filed their Motion to Dismiss, with prejudice, pursuant to R. 4:23-5(a)(2). (Pa34).

Subsequently, on December 28, 2023, plaintiffs filed a Motion to Restore the Complaint. (Pa62). On January 2, 2024, defendants filed their Letter Memorandum in opposition to plaintiffs' Motion to Restore the Complaint. The Interrogatories were not fully and responsively answered, and plaintiffs failed to serve expert reports at that time.

On January 4, 2024, the Court adjourned the hearing on the Motions. All Motions were then made returnable on January 19, 2024. (T2:8:1-19). The Court sent out a notice on January 3, 2024, ordering everyone to appear in-person on January 5, 2024. Mr. Thyne advised the Court that he was unable to get his clients there, so the Court adjourned the Motion to January 19, 2024. So, plaintiffs got more time to comply with the discovery requests.

All counsel appeared before this Court on Thursday, February 8, 2024. As a result of that hearing, the Court then scheduled argument on the Motion to Dismiss for March 1, 2024, via Zoom. (T2:8:4). At that point, the Court did not restore the case. However, the Court advised Mr. Thyne that the whole thing came down to an expert report, and that plaintiffs would have until March 1, 2024 to get a report. At that point, plaintiffs' counsel told the Court that this was his fault, not the clients' fault, and that he should be sanctioned.

The argument was then scheduled for Friday, March 15, 2024, at 2:00 p.m., via Zoom. (T2:8:4-5). Plaintiffs produced an expert report authored by Barry Levine of March 8, 2024. That was reviewed by this Court. Although the expert mentioned damages, he did not state what they were, and no computation or analysis was provided. This Court held argument in connection with the Motion to Dismiss with prejudice, and plaintiffs' Motion to Restore

the Complaint. This Court granted defendants' Motion to Dismiss with prejudice, and denied plaintiffs' Motion to Restore as moot.

On April 4, 2024, this Court entered an Order dismissing the Complaint, with prejudice, pursuant to R. 4:23-5(a)(2), for failure to answer discovery. (Pa102). Also, on April 4, 2024, this Court entered an Order denying as moot plaintiffs' Motion to Restore the Complaint. (Pa104). Also, the Court noted that on one of the return dates of the Motions, Mr. Castella was on the hearing and was aware, made on the record, that this Motion was pending, and that it could in fact be entered. (T2:8:13-18).

On April 24, 2024, plaintiffs filed their Motion for Reconsideration of the Order of April 4, 2024.

Also, it must be noted that the Certification of Mr. Thyne in support of plaintiffs' Motion for Reconsideration is not accurate with respect to the procedural history. In Mr. Thyne's Certification, he states that he appeared for oral argument on April 4, 2024. That is not accurate. Rather, the matter was heard, via Zoom, on April 4, 2024, and there was no argument. It was simply a matter of the Court reading the decision into the record.

On Thursday, February 8, 2024, this Court gave plaintiffs more time, and adjourned the Motions to March 1, 2024, to be heard via Zoom. On February 8, 2024, Mr. Thyne advised the Court that this was his fault, not the

clients' fault, and that he should be sanctioned. However, Mr. Thyne did not tell the Court that the plaintiffs were not aware of anything, and that he did not give them advice and warning.

In addition, the Certification submitted by Mr. Thyne in support of the Motion for Reconsideration states that Mr. Thyne informed the clients of the hearing on plaintiffs' Motion to Reinstate, and defendants' Motion to Dismiss with prejudice. Attention is called to the transcripts of March 15, 2024 and April 4, 2024 (T1 and T2).

Accordingly, plaintiffs' Motion for Reconsideration was properly denied.

On March 15, 2024, the Court conducted a Motion hearing in this matter. (T1). Counsel for defendants noted that the Motion involved more than simply the failure of plaintiff to serve an expert report. Rather, there were key Interrogatories which were part of the Motion. Specifically, Interrogatory No. 16 demanded plaintiffs' damages, the calculation of the damages, and the documents reflecting the damages. (T1:5:16-25). The answer to Interrogatory No. 16 simply stated that the information would be supplied. (T1:5:25).

In addition, the plaintiffs' expert report did not provide any damage calculation or analysis. There was no computation of damages in the expert report in connection with damages, or the future loss claim by plaintiffs.

(T1:6:3-16). Accordingly, defendants objected to restoring the case, and also objected to vacating the Order of Dismissal without prejudice. (T1:7:1-5).

The Court noted that the Motion to Dismiss was filed on December 1, 2023. (T1:7:16-20). The Court further noted that plaintiff had three and a half months, yet nothing changed. (T1:7:22-25). In addition, the Court pointed out that there was another 60 days where the defense was demanding the information, and that the defense had been seeking information for six months. (T1:8:1-5).

The defense pointed out that the case was a year and a half old, and plaintiffs still could not state what their damages were, and could not provide a computation of the damages. In addition, their expert was unable to do it as well, and it was not in the expert report. (T1:8:19-25). The defense needed the damages number and calculation. (T1:9:12-13). In addition, the defense pointed out that this was not an exceptional circumstance situation where plaintiffs were sick or ill, or could not get around to answering the discovery. (T1:9:15-22).

The Court, after hearing argument, reserved decision. (T1:10:24-25).

This Court entered its decision on the record on April 4, 2024. In the decision, the Court noted that the case had a discovery end date of November 23, 2023. (T2:4:13-15). On September 22, 2023, the Court had entered an

Order dismissing the Complaint, without prejudice, for failure to provide answers to discovery pursuant to R. 4:23-5(a)(1). (T2:4:17-18). The Court found that plaintiffs were delinquent in providing responses to Interrogatories and the request for documents which had been served on July 1, 2022. (T2:4:17-22). The discovery requests were re-sent to plaintiffs' counsel on September 26, 2023. Accordingly, once 60 days had passed since the Court's Order of September 22, 2023, defendants filed their Motion to Dismiss, with prejudice, on December 1, 2023. (T2:4:22-25).

On December 20, 2023, plaintiffs served Answers to Interrogatories and documents. (T2:5:4-7). Plaintiffs filed a Motion to Reinstate. An Affidavit was not filed certifying that plaintiffs' counsel notified the plaintiffs of the Motion under R. 4:23-5(a)(2). (T2:5:10-14). The Court noted that more than 60 days had passed since the September 22, 2023 Order. There was no compliance, so the Motion to Dismiss with prejudice was filed. (T2:5:20-22). The Court noted that plaintiffs served an expert report, but that expert report did not address damages. In addition, plaintiffs did not address damages in their Answers to Interrogatories. (T2:6:9-15). Accordingly, the Court dismissed with prejudice. (T2:6:16-22).

The Court noted that the delinquent parties filed and served an Affidavit indicating that the clients was previously served with notice of dismissal

without prejudice, and were served with additional notice as required by Appendix 2B by seven (7) days before the return date of the Motion. The Court found that the Answers to Interrogatories served by plaintiffs were not fully responsive. They failed to provide defendants with the necessary expert reports with the nature of the amount of damages plaintiffs were seeking.

In addition, the Court found that plaintiffs did not satisfy the exceptional circumstances standard because there was not sufficient information provided by plaintiffs to determine what plaintiffs' efforts had been to provide responses to the discovery requests. (T2:7:18-21). The Court also noted that the Motion to Dismiss with prejudice had been filed on January 5, 2024, and was carried to January 17-19, 2024. (T2:7:22-25). Both Motions were carried, including the Motion to Reinstate. (T2:8:1-4). They were then carried to February 2, 2024, and then carried again to March 1, 2024. The Motions were then carried again to March 15, 2024, at which time argument took place. (T2:8:3-5). The Court also stated:

> And I will note for the record that on one of the return dates of the motion that the client was -- Mr. Frank Castella was on the hearing and was aware -- made on the record that this motion was pending. It could in fact be entered …

(T2:8:12-19).

Accordingly, the Court entered an Order dismissing the Complaint with prejudice. (Pa104). Accordingly, plaintiffs' Motion for Reconsideration should be denied.

VI. SINCE PLAINTIFFS DID NOT SATISFY THE STANDARD FOR RECONSIDERATION, THE ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION SHOULD BE AFFIRMED (PA104).

The order dismissing this case with prejudice of April 4, 2024 was the final order in this case. It was not interlocutory. Likewise, the order denying plaintiffs' motion to reinstate was not interlocutory.

The plaintiffs failed to satisfy the standard for reconsideration pursuant to R. 4:49-2. The rule, which applies in this instance, states:

> Except as otherwise provided by R. 1:13-1 … a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

In this case, the order of the trial court was final. Also, the filing of a motion for reconsideration does not provide the plaintiffs with an opportunity to raise new legal issues that were not presented to the court in the underlying

Motion. See, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Rather, Motions for Reconsideration under R. 4:49-2 are reserved for "cases which fall into that narrow corridor" where the prior decision was "based upon a palpably incorrect irrational basis," where the court failed to consider or appreciate "the probative, competent evidence," or where "a litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application[.]" D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

This was not a case where the information was not available, or could not have been presented in response to the motion to dismiss with prejudice. The arguments advanced by plaintiffs on the motion to dismiss with prejudice were nothing more than an afterthought. Also, those arguments were not advanced at the time the motion to dismiss with prejudice was argued. This is not a case where this court abused its discretion, and issued a decision without a "rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002).

This court made particular findings at the time of its decision. This is not a case where the court entered an order which was in error, or in which this court entered an order which ceased to permit a fair and efficient proceeding

where error correction was necessary. See, McBride v. Minstar, Inc., 283 N.J. Super. 471 (Law Div. 1994), aff'd, McBride v. Raichle Molitor, USA, 283 N.J. Super. 422 (App. Div. 1995). Likewise, this is not a case where the court was faced with an order entered by another judge which needed to be corrected.

At the time of the argument, and at the time the decision was entered on April 4, 2024, each and every procedural event was analyzed by this court. At this point, the plaintiffs have failed to properly address the holding and reasoning supporting the court's decision. In addition, a motion for reconsideration is not a substitute for appeal.

Attention is called to the Certification of the plaintiffs. In their certification, they do not state that their attorneys did not advise them of the rules, the necessity to comply with the same, and the necessity to be present in court. None of that is set forth in the certification of the Castellas of April 24, 2024.

In addition, as noted in the transcript of April 4, 2024, at p. 8, lines 13-16, plaintiffs were advised, and Mr. Castella was actually present on the hearing. (T2:8:13-16).

Also, the argument advanced by Mr. Thyne at paragraph 3 of his certification should not be accepted by this court. Mr. Thyne assumes that the reason why Levine was not specific in his report was because the client was

uncertain as to the amount of damages. This makes absolutely no sense. After all this time, plaintiffs come before this court and argue that they were uncertain about the damages? This was the duty and obligation of the expert to analyze this in his report, and he failed to do so. See, Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023). This afterthought argument about being uncertain about damages makes absolutely no sense considering the fact that this is an environmental cleanup case, in which an environmental expert attorney was necessary to analyze the damages, and the proofs regarding the same. In this case, Levine failed to do it, despite extensions granted by this court.

In addition, the unpublished opinion of the Appellate Division in Anello v. Ingber, A-2055-22 (App. Div. April 8, 2024) does not support plaintiffs' argument. In Anello, the court dismissed the Complaint, with prejudice, pursuant to R. 4:23-5(a)(2). In that case, the Appellate Division was concerned because the trial court did not make sufficient efforts to obtain plaintiffs' compliance with the rule. That is not what happened here. The plaintiffs here were given extension after extension before this case was dismissed with prejudice. Plaintiffs' counsel indicated to this court that, with those extensions, he would comply, and obtain his clients' cooperation, as well as produce an expert report. This was not a situation where the court did not grant extensions,

and did not make efforts to obtain plaintiffs' compliance with the rule. Therefore, Anello is inapposite and, in addition to the fact that it is not published, is distinguishable on its facts. In this case, the defense followed the two-step process under R. 4:23-5.

Also, in Anello, the plaintiffs did not file a motion to vacate the previously entered order of dismissal without prejudice. In this case, plaintiffs did file the motion to vacate and reinstate. In addition, in Anello, the plaintiffs were unaware of their attorneys' multiple missteps. There is no affidavit or certification from the plaintiffs to that end in this case. In addition, this court previously noted that Mr. Castella was on the hearing, and that an order could be entered. (T2:8:12-19).

Plaintiffs' counsel advised the court of the situation when counsel was before this court on motions. This court explained the situation to counsel, and counsel stated that he would comply and get the clients to Court. In Anello, the plaintiffs' attorney failed to comply with those obligations to inform plaintiffs of the efforts to dismiss their lawsuit. There, the trial court's efforts to obtain the attorneys' compliance was insufficient. That is not this case. This Court took pains to be sure that plaintiffs' counsel understood. In addition, the plaintiffs do not state in their certifications that they were not informed of anything along the way, or that they were unaware of their attorneys' missteps.

Plaintiff was present and was aware, as noted in the transcript of April 4, 2024. (T2:8:13-18). That was missing from the certification and, for that reason alone, the motion for reconsideration did not satisfy the standard.

Also, even under the more liberal approach, pursuant to R. 4:42-2(b), the order of the trial court should be affirmed. This is not a case where reconsideration should have been granted "in the interest of justice" pursuant to R. 4:42-2(b).

In this case, the trial court provided plaintiffs with multiple opportunities to provide completely responsive answers to interrogatories with expert reports. Extensions were given all along the way to plaintiffs with regard to discovery which was needed. In this case, dismissal with prejudice was warranted. See, Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 345 (1984). The failure to provide fully responsive answers to interrogatories, including a fully responsive expert report, was attributable to plaintiffs. Deadlines were extended by the trial court for the benefit of plaintiffs in this case. Notwithstanding, plaintiffs were still unable to provide fully responsive answers to interrogatories on the key elements of their claim. Because plaintiffs failed to provide fully responsive answers to interrogatories, and failed to provide a fully responsive expert report, plaintiffs do not have a cause of action to pursue.

This was a complex legal malpractice case arising out of an environmental cleanup and closure claim. As a result of plaintiffs' failure to serve fully responsive answers to interrogatories, including a fully responsive expert report, plaintiffs were unable to prove their cause of action. The plaintiffs bore the burden of proving all of the elements of their legal malpractice claim. Plaintiffs could not prevail on their claims without an expert report on damages. See, Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023).

CONCLUSION

For the reasons expressed above, it is respectfully submitted that the orders of the trial court of April 4, 2024 granting defendants' motion to dismiss the complaint with prejudice, and of June 28, 2024 denying plaintiffs' motion for reconsideration, should be affirmed. Oral argument is requested.

MARSHALL DENNEHEY, P.C.
Attorneys for Defendants-Respondents, Gerald J. Lepis, Esquire; The Law Office of Gerald J. Lepis; and Hudson Realty Abstract Company, Inc.

BY: */s/ John L. Slimm*
JOHN L. SLIMM

Dated: March 11, 2025

FRANK CASTELLA and CAROLINE RUBANO CASTELLA,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003817-23
Plaintiffs-Appellants,	On Appeal From: SUPERIOR COURT OF NEW JERSEY
vs.	LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-1554-22
GERALD J. LEPIS, ESQ., THE LAW OFFICE OF GERALD J. LEPIS, HUDSON REALTY ABSTRACT COMPANY, INC., JOHN DOES 1-100 (Names being fictitious and unknown).	Sat Below: Hon. JOSEPH A. TURULA, P.J.CV.
Defendants-Respondents.	

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS FRANK CASTELLA AND CAROLINE RUBANO CASTELLA

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INTRODUCTORY STATEMENT

At oral argument on February 8th, 2024, it was discussed that the Trial Court would contemplate restoring Plaintiffs-Appellants' case and considering sanctions less than dismissal with prejudice upon the service of an expert report by Plaintiffs-Appellants' liability expert. Plaintiffs-Appellants served that liability expert report, yet the Trial Court still dismissed the case with prejudice.

Plaintiffs-Appellants again looks to this Court for an opportunity to try this dispute on the merits as Plaintiffs-Appellants served the expert report within the time thus made by the Trial Court.

FACTS

On February 8, 2024, the parties appeared before the Court and the Court indicated that the Plaintiffs-Appellants could serve an expert report and at that time the Court would consider restoring the case and imposing less than sanctions. Judge Turula stated:

> Is -- the biggest deficiency is the expert report, because you're right, what is this case about? There's a dry cleaner who had pollution on a site and there's a lien by the DEP. That's all I think – I know as much as anybody else in this case, it seems like. So, I'll carry this motion. I was going to say two weeks, but is that unreasonable? Maybe it would be four weeks, I don't know…..
>
> So, then in four weeks if there's an expert report, and I don't know what the - that expert report is going

to have net opinions, it's going to be his –- holes like swiss cheese. I don't know. Or it may be perfect.

Then we could talk about restoring the case and paying costs, because – you know – and I'm – I'm not singling it out. I really don't want you to take not go to vacation in Florida because of the cost of something. But people have to pay these bills, and even if this was a carrot here – you know, we have to pay for it.

One of the things I'm going to do is when we come back, okay, I'll do it on Zoom to cut down on costs. That means anything -– you know, but pay the $25 to park and the two hours traveling back and forth here. But I would like your clients on with you. I mean, so we –….

if we're going to do it four weeks, I think the next motion date is March 1st. Is that –- that's not 30 days. It's -- you're getting shortchanged by –- I'm going to put it on for the first. If you're going to tell me you can't do it, we could just carry to the next week, so you get your thirty. Or I'm not going to –- I told you I'd do that. I'm going to do it. And then we can figure out a schedule that's good for both of you, whether it's in the afternoon on Zoom as well as your clients.

But – and we'll deal with that. If there's a report and you serve him, and that's the biggest issue, then we can talk about everything else." T1 16:6-17:23.

The Court added:

> And, I know you have other cases, but let's take the first step, see if that's satisfactory. If it is, then we talk about restoration and maybe some fees that are reasonable, and then we can go from there. . . .

> We can go off the record and carry it until - If March 1st is too short, call Donald – you don't have to talk to my secretary. Talk to Donald to see if we can go a couple – we can go a couple days or whatever you need. T1 19:4-8,17-22.

Plaintiffs-Appellants served the expert report of Mr. Barry E. Levine, Esquire on March 13, 2024.

Here Plaintiffs-Appellants served the expert report that the Trial Court required at the March 15, 2024 hearing, and the Plaintiffs-Appellants served all discovery that they had. (Pa0170). Here, there is no prejudice suffered by the Defendant-Respondent that a lesser sanction could not cure. Plaintiffs-Appellants looks to this Court for mercy and for the opportunity to present his claims to a jury.

ARGUMENT

I. DISMISSAL WITH PREJUDICE WAS NOT WARRANTED

The ultimate sanction, which is a dismissal of the complaint with prejudice, has the effect of not only punishing the offending party but also deterring others who might engage in similar conduct. Abtrax Pharmaceuticals, Inc. v. Elkins–Sinn, Inc., 139 N.J. 499, 514–15, 518(1995). Such a drastic

measure should be used sparingly. It should not be invoked unless: the refusal to comply with a discovery order was deliberate and contumacious; the litigant rather than the attorney was at fault; and considering the range of sanctions available, no lesser sanction would suffice to eliminate the prejudice to the non-delinquent party. Id. at 513. Accord Kosmowski, *supra*, 175 N.J. at 574–75; Zaccardi v. Becker, 88 N.J. 245, 252–53 (1982); Wolfe, *supra*, 334 N.J.Super. at 638–39; Rabboh, *supra*, 312 N.J.Super. at 492–93; Johnson v. Mountainside Hosp., 199 N.J.Super. 114, 119–20 (App.Div.1988)

In assessing the appropriate sanction for the violation of one of its orders, the court must consider a number of factors, including whether the plaintiff acted willfully and whether the defendant suffered harm, and if so, to what degree. See Abtrax Pharm., Inc. v. Elkins–Sinn, Inc., 139 N.J. 499, 514 (1995). Because the dismissal of a Plaintiff's cause of action with prejudice is a drastic remedy, it should be invoked sparingly, such as when the plaintiff's violation of a rule or order evinces "a deliberate and contumacious disregard of the court's authority." Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 575 (2003) (quoting Allegro v. Afton Vill. Corp., 9 N.J. 156, 160–61 (1952)); see also Abtrax Pharm., *supra*, 139 N.J. at 514 ("The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases ... where the

refusal to comply is deliberate and contumacious." (quoting Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951))). When the vindication of the court's authority standing alone is not at issue, then the prejudice suffered by the defendant also must enter into the calculus in determining the appropriate sanction. See Crispin, *supra*, 96 N.J. at 345. The extent to which a plaintiff has impaired a defendant's case may guide the court in determining whether less severe sanctions will suffice. See Johnson v. Mountainside Hosp., 199 N.J.Super. 114, 120 (App.Div.1985) (per curiam). Absent serious prejudice, lesser sanctions should be considered. Crispin, *supra*, 96 N.J. at 345; see also Olds v. Donnelly, 150 N.J. 424, 438–49 (1997). But when the plaintiff's disregard of a court order impairs "the defendant's ability to present a defense on the merits," the defendant will be deemed to have suffered irreparable prejudice. State v. One 1986 Subaru, 120 N.J. 310, 315 (1990); see also Perna v. Pirozzi, 92 N.J. 446, 457 (1983).

However, it is important to emphasize that "[t]he dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases where the order for discovery goes to the very foundation of the cause of action, ... or where the refusal to comply is deliberate and contumacious...." Lang v. Morgan's Home Equipment Corp., 6 N.J. 333, 339

(1951). "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party ... or when the litigant rather than the attorney was at fault...." Zaccardi v. Becker, 88 N.J. 245, 253 (1982). Dismissal is not the sole remedy, rather "a range of sanctions is available to the trial court when a party violates a court rule." Id. at 252–253. And, of course, it is fundamental that the trial court has the "inherent discretionary power to impose sanctions for failure to make discovery," Calabrese v. Trenton State College, 162 N.J.Super. 145 (App.Div.1978), aff'd, 82 N.J. 321 (1980), and "is free to apply them, subject only to the requirement that they be just and reasonable in the circumstances...." Lang v. Morgan's Home Equipment Corp., *supra*, 6 N.J. at 339; Calabrese v. Trenton State College, *supra*, 162 N.J. at 151–152. We must not lose sight of the fact that "justice is the polestar and our procedures must ever be moulded and applied with that in mind." N.J. Highway Authority v. Renner, 18 N.J. 485, 495 (1955).

Here, Plaintiffs-Appellants served the expert report, responsive Answers to Interrogatories, and all documents within Plaintiffs-Appellants possession. Plaintiff-Appellants certified that those were the most complete documents and answers that they could provide. The death penalty imposed by the Trial Court

on this case is not warranted and as Plaintiffs-Appellants served the expert report required, the Court should have restored Plaintiffs-Appellants' case.

CONCLUSION

For the forgoing reasons, the Plaintiffs-Appellants' appeal should be granted in this matter and this matter should be remanded to the Trial Court for trial on the merits.

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