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ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY & CASUALTY INSURANCE, AND ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiffs/Appellants, v. PENNSAUKEN SPINE AND REHAB, P.C.; DOMINIC MARIANI, D.C.; MARK A. BOLINGER, D.C.; MICHAEL ROSS, D.C.; WILFREDO W. CASTRO, A/K/A "WILFREDO S. CASTRO," "FREDDIE CASTRO," "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOSEPH KEPKO, D.O.; SILVERS LANGSAM & WEITZMAN ASSOCIATES, P.C. (F/K/A SILVERS, LANGSAM & WEITZMAN, P.C.); DEAN WEITZMAN, ESQUIRE; BROWNSTEIN PEARLMAN WIEZER NEWMAN & COOK, P.C. (F/K/A BROWNSTEIN PEARLMAN WIEZER & NEWMAN, P.C.); CURTIS BRACEY; JOHN DOE 1-50; JOHN ROE 1-50; ABC CORP. 1-50; XYZ, P.C. 1-50, Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003819-23 On Appeal From: Superior Court of New Jersey Law Division, Mercer County **Sat below:** Honorable R. Brian McLaughlin, J.S.C. Trial Court Docket No.: MER-L-2288-21

AMENDED BRIEF OF PLAINTIFFS-APPELLANTS
Submitted October 15, 2024

Of Counsel and On the Brief:
Douglas M. Alba, Esq.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Rules

TABLE OF JUDGMENTS, ORDERS, AND RULINGS ON APPEAL

PRELIMINARY STATEMENT

This is an action brought by Plaintiffs Allstate New Jersey Insurance Company, et al., pursuant to the Insurance Fraud Prevention Act ("IFPA"), N.J.S.A. 17:33A-1, et. seq., against Defendants Central Jersey Orthopedic and Neurodiagnostic Group, L.L.C., John Hochberg, M.D., Colleen Mulryne, D.C., Bradley Bodner, D.O., and Joseph Kepko, D.O. (hereinafter collectively referred to as "the CJON Defendants"), other medical providers, law firms, an attorney and patient brokers/runners. The Second Amended Complaint alleges that the CJON Defendants have engaged in following schemes in violation of the IFPA: the "CJON Unlawful Practice Structure Scheme" (Counts Ten through Twelve); the "CJON Fraudulent Electrodiagnostic Testing Scheme" (Counts Thirteen through Fifteen); and the "Unlawful Payment of Rent Scheme" (Counts Seventeen and Eighteen).

The instant appeal arises from the trial court's June 28, 2024 Order dismissing Counts Ten through Fifteen of the Plaintiffs' Second Amended Complaint in favor of Alternative Dispute Resolution ("ADR"). (Pa0001). The trial court relied upon its order and decision on August 3, 2023, dismissing Counts One and Four through Nine of the Plaintiffs' Complaint in favor of ADR. (Pa0001; Pa0003; Pa0005). In its August 3, 2023 decision, the

trial court bifurcated Plaintiffs' IFPA case, and decided, *sua sponte*, that certain of Plaintiffs' IFPA claims constitute fraud and should remain in Superior Court, while the rest of Plaintiffs' IFPA claims are actually PIP payment disputes and are subject to ADR. (Pa0005). On June 28, 2024, the trial court likewise ordered that Counts Ten through Fifteen constitute PIP disputes and are subject to ADR. (Pa0001).

The trial court made this determination: (1) in violation of the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-4(d), as the trial court engaged in unlawful "rule-making" by allowing ADR jurisdiction over IFPA claims; (2) in violation of the Supreme Court of New Jersey's mandates in Allstate v. Lajara, 222 N.J. 129 (2015), by depriving the Plaintiffs of their right to a jury trial, which all of the parties repeatedly demanded in this case; and (3) despite the CJON Defendants' clear waiver of any alleged right to ADR after almost three years of litigation.

Plaintiffs respectfully submit that the trial court erred in dismissing Counts Ten through Fifteen of the Plaintiffs' Second Amended Complaint against the CJON Defendants.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

1. On November 4, 2021, the Plaintiffs filed their IFPA Complaint against the CJON Defendants, the Pennsauken Spine Defendants[2], and layperson/runner Wilfredo Castro. (Pa0019).

2. Plaintiffs brought this action in the Superior Court of New Jersey in accordance with the mandatory jurisdictional requirements of N.J.S.A. 17:33A-7. Ibid.

By November 2022, the Plaintiffs and all of the Defendants demanded a Trial by Jury.

3. In the Plaintiffs' Complaint, the Plaintiffs **demanded a Trial by Jury**. (Pa0181).

4. In the Plaintiffs' Case Information Statement, the Plaintiffs **requested a Jury Demand**. (Pa0185).

5. On February 9, 2022, the CJON Defendants filed an Answer to the Complaint. (Pa0189).

6. In the CJON Defendants' Answer, the CJON Defendants **demanded a Trial by Jury**. (Pa0252).

7. The CJON Defendants did not include an Affirmative Defense regarding lack of subject matter jurisdiction. (Pa0251).

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[1] The Procedural History and Statement of Facts have been combined for the convenience of the Court as they are substantially related.

[2] The Pennsauken Spine Defendants include: Pennsauken Spine and Rehab, P.C., Dominic Mariani, D.C., Mark A. Bolinger, D.C., and Michael Ross, D.C.

8. The CJON Defendants included a "Certification Pursuant to R. 4:5-1" that stated, in part: "I certify that to my knowledge and belief the subject matter of this litigation is not the subject of a pending matter." (Pa252).

9. In the CJON Defendants' Case Information Statement, the CJON Defendants **requested a Jury Demand by 6 jurors**. (Pa0257).

10. On February 10, 2022, Defendant Castro filed an Answer to the Complaint. (Pa0259).

11. In Defendant Castro's Answer, Defendant Castro **demanded a Trial by Jury**. (Pa0304).

12. In Defendant Castro's Case Information Statement, Defendant Castro **requested a Jury Demand by 6 jurors**. (Pa0308).

13. On July 25, 2022, the Pennsauken Spine Defendants filed a Verified Counterclaim. (Pa0310).

14. In the Pennsauken Spine Defendants' Verified Counterclaim, the Pennsauken Spine Defendants **demanded a Trial by Jury**. (Pa0330).

15. On November 21, 2022, the Pennsauken Spine Defendants filed an Answer and a First Amended Counterclaim to the Complaint. (Pa0365).

16. In the Pennsauken Spine Defendants' Answer, the Pennsauken Spine Defendants **demanded a Trial by Jury**. (Pa0426).

17. In the Pennsauken Spine Defendants' Case Information Statement, the Pennsauken Spine Defendants **requested a Jury Demand by 6 jurors.** (Pa0431).

The Pennsauken Spine Defendants filed their first Motion to Dismiss in February 2022 and argued that the entirety of the Complaint, including all IFPA causes of action, should be dismissed to ADR – the CJON Defendants did not file a Motion to Dismiss at that time.

18. On February 11, 2022, the Pennsauken Spine Defendants filed their first Motion to Dismiss the Plaintiffs' Complaint. (Pa0433).

19. The Pennsauken Spine Defendants' main argument was that the entirety of the Complaint, including all IFPA causes of action in Counts One through Nine against the Pennsauken Spine Defendants, should be dismissed in favor of ADR. (Pa0436).

20. The CJON Defendants did not join in this motion or similarly move at that time. (Pa0452).[3]

In August 2023, the Plaintiffs amended their Complaint to include additional non-medical provider and layperson Defendants.

21. On June 7, 2023, the Plaintiffs filed a Motion to Amend the Complaint. (Pa0486).

[3] N.J.R.E. 201, Judicial Notice of Law and Adjudicative Facts, states: "The court may judicially notice a fact, including . . . (4) records of the court in which the action is pending . . ." Plaintiffs attached the Case Docket to allow the Appellate Division to take judicial notice of any facts pertaining to Superior Court case record, including, but not limited to, whether a party filed a motion or did not file a motion.

22. The Motion to Amend the Complaint sought to include the following new parties: layperson/runner Curtis Bracey; law firms Silvers Langsam and Weitzman Associates and Brownstein Pearlman Weizer Newman and Cook; and attorney Dean Weitzman, and new claims and damages seeking violations of the IFPA and disgorgement as it relates to the Pennsauken Spine Defendants, the runner Defendants, and the law firm Defendants conspiring to unlawfully obtain Bodily Injury benefits and PIP benefits from the Plaintiffs. (Pa0489).

23. On June 14, 2023, the Pennsauken Spine Defendants opposed Plaintiffs' Motion to Amend the Complaint "because: (1) New Jersey law mandates that the disputed Personal Injury Protection ("PIP") claims be arbitrated. . ." (Pa0492).

24. The CJON Defendants did not take a position with regard to the Motion to Amend the Complaint. (Pa0452).

25. On August 3, 2023, the trial court granted the Plaintiffs' Motion to Amend the Complaint. (Pa0469).

On August 3, 2023, the trial court granted the Pennsauken Spine Defendants' first Motion to Dismiss as to Counts One and Four through Nine, and denied the Motion as to Counts Two and Three.

26. On August 3, 2023, the trial court held oral argument and issued an Order and letter decision related to the Pennsauken Spine Defendants' Motion to Dismiss that had been filed in February 2022. (Pa0003; Pa0005).

27. At no time between February 2022 and August 2023 did the CJON Defendants file a Motion to Dismiss or join in on the Pennsauken Spine Defendants' pending Motion to Dismiss. (Pa0459-Pa0470).

28. On August 3, 2023, the trial court denied the Pennsauken Spine Defendants' Motion to Dismiss as to Counts Two and Three (Runner and Kickback Counts), but granted the Motion to Dismiss as to Count One (Declaratory Judgment – Runner and Kickback), Counts Four through Six (Fraudulent Billing Scheme), and Counts Seven through Nine (Concealment of Past Medical History Scheme), dismissing those counts in favor of ADR. (Pa0003; Pa0005).

29. Among other cases, the trial court relied upon the unpublished case of Rivera v. Allstate Ins. Co., 2011 WL 1661145 (App. Div. May 4, 2011)[4], which the trial court acknowledged "is nonbinding, but is nonetheless helpful in interpreting any extension to [Nationwide Mutual Fire Insurance Co. v. Fiouris, 395 N.J. Super 156 (App. Div. 2007)]." (Pa0011-Pa0012).

[4] The trial court relied on and cited to this unpublished case in rendering its decision, despite the Appellate Division's clear prohibition against same: "[W]e do not rely on or cite to unpublished cases because they do not constitute binding precedent." See, Doe 70 v. Diocese of Metuchen, 477 N.J. Super. 270, fn3 (App. Div. 2023).

30. The trial court bifurcated Plaintiffs' IFPA claims, deeming some as "PIP disputes" and others as "violations under the IFPA." (Pa0016-Pa0017).

31. The trial court stated the following in relevant part:

> This Court concludes the claims based on the payment of (or obligation to pay) PIP benefits must be dismissed to be submitted to arbitration. The kickback and runner scheme count is not addressed in the No-Fault statute and is therefore retained by this Court, which is authorized to apply the remedies available under the NJ IFPA. N.J.S.A. 17:33A-4.
>
> Accordingly, because Counts One, Four, Five, Six, Seven, Eight, and Nine only complain of PIP medical expense benefits or request the Court declare that Plaintiffs have no obligation to pay the PIP benefits, as stated supra, they are dismissed as Defendants request they be handled in arbitration. Counts Two and Three, pertaining to the kickback and runner schemes, are not dismissed because they are violations under the NJ IFPA.
>
> [Pa0016-Pa0017].

32. As to Counts Two and Three, the trial court stated further:

> This claim relates to a form of fraud not contemplated under No-Fault Statute and is a violation under the NJ IFPA. Only a court, not an arbitrator, can apply remedies under NJ IFPA and any prior decision in arbitration as to the runner scheme must be void. This Count is retained, and Defendants' other defenses based on the previous action(s) by the arbitrator are moot.

[Pa0017].

By November 2023, the Plaintiffs, the Pennsauken Spine Defendants and Defendant Castro again demanded a Trial by Jury.

33. On August 11, 2023, the Plaintiffs filed the Amended Complaint. (Pa0493).

34. In the Plaintiffs' Amended Complaint, the Plaintiffs again **demanded a Trial by Jury**. (Pa0666).

35. In the Plaintiffs' Case Information Statement, the Plaintiffs **requested a Jury Demand**. (Pa0670).

36. On August 14, 2023, the Pennsauken Spine Defendants filed an Answer to the Amended Complaint. (Pa0674).

37. In the Pennsauken Spine Defendants' Answer, the Pennsauken Spine Defendants **demanded a Trial by Jury**. (Pa0854).

38. In the Pennsauken Spine Defendants' Case Information Statement, the Pennsauken Spine Defendants **requested a Jury Demand by 6 jurors**. (Pa0860).

39. On November 2, 2023, Defendant Castro filed an Answer to the Plaintiff's Amended Complaint. (Pa0862).

40. In Defendant Castro's Answer, Defendant Castro **again demanded a Trial by Jury**. (Pa0931).

The Plaintiffs and the Pennsauken Spine Defendants again demanded a Trial by Jury.

41. On April 4, 2024, the Pennsauken Spine Defendants filed a standalone Second Amended Counterclaim. (Pa0934).

42. In the Pennsauken Spine Defendants' Second Amended Counterclaim, the Pennsauken Spine Defendants **again demanded a Trial by Jury**. (Pa0946).

43. On May 8, 2024, the Plaintiffs filed an Answer to the Pennsauken Spine Defendants' Second Amended Counterclaim. (Pa0951).

44. In the Plaintiffs' Answer, the Plaintiffs **again demanded a Trial by Jury**. (Pa0957).

Plaintiffs filed a Motion for Leave to File a Second Amended Complaint to add additional kickback and unlawful referral allegations against the CJON Defendants and the Pennsauken Spine Defendants and the CJON Defendants and the Pennsauken Spine Defendants opposed the motion.

45. On December 20, 2023, the Plaintiffs filed a Motion for Leave to File a Second Amended Complaint. (Pa0958).

46. The Motion for Leave to File a Second Amended Complaint sought to include the following new claim: that the Pennsauken Spine Defendants and the CJON Defendants engaged in a kickback and unlawful referral scheme in violation of the IFPA, and that through this conduct, the Pennsauken Spine Defendants and the CJON

Defendants unlawfully obtained monies from the Plaintiffs. (Pa0961).

47. On March 6, 2024, the CJON Defendants opposed the Motion for Leave to File a Second Amended Complaint. (Pa0478).

48. The CJON Defendants argued, in part, that the new Counts of the proposed Second Amended Complaint, including the IFPA cause of action, were "rightly cognizable in Forthright." (Pa0964).

49. On March 15, 2024, the Court rejected the CJON Defendants' argument, and granted the Plaintiffs' Motion for Leave to File a Second Amended Complaint to include Counts 17 and 18. (Pa0965).

50. The CJON Defendants never moved to reconsider and/or appeal the Court's March 15, 2024 Order. (Pa0452).

The Plaintiffs filed their Second Amended Complaint, and again demanded a Trial by Jury.

51. On March 20, 2024, the Plaintiffs filed the Second Amended Complaint. (Pa0967).

52. In the Plaintiffs' Second Amended Complaint, the Plaintiffs again **demanded a Trial by Jury**. (Pa1116).

53. In the Plaintiffs' Case Information Statement, the Plaintiffs **requested a Jury Demand**. (Pa1119).

All of the Defendants filed Motions to Dismiss the Second Amended Complaint and argued that the entirety of the Second Amended Complaint, including all IFPA causes of action, should be dismissed to ADR.

54. On March 26, 2024, the Pennsauken Spine Defendants filed another Motion to Dismiss the Plaintiffs' Second Amended Complaint for failure to state a claim. (Pa1123).

55. On April 26, 2024, the Brownstein Pearlman Defendants filed a Motion to Dismiss the Plaintiffs' Second Amended Complaint for failure to state a claim (Pa1127).

56. On April 29, 2024, the Silvers Langsam Defendants and Defendant Dean Weitzman filed a Motion to Dismiss the Plaintiffs' Second Amended Complaint for failure to state a claim. (Pa1130).

57. All of these Defendants sought the dismissal of the Plaintiffs' entire case in favor of ADR. (Pa1123; Pa1127; Pa1130).

58. On May 2, 2024, the CJON Defendants filed a Motion to Dismiss the Plaintiffs' Second Amended Complaint for failure to state a claim. (Pa1133).

59. The CJON Defendants also sought the dismissal of the Plaintiffs' entire case in favor of ADR. (Pa1133).

60. The CJON Defendants joined in the Pennsauken Spine Defendants arguments concerning dismissal of the entire case, and alternatively sought dismissal of certain counts of the Second

Amended Complaint against the CJON Defendants based on the trial court's August 3, 2023 Order and Decision. (Pa1136).

61. On June 28, 2024, the trial court denied the parties' Motions to Dismiss, except that the trial court granted the CJON Defendants' Motion as to Counts Ten through Fifteen, dismissing those counts in favor of PIP arbitration consistent with the trial court's prior ruling on August 3, 2023 dismissing Counts One and Four through Nine of the Plaintiffs' Complaint. (Pa0001; T15:1-16:3[5]).

All of the Defendants again demand a Trial by Jury.

62. On July 8, 2024, the Silvers Langsam Defendants and Defendant Dean Weitzman filed an Answer to the Second Amended Complaint. (Pa1137).

63. In the Silvers Langsam Defendants and Defendant Dean Weitzman's Answer, the Pennsauken Spine Defendants **demanded a Trial by Jury.** (Pa1161).

64. In the Silvers Langsam Defendants and Defendant Dean Weitzman's Case Information Statement, they **requested a Jury Demand by 6 jurors.** (Pa1165).

65. On July 9, 2024, the Pennsauken Spine Defendants filed an Answer to the Second Amended Complaint. (Pa1167).

[5] June 28, 2024 Transcript

66. In the Pennsauken Spine Defendants' Answer, the Pennsauken Spine Defendants **demanded a Trial by Jury.** (Pa1369).

67. In the Pennsauken Spine Defendants' Case Information Statement, the Pennsauken Spine Defendants **requested a Jury Demand by 6 jurors.** (Pa1374).

68. On July 31, 2024, the Brownstein Pearlman Defendants filed an Answer to the Second Amended Complaint. (Pa1376).

69. In the Brownstein Pearlman Defendants' Answer, the Brownstein Pearlman Defendants **demanded a Trial by Jury.** (Pa1457).

70. In the Brownstein Pearlman Defendants' Case Information Statement, the Brownstein Pearlman Defendants **requested a Jury Demand by 6 jurors.** (Pa1460).

71. On September 18, 2024, Defendant Castro filed an Answer to the Plaintiff's Second Amended Complaint. (Pa1462).

72. In Defendant Castro's Answer, Defendant Castro **again demanded a Trial by Jury.** (Pa1530).

73. On September 18, 2024, the CJON Defendants filed an Answer to the Second Amended Complaint. (Pa1536).

74. In the CJON Defendants' Answer, the CJON Defendants **demanded a Trial by Jury.** (Pa1595).

75. The CJON Defendants did not include an Affirmative Defense regarding lack of subject matter jurisdiction. (Pa1594).

76. The CJON Defendants included a "Certification Pursuant to R. 4:5-1" that stated, in part: "I certify that to my knowledge and belief the subject matter of this litigation is not the subject of a pending matter." (Pa1596).

77. In the CJON Defendants' Case Information Statement, the CJON Defendants **requested a Jury Demand by 6 jurors**. (Pa1600).

78. To date: the Plaintiffs have requested a Trial by Jury a total of seven (7) times; the CJON Defendants have requested a Trial by Jury a total of four (4) times; the Pennsauken Spine Defendants have requested a Trial by Jury a total of eight (8) times; Defendant Castro has requested a Trial by Jury a total of four (4) times; the Silvers Langsam Defendants and Defendant Dean Weitzman have requested a Trial by Jury a total of two (2) times; and the Brownstein Pearlman Defendants have a requested a Trial by Jury a total of two (2) times.

The CJON Defendants have voluntarily and intentionally been active in this litigation and discovery.

79. There have been over 1337 days of discovery in this litigation. (Pa0452).

80. The CJON Defendants have participated in discovery by responding to Plaintiffs' Requests for Admissions on March 15, 2022. (Pa1603).

81. The CJON Defendants have been the recipients of the Plaintiffs' discovery responses, including over 172,000 pages of relevant documents the Plaintiffs have produced during discovery in this litigation. (Pa1603).

82. On November 6, 2023, the trial court issued a Case Management Order applicable to all parties, including the CJON Defendants, setting forth a discovery schedule and certain directives concerning the parties' conduct as it relates to discovery. (Pa1604).

83. On August 22, 2024, the trial court issued a Revised Case Management Order applicable to all parties, including the CJON Defendants, setting forth a discovery schedule and certain directives concerning the parties' conduct as it relates to discovery disputes. (Pa1608).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW - MOTION TO DISMISS, STATUTORY INTERPRETATION

Orders compelling arbitration are appealable as of right, R. 2:2-3(b)(8), and are reviewed de novo, Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 131 (2020). The court also reviews de novo the trial court's interpretation of statutes. Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 139 (2015).

POINT II

THE TRIAL COURT ERRED IN DISMISSING COUNTS TEN THROUGH FIFTEEN OF PLAINTIFFS' IFPA COMPLAINT IN FAVOR OF ADR, VIOLATING THE ADMINISTRATIVE PROCEDURES ACT (Pa0001; Pa0003; Pa0005; T29:13-35:3)

A. The PIP ADR Forum (Forthright) can never have jurisdiction over the Plaintiffs' IFPA Claims. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

AICRA is explicitly clear that an insurer's claims for violations of the IFPA and are not "disputes involving medical expense benefits." N.J.S.A. 39:6A-5.1(c) citing to N.J.S.A. 39:6A-4. N.J.S.A. 39:6A-5.1(a) is the enabling statutory provision allowing for ADR and it states, in relevant part:

> Any dispute regarding the recovery of medical expense benefits or other benefits provided under personal injury protection coverage pursuant to section 4 of P.L. 1972, c. 70 (C.39:6A-4) . . . arising out of the

> operation, ownership, maintenance or use of an automobile may be submitted to dispute resolution on the initiative of any party to the dispute, as hereinafter provided.

According to the above provision, the only disputes that may be subject to ADR are those regarding the recovery of medical expense benefits[6] provided under N.J.S.A. 39:6A-4. N.J.S.A. 39:6A-4 states, in relevant part:

> . . . every standard automobile liability insurance policy issued or renewed on or after [the effective date of the Automobile Insurance Cost Reduction Act ("AICRA")] shall contain personal injury protection benefits for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian, caused by an automobile or by an object propelled by or from an automobile, and to any other persons sustaining bodily injury while occupying, entering into, alighting from or using the automobile of the named insured, with permission of the named insured. (emphasis added)

N.J.S.A. 39:6A-4(a) defines "medical expense benefits" that the named insured, injured resident relatives, or other persons sustaining bodily injury may be entitled to under the "personal injury protection coverage." In other words, "medical expense

[6] Other benefits include the insured and/or injured person seeking to recover income continuation benefits, essential services benefits, death benefits and funeral expenses. Here, we focus on medical expense benefits.

benefits" are benefits **to** the named insured, injured resident relatives, or other persons sustaining bodily injury.

N.J.S.A. 39:6A-5.1(c) states that dispute resolution proceedings "shall include disputes arising regarding medical expense benefits provided under" N.J.S.A. 39:6A-4. This provision does not reference the IFPA or affirmative claims brought for violations of the IFPA. Moreover, given the analysis of N.J.S.A. 39:6A-4 above, that the disputes involving medical expenses articulated in § 5.1(c) apply only to the insured, the injured person, or a medical provider seeking the payment of medical expense benefits from the automobile insurance carrier, the scope and extent of a PIP dispute does not include an automobile insurance carrier seeking the reimbursement of medical expense benefits paid to a medical provider because that provider violated the IFPA.

In its August 3, 2023 decision, the trial court recited N.J.S.A. 39:6A-5.1 as follows: "Any dispute regarding the recovery of medical or other benefits provided under personal injury protection coverage . . . may be submitted to dispute resolution on the initiative of any party to the dispute." (Pa0009). The trial court patently erred when it utilized the ellipses in the place of the following key language: "pursuant to section 4 of

P.L. 1972, c. 70 (C.39:6A-4) . . . arising out of the operation, ownership, maintenance or use of an automobile." (Pa0009). If the trial court had reviewed the full and complete enabling statute, it would have also reviewed N.J.S.A. 39:6A-4, which limits the parties and the claims subject to ADR jurisdiction. However, by failing to do so and disregarding the language in the ellipses, the Court made a critical error in its analysis, upon which it based its decision to dismiss Counts One, Four through Nine, and, pertinent to this appeal, Ten through Fifteen.

There is simply no support in the enabling statutes to subject an insurer's IFPA claims to ADR and a full and complete reading of the enabling statutes provides a clear explanation of the limits to ADR jurisdiction. Thus, the Plaintiffs' IFPA claims against the CJON Defendants in Counts Ten through Fifteen must remain in the Superior Court. The Court's decision dismissing them in favor of ADR was erroneous and violated the law.

B. The Court's decision that the enabling statutes and regulations apply to an insurer's affirmative IFPA claims constituted unlawful "Rule-Making" and violated the Administrative Procedures Act. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

It is a fundamental tenet of New Jersey law that Courts may not usurp policy decisions from other branches of government. See Texter v. Dep't of Hum. Servs., 88 N.J. 376, 382 (1982). Indeed,

as recently as May 2024, the Supreme Court of New Jersey reaffirmed this principle. In Goyco v. Progressive Insurance Company, 257 N.J. 313 (2024), the Supreme Court refused to expand the definition of the term "pedestrian" in the No-Fault Act to include low speed electric scooters because to do so would be a policy decision with insurance cost implications that is properly for the Legislature, not the Court. Similarly, in this case, expanding the definition of PIP dispute to include an insurer's affirmative claims for violations of the IFPA, would be a policy decision with insurance cost implications that is properly for the Legislature and/or DOBI, not the Court.

As the trial court adopted the course of action proposed by the CJON Defendants, this adoption is clearly an instance of judicial overreach in violation of the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-4(d), which vests rule-making authority in state administrative agencies when appropriately delegated by the legislature. To be valid, a rule must be adopted in "substantial compliance" with APA. N.J.S.A. 52:14B-4(d). Under the APA, prior to adopting or amending any rule, an administrative agency must give notice of its intended action, N.J.S.A. 52:14B-4(a)(1), and afford interested parties a "reasonable opportunity to submit data, views, or arguments, orally or in

writing." N.J.S.A. 52:14B-4(a)(3). Public comments should be "given a meaningful role" in the process of rule adoption. In re Adoption of Rules Concerning Conduct of Judges, 244 N.J. Super. 683, 687 (App. Div. 1990). Among the purposes of the APA is "to give those affected by the proposed rule an opportunity to participate in the rule-making process, not just as a matter of fairness but also as a means of informing regulators of possibly unanticipated dimensions of a contemplated rule." In re Comm'r's Failure to Adopt 861 CPT Codes, 358 N.J. Super. 135, 142-43 (App. Div. 2003) (citations and internal quotations omitted).

The APA defines an "administrative rule" as an:

> . . . [A]gency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) interagency and interagency statements; and (3) agency decisions and findings in contested cases. (N.J.S.A. 52:14B-2(e)).
>
> [Coalition for Quality Health Care v. NJDOBI, 348 N.J. Super. 272, 295 (App. Div. 2002)].

In determining whether agency action constitutes rule-making courts inquire whether the agency action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated

> or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Id. at 296 (citing Metromedia, Inc. v. Dir. Div. of Tax, 97 N.J. 313 (1984)].

These factors are applicable whenever the authority of an agency to act without conforming to the requirements of the APA is questioned, for example, in adopting orders, guidelines, or directives. Ibid. However, not all of these factors must be present for an agency action to constitute rule-making; instead, the factors are balanced according to weight. Ibid.

The application of the aforementioned factors leads to the inescapable conclusion that if the Court were to affirm the trial court's ruling, to allow ADR jurisdiction over insurers' affirmative claims for IFPA violations, then this would constitute impermissible rule-making. Such a ruling would: (1) violate the

APA; (2) usurp the authority of the Commissioner of Banking and Insurance in administering how claims are handled by Forthright; and (3) usurp the law-making function of the Legislature.

All of the aforementioned factors are present here, yet the trial court engaged in unlawful rule-making in violation of the APA. The adopted course of action, subjecting affirmative IFPA claims to ADR, will have "wide coverage" encompassing a large segment of the regulated insurance industry and the general public served by those insurers. Metromedia, 97 N.J. at 331. The second factor, which requires a showing that the action was "intended to be applied generally and uniformly to all similarly situated persons," also weighs in favor of rule-making. Ibid. The third factor — whether the action was designed to operate only prospectively — is present because all current and future IFPA claims related to automobile accidents will be subject to ADR. Ibid.

The fourth factor is also present. As Plaintiffs set forth in section (A) above, the trial court prescribed "a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization," and this is a factor which deserves significant weight. Ibid.; Doe v. Poritz, 142 N.J. 1, 98 (1995) (declined to

follow on other grounds) (according the greatest weight to this factor in assessing whether promulgation of guidelines constituted rulemaking). The only issue referenced in the aforementioned PIP statutes are the recovery of PIP medical expense benefits pursuant to N.J.S.A. 39:6A-4 by the insured, the injured party and/or the medical provider. Other issues such as an insurer's affirmative IFPA claims are not expressly identified in the enabling statute. Therefore, the trial court's adoption of a legal standard or directive specifying additional issues that are subject to ADR constitutes rule-making by the trial court. Ibid.

Similarly, factor five, whether the action reflects a material change in administrative policy, would also be satisfied. Metromedia, 97 N.J. at 331. Here, the trial court materially changed the regulations established by DOBI to implement the enabling statute. Finally, the sixth factor is also satisfied because the trial court's action represents "a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Metromedia, 97 N.J. at 331-32.

The trial court's ruling allowing ADR jurisdiction over an insurer's affirmative IFPA claims is tantamount to the Court creating a new administrative rule, adopted in violation of the

procedural requirements of the APA, N.J.S.A. 52:14B-1 to -24.

POINT III

THE TRIAL COURT ERRED IN DISMISSING COUNTS TEN THROUGH FIFTEEN OF PLAINTIFFS' IFPA COMPLAINT IN FAVOR OF ADR, AS THEY FAILED TO FOLLOW OR EVEN ACKNOWLEDGE THE PRECEDENTIAL NEW JERSEY SUPREME COURT RULING IN LAJARA THAT THE IFPA MANDATES THE RIGHT TO A JURY TRIAL. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

A. The parties have a constitutional right to a Jury Trial. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

In Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 151 (2015), the Supreme Court of New Jersey held that the right to a jury trial is implied in the IFPA. "The right to a civil jury trial is one of the oldest and most fundamental of rights." Lajara, 222 N.J. at 134. "Under New Jersey's constitutional jurisprudence, the right to a jury trial applies to causes of action—even statutory causes of action—that sound in law rather than equity." Id. at 142. New Jersey courts consider not only the nature of the relief (the remedy), but whether the cause of action resembles one that existed in common law. Ibid.

The Lajara Court determined that the relief available to insurance companies in IFPA actions—compensatory damages, treble damages, and attorneys' fees and costs—is legal in nature. Id. at 146. Further, the Court compared a private-party action brought under the IFPA to the cause of action for common-law fraud and

concluded that the only element of a claim for common-law fraud absent from an IFPA claim is reliance by the plaintiff on the false statement. Id. at 147-49. "Perfect alignment between the elements of an IFPA claim and common-law fraud is not necessary to trigger the right to a jury trial." Id. at 148. The Court pointed out that a jury trial is required in a consumer-fraud case, despite the lack of complete symmetry between a consumer-fraud case and a common-law fraud claim. Id. at 148-149.

The Lajara Court stated:

> We presume that the Legislature is aware that New Jersey's jury-trial right attaches to statutory actions that confer legal remedies and resemble actions in common law. In other words, we will presume, as we must, that the Legislature intended to conform to the Constitution.
>
> We have no reason to conclude that, in IFPA private-party actions, the Legislature intended a result inconsistent with the demands of our State Constitution. When the Legislature provides for legal remedies, it can be inferred that it "intended to authorize a jury trial." (citations omitted)
>
> [Id. at 149-150].

". . . [A] jury trial in an IFPA action is not a recent advent or a break from a long-accepted practice of bench trials. **IFPA claims have been tried before juries since at least 1994.**" Id. at 153. (Emphasis added). Ultimately, the Lajara Court held:

> By this measure, we conclude that the right to a civil jury trial provided by Article I, Paragraph 9 of the New Jersey Constitution applies to private-action claims seeking compensatory and punitive damages under the IFPA. We also presume that the Legislature, in passing the IFPA, intended the statutory scheme to conform to the Constitution. We therefore remand to the trial court to allow defendants in this case to exercise their right to a jury trial.
>
> [Id. at 134].

In its August 3, 2023 decision, the trial court did not acknowledge the Lajara case, did not discuss it, and did not rely upon it. (Pa0005). The trial court issued its decision to dismiss Counts One and Four through Nine in favor of ADR, in direct contravention of the New Jersey Supreme Court's clear jury trial mandates for IFPA cases. Id. The trial court then issued its decision to dismiss Counts Ten through Fifteen in favor of ADR, relying upon its August 3, 2023 decision. (Pa0001).

The trial court patently erred when it failed to take into account and rely upon the New Jersey Supreme Court's precedential ruling in Lajara. Moreover, the trial court's dismissal of the Plaintiffs' IFPA case in favor of PIP ADR overruled the express command of this State's highest court, deprived the parties of their right to a jury trial under the IFPA, and violated R. 4:35-1(d), discussed below.

B. The CJON Defendants demanded a Jury Trial and voluntarily and intentionally litigated the case for three years in the Superior Court thereby waiving any theoretical right to ADR. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

New Jersey Court Rule 4:35-1(a) states: "Except as otherwise provided . . . any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing not later than 10 days after the service of the last pleading directed to such issue . . ." R. 4:35-1(d), Withdrawal of Demand, Consent, provides:

> When trial by jury has been demanded as provided by this rule, the trial of all issues so demanded shall be by jury, **unless all parties or their attorneys, by written and filed stipulation or oral stipulation made in open court and entered on the record, consent to trial by the court without a jury**, or unless the court on a party's or its own motion finds that a right of trial by jury of some or all of those issues does not exist.

Here, the Plaintiffs filed three (3) Complaints with Jury Demands. (Pa0019, Pa0493, and Pa0967). The Plaintiffs also filed an Answer to the Pennsauken Spine Defendants' Second Amended Counterclaim, which included a demand for a Trial by Jury. (Pa0951). Likewise, the CJON Defendants, the Pennsauken Spine Defendants, Defendant Castro, the Silvers Langsam Defendants and Defendant Weitzman, and the Brownstein Pearlman Defendants

demanded a Trial by Jury, in accordance with R. 4:35-1(a), on at least twenty (20) occasions, including in February 2022, July 2022, November 2022, August 2023, November 2023, April 2024, July 2024 and September 2024. (Pa0189; Pa0259; Pa0310; Pa0365; Pa0674; Pa0862; Pa0934; Pa1137; Pa1167; Pa1376; Pa1462; Pa1536). Pursuant to R. 4:35-1(d), all parties must consent to waive the jury demand. Here, Plaintiffs did not consent to waive a jury trial. Therefore, the trial court's dismissal of this matter in favor of ADR contravened the Supreme Court of New Jersey's clear holding in Lajara, and violated the New Jersey Court Rules as well.

Moreover, assuming *arguendo* that there was any right to ADR here, which the law establishes there is not, the CJON Defendants have engaged in over three years-worth of litigation in this case. This voluntary and intentional conduct wholeheartedly demonstrates that the CJON Defendants waived any theoretical right to compel ADR of Plaintiffs' IFPA claims. "Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). Waiver can be explicitly asserted, or it may be inferred from a party's conduct. Ibid. In Cole v. Jersey City Medical Center, 215 N.J. 265, 280-81 (2013), the Supreme Court of New Jersey set forth a multi-factor assessment to determine whether a party to an arbitration agreement has waived that remedy.

The Court stated:

> In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive. A court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense. (citations omitted).
>
> [Ibid.].

Recently, in Marmo and Sons General Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593 (App. Div. 2024), the Appellate Division considered the Cole factors in determining that the plaintiff waived its right to compel arbitration by its conduct in a lawsuit. The Appellate Division reiterated the Supreme Court of New Jersey's holding in Knorr, stating that the definition of waiver focuses predominantly on the intent of the waiving party.

Marmo, 478 N.J. Super. at 607. Significantly, with regard to the first Cole factor, "delay," the Appellate Division stated:

> As we noted above, the trial court found that Marmo's delay of approximately six months between filing its complaint and moving to compel arbitration was "not inordinate." The delay is substantially less than the twenty-one-month delay that the Court decried in Cole. Six months is approximately the same delay we excused in [Spaeth v. Srinivasan, 403 N.J. Super. 508, 516 (App. Div. 2008)]. **However, unlike the pro se litigant in Spaeth – who had asserted a right to arbitrate before exchanging discovery or scheduling depositions – Marmo was represented here by counsel, who was better equipped to recognize its right to arbitration and act upon it swiftly.** In any event, if the delay factor is assessed purely by the passage of time, it does not weigh heavily in favor of waiver. (Emphasis added).
>
> [Id. at 610-611].

With regard to factor two, motion practice, the Appellate Division found that while there was no motion practice in the six months, plaintiff did threaten to file a motion to compel discovery which "evinces conduct by [plaintiff] to invoke judicial enforcement processes that are, by comparison, more robust than those in arbitration." Id. at 611. As to factor four, extent of discovery conducted, the Appellate Division pointed out that the "delay in moving to compel arbitration allowed [plaintiff] to obtain the early benefit of discovery that might not have been as

easily obtainable in arbitration." Id. at 612. The Appellate Division indicated: "We accept the representation of [plaintiff's] counsel concerning Cole factor three, that [plaintiff's] failure to recognize its right to arbitration sooner was a good-faith mistake, but that does not eliminate the relevance of Cole factor four, that strongly weighs in favor of waiver." Ibid.

In this case, there was a **three-year** delay between Plaintiffs' November 2021 Complaint and the CJON Defendants' Motion to Dismiss for lack of subject matter jurisdiction. During those three years and over 1337 days of discovery (Pa0452), the CJON Defendants voluntarily and intentionally engaged in this litigation, participated in discovery, and had the benefit of obtaining Plaintiffs' discovery responses. The CJON Defendants:

- Were the subject of multiple Case Management Orders setting discovery schedules and providing guidelines for the parties' conduct in discovery and discovery disputes, including the Orders of November 6, 2023 and August 22, 2024 (Pa1604; Pa1608);

- Filed Two (2) Answers with Demands for Trial by Jury (Pa0189; Pa1536);

- Produced responses to Plaintiffs' First Requests for Admissions (Pa1603);

- Received Plaintiffs' discovery responses and over 170,000 pages of responsive records from Plaintiffs (Pa1603); and

- Chose not to file a Motion to Dismiss until May 2024 and also choose not to join in the Pennsauken Spine Defendants' First Motion to Dismiss filed in February 2022, which was not decided until August 2023 (Pa0452).

Moreover, as the Appellate Division explained in Marmo, the CJON Defendants voluntarily and intentionally engaged in over three years of this litigation while represented by counsel, who was certainly equipped to recognize their alleged right to arbitration and to act upon it swiftly. Marmo, 478 N.J. Super. at 611. Cole factors one, two and four weigh heavy against ADR.

As to the third Cole factor, the CJON Defendants' litigation strategy is unknown. However, the parties have expended three years' worth of time and resources engaging in extensive litigation. Thus, the filing of the CJON Defendants' Motion to Dismiss in May 2024, conceivably could have been to their advantage by draining the Plaintiffs' resources and running out the proverbial clock in litigation. With regard to the fifth Cole factor, the CJON Defendants' pleadings strongly support a finding of waiver. They have filed two (2) Answers which included Affirmative Defenses and a jury demand, but they never asserted "lack of subject matter jurisdiction" as an affirmative defense. Moreover, any such affirmative defense would have been abandoned after three years of complex litigation. Additionally, the CJON

Defendants' R. 4:5-1 Certification explicitly omitted any contemplation of ADR. With regard to factor six, there is no fixed trial date but the discovery-end-date is on October 8, 2025.

If the trial court's decision stands and the Plaintiffs' IFPA claims are sent to ADR, in violation of the Plaintiffs' statutory and constitutional rights, and after having endured three years' worth of extensive litigation, the prejudice to Plaintiffs is significant and heavily weighs against ADR. (Cole factor seven). Moreover, as was the plaintiff in Marmo, the CJON Defendants were able to obtain, through the Superior Court discovery process, a substantial amount of discovery from Plaintiffs that it would not have been able to obtain in arbitration. See Marmo, 487 N.J. Super. at 613 ("even though the extent of prejudice to [defendant] was arguably modest, it is not completely insignificant").

In Marmo, the Appellate Division viewed the totality of the Cole factors as weighing in favor of waiver of the opportunity to compel arbitration. Id. at 614. The CJON Defendants' conduct in this lawsuit is immeasurably greater and more intentional than the plaintiff in Marmo and clearly demonstrates their waiver of any theoretical right to arbitration. The trial court's disregard for the New Jersey Supreme Court's decision in Lajara, R. 4:35-1(d), and the relevant caselaw regarding waiver is highly erroneous and

must, respectfully be overturned.

POINT IV

THE SUPERIOR COURT IS THE PROPER JURISDICTION FOR CLAIMS BROUGHT PURSUANT TO THE IFPA, N.J.S.A. 17:33A-1, et seq. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

A. New Jersey State Courts have consistently adjudicated IFPA claims since 1994. (Pa0001; Pa0003; Pa0005; T29:13-35:3)

For the last 30 years, the Supreme Court of New Jersey, the Appellate Division, and the Law Division have consistently permitted cases concerning violations of the IFPA arising from fraudulent conduct resulting in an insurer's payment of personal injury protection benefits to be adjudicated in the Superior Court. Not once, until the latter part of 2023, did any State Court rule that ADR is the appropriate forum for an IFPA case.

Not only have the State Courts heard IFPA cases since 1994[7], but they have uniformly held that the Superior Court is the proper jurisdiction to litigate IFPA claims. For example, in Lajara, the Supreme Court of New Jersey also held that insurance carriers have standing to sue under the IFPA. "**The IFPA authorizes two separate causes of action to enforce the statutory scheme . . . the other a private civil action brought by insurers 'damaged as the result**

[7] Lajara, 222 N.J. at 153.

of a violation of any provision of [the IFPA], N.J.S.A. 17:33A-7.'" Lajara, 222 N.J. at 143-144. (Emphasis added). "Under the IFPA, "[a]ny insurance company damaged as the result of a violation of [the Act] may sue ... to recover compensatory damages, which shall include reasonable investigation expenses, costs of suit and attorneys fees." N.J.S.A. 17:33A-7(a). Moreover, an insurance company "shall recover treble damages if the court determines that the defendant has engaged in a pattern of violating [the IFPA]." N.J.S.A. 17:33A-7(b)." Id. at 144.

Finally, the Supreme Court held that: "Notably, attorneys' fees, investigatory costs, and costs of suit are, by definition, compensatory damages under the IFPA, **and therefore a successful lawsuit initiated by an insurance company will necessarily involve an award of damages.** N.J.S.A. 17:33A-7(a)." (Id. at 147-48). (Emphasis added). The Lajara Court interpreted the word "court" in "court of competent jurisdiction" to include a jury serving as the fact-finder. Id. at 151.

In Material Damage Adjustment Corp. v. Open MRI of Fairview, 352 N.J. Super. 216, 230 (Law Div. 2002), Plaintiff sought reimbursement of payments made to Defendant, treble damages, and counsel fees pursuant to the IFPA. Plaintiff there alleged that Defendant submitted claims and received PIP reimbursement during

the time it was not licensed by the Department of Health. Open MRI of Fairview, 352 N.J. Super. at 230. In determining that the Defendant's conduct constitutes a violation of the IFPA, the Court stated:

> The Legislature has authorized private insurance companies damaged as a result of a violation of any provision of the Insurance Fraud Act **to institute a civil action to recover compensatory damages, including reasonable investigation expenses, costs of suit and counsel fees.** N.J.S.A. 17:33A-7(a). **The statute also mandates treble damages "if the court determines that the defendant has engaged in a pattern of violating the act."** N.J.S.A. 17:33A-7(b). (emphasis added)
>
> [Ibid.].

In Allstate Ins. Co. v. Greenberg, 376 N.J. Super. 623, 637 (Law Div. 2004), the Court stated: "The Fraud Act expressly provides that the forum for the adjudication of claims is in the Superior Court. Section 7(a) of the Fraud Act prescribes that, "[a]ny insurance company damaged as the result of a violation of any provision of this act may sue therefor in any court of competent jurisdiction."

In Allstate v. Northfield Medical Center, 228 N.J. 596, 600 (2017), the Supreme Court of New Jersey granted Certification of Allstate's appeal to consider the issue of whether violations of regulatory requirements could constitute insurance fraud under the

provision of the IFPA that creates liability for one who "knowingly assists, conspires with, or urges any person or practitioner to violate any of the provisions of the [IFPA]." (citations omitted). The Supreme Court of New Jersey unanimously adopted Allstate Insurance Co. v. Orthopedic Evaluations, Inc., 300 N.J. Super. 510 (App. Div. 1997), which held that healthcare services must be rendered in compliance with all significant requirements imposed by law in order to qualify for payment as a PIP medical expense benefit. "The theory . . . reflects that in New Jersey a practice entity must comply with all statutes and regulations governing the permissible structures for control, ownership, and direction of a medical practice, including the use of professional services interconnected with a medical practice." Northfield, 228 N.J. at 622.

The Northfield Court concluded that the trial court's finding of a knowing violation of the IFPA was amply supported in the record, which contained compelling evidence demonstrating how the unlawful practice structure shielded from view its effective circumvention of regulatory rules. Id. at 600. Thus, the Supreme Court of New Jersey's consideration of this IFPA case and its holding are clear evidence that the Supreme Court of New Jersey believes it has jurisdiction over IFPA claims.

Therefore, it is the clear dictate of the State Courts that IFPA claims are to be adjudicated in the Superior Court and not in the inadequate ADR forum. In rendering its decision to dismiss Counts Ten through Fifteen in favor of ADR, the trial court disregarded over 30 years of precedent and its ruling was patently wrong.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Honorable Court reverse the trial court's June 28, 2024 Order dismissing Counts 10-15 of the Plaintiffs' Second Amended Complaint to arbitration.

Respectfully submitted,

Kennedy Vuernick, LLC
Attorneys for Plaintiffs

By: */s/ Douglas M. Alba*
Douglas M. Alba, Esq.

Dated: October 15, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY & CASUALTY INSURANCE; and ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

PENNSAUKEN SPINE AND REHAB, P.C.; DOMINIC MARIANI, D.C.; MARK A. BOLINGER, D.C.; MICHAEL ROSS, D.C.; WILFREDO W. CASTRO, A/K/A "WILFREDO S. CASTRO," "FREDDIE CASTRO," "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOSEPH KEPKO, D.O.; SILVERS LANGSAM & WEITZMAN ASSOCIATES, P.C. (F/K/A SILVERS, LANGSAM & WEITZMAN, P.C.); DEAN

Docket No. A-003819-23

On Appeal from:
Superior Court of New Jersey, Law Division, Mercer County
Docket No. MER-L-002288-21

Sat Below:
Hon. R. Brian McLaughlin, J.S.C.

WEITZMAN, ESQUIRE; BROWNSTEIN PEARLMAN WIEZER NEWMAN & COOK, P.C. (F/K/A BROWNSTEIN PEARLMAN WIEZER & NEWMAN, P.C.); CURTIS BRACEY; JOHN DOE 1-50; JOHN ROE 1-50; ABC CORP. 1-50; XYZ, P.C. 1-50,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS, PENNSAUKEN SPINE AND REHAB, P.C., DOMINIC MARIANI, D.C., MARK A. BOLINGER, D.C., AND MICHAEL ROSS, D.C.

Dated: December 2, 2024

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

INDEX OF APPENDIX OF RESPONENTS

[1] Pursuant to R. 2:6-1(a)(2), the entirety of this brief is submitted within the PSR Defendants' Appendix because the question of whether an issue was raised in the trial court is germane to the appeal. Further, the entirety of this brief is relevant to show that the underlying issue now raised by Plaintiffs was not raised below.

TABLE OF AUTHORITIES

Cases

Rules

Statutes

PRELIMINARY STATEMENT

Plaintiffs, Allstate Insurance Company, et al. (collectively, "Plaintiffs"), now appeal the trial court's June 28, 2024 ruling granting the Motion to Dismiss filed by Defendants, Central Jersey Orthopedic and Neurodiagnostic Group, LLC, John L. Hochberg, M.D., Colleen Mulryne, D.C., Bradley A. Bodner, D.O., and Joseph Kepko, D.O. (collectively, the "CJO Defendants"), as to Counts 10-15 of the Complaint in favor of PIP arbitration. This ruling was exclusively based upon the trial court's prior August 3, 2023 ruling granting the Motion to Dismiss filed by Defendants, Pennsauken Spine and Rehab, P.C. ("Pennsauken Spine"), Dominic Mariani, D.C., Mark A. Bolinger, D.C., and Michael Ross, D.C. (collectively, "the PSR Defendants"), as to Counts 1 and 4-9 of the Complaint in favor of PIP arbitration.

Procedurally and substantively, the circumstances here do not warrant the reversal or disturbance of the trial court's June 28, 2024 ruling granting the CJO Defendants' Motion to Dismiss or its prior August 3, 2023 ruling granting the PSR Defendants' Motion to Dismiss. Procedurally, Plaintiffs lack standing to now appeal the August 3, 2023 and June 28, 2024 rulings. Plaintiffs did not appeal the trial court's August 3, 2023 Order granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 within the time afforded by R. 2:4-1(a) and R. 2:4-3(e) and, therefore, that ruling is not appealable. Plaintiffs also

did not oppose or object to the trial court's June 28, 2024 Order granting the CJO Defendants' Motion to Dismiss as to Counts 10-15 and, therefore, Plaintiffs waived their right to now appeal that ruling. Plaintiffs' appeal should be denied due to these procedural deficiencies alone.

Putting aside these glaring procedural mishaps, the present appeal is also substantively flawed. The trial court correctly dismissed Plaintiffs' PIP claims against the CJO Defendants (Counts 10-15) in favor of arbitration, just as the trial court previously correctly dismissed Plaintiffs' PIP claims against the PSR Defendants (Counts 1 and 4-9) in favor of arbitration. In both instances, after an extensive review of the legislative history, statutory language, and interplay between the No-Fault Law and the New Jersey Insurance Fraud Prevention Act ("IFPA"), N.J.S.A. 17:33A-1 et seq., the trial court properly distinguished claims alleging PIP disputes from claims alleging violations of the IFPA. The trial court appropriately relied upon Molino and Sabato, two binding Appellate Division holdings, and the subsequent rulings applying those cases in the context of the IFPA, including Fiouris, Rivera, and Meer, among others.

Based on those holdings, as well as the trial court's in-depth analysis of the legislative histories of the No-Fault Law and the IFPA in the context of this dispute, the trial court correctly ruled that Counts 1, 4-9, and 10-15 only complain of PIP benefits or request the Court declare that Plaintiffs have no

obligation to pay PIP benefits to the PSR Defendants and the CJO Defendants. Distilled to their core, Counts 1, 4-9, and 10-15 are founded exclusively upon common PIP-related disputes that have been statutorily reserved for arbitration. The trial court's rulings did not violate the Administrative Procedures Act, N.J.S.A. 52:14B-4(d), nor did they ignore the language of the IFPA or the controlling case law, as Plaintiffs now suggest. There is ample legal authority supporting the trial court's bifurcation of certain claims in favor of arbitration, even those asserting "fraud" as a justification for the non-payment of PIP benefits.

For these reasons, as set forth more fully below, the trial court correctly granted the CJO Defendants' Motion to Dismiss as to Counts 10-15 of the Complaint in favor of arbitration, just as the trial court previously correctly granted the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 in favor of arbitration. Accordingly, the PSR Defendants respectfully submit that Plaintiffs' appeal should be denied and the trial court's August 3, 2023 and June 28, 2024 rulings should both be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[2]

A. Plaintiffs' Initial Complaint

On November 4, 2021, Plaintiffs filed their Complaint against the PSR Defendants, Wilfredo Castro ("Castro"), and the CJO Defendants. (Pa0019). In the Complaint, Plaintiffs allege the PSR Defendants engaged in three "schemes," including: (1) a "Runner and Kickback Scheme," (2) a "Fraudulent Billing Scheme," and (3) a "Concealment of Past Medical History Scheme." (Pa0028, ¶30). Plaintiffs also allege the CJO Defendants engaged in two "schemes," including: (1) an "Unlawful Practice Structure Scheme," and (2) a "Fraudulent EDX Testing Scheme." (Pa0028, ¶30).

Counts 1-3 of the Complaint allege claims for declaratory judgment, unjust enrichment, and violation of the IFPA and seek damages and other relief relating to the alleged "Runner and Kickback Scheme." (Pa0101-0112). Counts 4-6 allege claims for declaratory judgment, unjust enrichment, and violation of the IFPA and seek damages and other relief relating to the alleged "Fraudulent Billing Scheme." (Pa0113-0131). Counts 7-9 allege claims for declaratory judgment, unjust enrichment, and violation of the IFPA and seek damages and other relief relating to the alleged "Concealment of Past Medical History

[2] The Procedural History and Statement of Facts have been combined for the convenience of the Court as they are substantially related.

Scheme." (Pa0132-0146).

Counts 10-12 of the Complaint allege claims for declaratory judgment, unjust enrichment, and violation of the IFPA and seek damages and other relief relating to the alleged "Unlawful Practice Structure Scheme." (Pa0146-0161). Counts 13-15 allege claims for declaratory judgment, unjust enrichment, and violation of the IFPA and seek damages and other relief relating to the alleged "Fraudulent EDX Testing Scheme." (Pa0161-0180).

B. The Trial Court's August 3, 2023 Order Partially Granting the PSR Defendants' Motion to Dismiss the Complaint

On February 11, 2022, the PSR Defendants filed a Motion to Dismiss the Complaint pursuant to R. 4:6-2(e). (Pa0433). On September 9, 2022, the trial court heard arguments on the PSR Defendants' Motion to Dismiss the Complaint, but reserved its decision. (1T at 66:15-67:3).[3] On August 3, 2023, the trial court entered an Order and a Letter Opinion partially granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 of the Complaint in favor

[3] 1T refers to the transcript from the September 9, 2022 oral argument on the PSR Defendants' Motion to Dismiss the Complaint. 2T refers to the transcript from the August 3, 2023 oral argument on the PSR Defendants' Motion to Dismiss the Complaint. 3T refers to the transcript from the October 6, 2023 oral argument on Plaintiffs' Motion for Reconsideration of the Trial Court's August 3, 2023 Order and Letter Opinion Partially Granting the PSR Defendants' Motion to Dismiss the Complaint. 4T refers to the transcript from the June 28, 2024 oral argument on the CJO Defendants' Motion to Dismiss the Second Amended Complaint.

of arbitration. (Pa0003, Pa0005; 2T at 37:21-38:12). In conjunction with its Order and Letter Opinion, the trial court retained jurisdiction over Counts 2-3 of the Complaint. (Pa0003; Pa0005; 2T at 37:21-38:12).

In its Letter Opinion, the trial court analyzed the No-Fault Law and the IFPA, as well as the controlling case law, and concluded that Counts 1 and 4-9 of the Complaint allege PIP disputes within the realm of the No-Fault Law and should therefore be dismissed in favor of arbitration. (Pa0005). The trial court ruled that Counts 1 and 4-9 of the Complaint "only complain of PIP medical expense benefits or request the Court declare that Plaintiffs have no obligation to pay the PIP benefits…." (Pa0016-0017). The trial court further concluded that Counts 2-3 of the Complaint allege viable claims under the IFPA outside the realm of the No-Fault Law and should therefore remain before the Superior Court. (Pa017).

C. The Trial Court's October 6, 2023 Order Denying Plaintiffs' Motion for Reconsideration and the Appellate Division's November 21, 2023 Order Denying Plaintiffs' Motion for Leave to File an Interlocutory Appeal

On August 22, 2023, Plaintiffs filed a Motion for Reconsideration of the trial court's August 3, 2023 Order and Letter Opinion. (Da0001). On October 6, 2023, the trial court heard arguments on the Motion for Reconsideration and denied the Motion. (Da0004; 3T at 15:4-19:5).

On October 25, 2023, Plaintiffs filed a Motion for Leave to File an

Interlocutory Appeal as to the trial court's August 3, 2023 Order and Letter Opinion partially granting the PSR Defendants' Motion to Dismiss the Complaint. (Da0006). On November 21, 2023 the Appellate Division entered an Order denying Plaintiffs' Motion for Leave to File an Interlocutory Appeal. (Da0010). Plaintiffs did not appeal the trial court's August 3, 2023 Order and Letter Opinion, as of right, pursuant to R. 2:2-3(b)(8).

D. Plaintiffs' First and Second Amended Complaints

On June 7, 2023, Plaintiffs filed a Motion for Leave to File an Amended Complaint. (Pa0486). On August 3, 2023, the trial court entered an order, granting in part, and denying in part, Plaintiffs' Motion for Leave to File an Amended Complaint, subject to its August 3, 2023 ruling dismissing Counts 1 and 4-9 of the Complaint in favor of arbitration. On August 11, 2023, Plaintiffs filed their Amended Complaint against the PSR Defendants, Castro, and the CJO Defendants, as well as Defendants, Silvers Langsam & Weitzman Associates, P.C. and Dean Weitzman, Esquire (collectively "the SLW Defendants"), Brownstein Pearlman Weizer Newman & Cook, P.C. ("Brownstein"), and Curtis Bracey ("Bracey"). (Pa0493).

With the Amended Complaint, Plaintiffs re-allege Counts 2-3 against the PSR Defendants and Castro relating to the alleged "Runner and Kickback Scheme," as well as Counts 10-15 against the CJO Defendants relating to the

alleged "Unlawful Practice Structure Scheme" and "Fraudulent EDX Testing Scheme." (Pa0503, ¶33). Plaintiffs allege the SLW Defendants, Brownstein, and Bracey were also part of the alleged "Runner and Kickback Scheme." (Pa0503, ¶34).

On December 20, 2023, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint. (Pa0958). On March 15, 2024, the trial court entered an order, granting in part, and denying in part, Plaintiffs' Motion for Leave to File a Second Amended Complaint, subject to its August 3, 2023 ruling dismissing Counts 1 and 4-9 of the Complaint in favor of arbitration. (Pa0965). On March 20, 2024, Plaintiffs filed their Second Amended Complaint against the PSR Defendants, Castro, the CJO Defendants, the SLW Defendants, Brownstein, and Bracey. (Pa0967).

With the Second Amended Complaint, Plaintiffs re-allege Counts 2-3 against the PSR Defendants, Castro, the SLW Defendants, Brownstein, and Bracey relating to the alleged "Runner and Kickback Scheme," as well as Counts 10-15 against the CJO Defendants relating to the alleged "Unlawful Practice Structure Scheme" and "Fraudulent EDX Testing Scheme." (Pa0977-0978, ¶33). Plaintiffs also allege the PSR Defendants and CJO Defendants engaged in a "Kickback and Unlawful Referral Scheme." (Pa0977-0978, ¶33). Counts 17-18 of the Second Amended Complaint allege claims for unjust enrichment and

violation of the IFPA and seek damages and other relief relating to the alleged "Kickback and Unlawful Referral Scheme." (Pa1107-1114).

E. The Trial Court's June 28, 2024 Order Partially Granting the CJO Defendants' Motion to Dismiss the Complaint

On March 26, 2024, the PSR Defendants filed a Motion to Dismiss the Second Amended Complaint pursuant to R. 4:6-2(e). (Pa1123). On April 26, 2024, Brownstein filed a Motion to Dismiss the Second Amended Complaint pursuant to R. 4:6-2(e). (Pa1127). On April 29, 2024, the SLW Defendants filed a Motion to Dismiss the Second Amended Complaint pursuant to R. 4:6-2(e). (Pa1130). On May 3, 2024, the CJO Defendants filed a Motion to Dismiss the Second Amended Complaint pursuant to R. 4:6-2(e). (Pa1133).

Plaintiffs did not oppose the CJO Defendants' Motion to Dismiss as to Counts 10-15 of the Second Amended Complaint in favor of arbitration pursuant to the trial court's August 3, 2023 ruling granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 in favor of arbitration. (Da0012; 4T at 14:25-16:3). On June 28, 2024, the trial court heard arguments on the CJO Defendants' Motion to Dismiss the Second Amended Complaint. (4T at 14:25-16:3). On the same day, the trial court entered an Order partially granting the CJO Defendants' Motion to Dismiss the Second Amended Complaint as to Counts 10-15 in favor of arbitration. (Pa0001). The trial court dismissed Counts 10-15 of the Second Amended Complaint in favor of arbitration consistent with its August 3, 2023

ruling dismissing Counts 1 and 4-9 in favor of arbitration. (Pa0001; 4T at 14:25-16:3).

Plaintiffs' now appeal the trial court's June 28, 2024 Order granting the CJO Defendants' Motion to Dismiss as to Counts 10-15 in favor of arbitration, which was unopposed and exclusively based on the trial court's August 3, 2023 Order granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 in favor of arbitration.

LEGAL ARGUMENT

I. PLAINTIFFS WAIVED THEIR APPEAL RIGHTS AS TO THE RULINGS BEING APPEALED (Procedural Issue; Not Raised Below)

"Waiver is the voluntary and intentional relinquishment of a known right." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)). "[I]t must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them." Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988). "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Largoza v. FKM Real Estate Holdings, Inc., 474 N.J. Super. 61, 83 (App. Div. 2022) (quoting Knorr, 178 N.J. at 177). "Waiver may be inferred from conduct, in addition to explicit declarations." Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593, 607 (App. Div.

2024).

As set forth below: (a) Plaintiffs waived their appeal rights as to the trial court's June 28, 2024 Order partially granting the CJO Defendants' Motion to Dismiss by failing to oppose or object to that Order; and (b) Plaintiffs waived their appeal rights as to the trial court's August 3, 2023 Order partially granting the PSR Defendants' Motion to Dismiss by failing to timely appeal that Order, as of right, pursuant to R. 2:2-3(b)(8). For these reasons alone, Plaintiffs' appeal is procedurally flawed and should be rejected.

A. Plaintiffs Did Not Oppose or Object to the Trial Court's June 28, 2024 Order Partially Granting the CJO Defendants' Motion to Dismiss and Therefore Waived Their Appeal Rights as to this Ruling (Procedural Issue; Not Raised Below)

"[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1977)); see also N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 339 (2010) ("We have often stated that issues not raised below will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate the public interest.").

Preserving an issue for appeal requires raising it in a pleading, motion, or

objection. See, e.g., Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 377 (App. Div. 2010) (raising an issue in a brief preserves it on appeal); Nat'l Westminster v. Anders Eng'g, 289 N.J. Super. 602, 609-10 (App. Div. 1996) (raising an issue in a motion brief opposing summary judgment preserves the issue for appeal); State v. Jones, 232 N.J. 308, 322 (2018) ("Defendant's appellate problem is generic to any defendant who has not made a record before the trial court. The onus is on defendant to make his record to support an issue to be pursued on appeal.").

It is well-established that an unchallenged dispositive motion below may not be challenged on appeal. See Yun v. Ford Motor Co., 276 N.J. Super. 142, 149 (App. Div. 1994) (Plaintiffs had no standing to appeal grant of summary judgment to defendant when counsel advised the court on motion record that he did not oppose defendant's motion); Infante v. Gottesman, 233 N.J. Super. 310, 319 (App. Div. 1989) ("Since plaintiff offered no opposition to defendant's motion for summary judgment as to these matters in the trial court, he will not be heard to complain that the trial court accepted as true the uncontradicted facts in defendant's moving papers, and thus he cannot challenge the summary judgment order entered in defendant's favor."); N.J.-American Water Co. v. Watchung Square Assocs., LLC, 2016 N.J. Super. Unpub. Lexis 1639, at *36

(App. Div. July 15, 2016)[4] (dismissing plaintiff's appeal after finding plaintiff made "no direct claim below" and did not challenge defendant's motion for summary judgment below).

On May 3, 2024, the CJO Defendants filed a Motion to Dismiss the Second Amended Complaint pursuant to R. 4:6-2(e). (Pa1133). In their opposition papers, Plaintiffs did not specifically oppose the CJO Defendants' request for the dismissal of Counts 10-15 of the Complaint based on the trial court's prior August 3, 2023 ruling granting the PSR Defendants' Motion to Dismiss the Complaint as to Counts 1 and 4-9. (Da0012; 4T at 14:25-16:3). On June 28, 2024, the trial court heard arguments on the CJO Defendants' Motion to Dismiss, as well as other pending motions. (4T at 14:25-16:3).

During the June 28, 2024 hearing, Plaintiffs' counsel confirmed Plaintiffs' acceptance of the dismissal of Counts 10-15 of the Complaint. (Id.). Specifically, during the June 28, 2024 hearing, Plaintiffs represented to the trial court as follows:

> THE COURT: All right, thank you. I'll turn now to Mr. Alba. And I'm first going to put you on the spot. Because I note -- I know it does not reflect Allstate's agreement with the Court's earlier rulings, but consistent with the Court [sic] earlier rulings, do you agree that dismissing Counts 10 to 15 as raised by

[4] This and all other unpublished opinions referenced herein are included within the PSR Defendants' Appendix. Counsel for the PSR Defendants is presently unaware of any contrary unpublished opinions.

> Central Jersey, would be consistent with the Court's prior rulings, again I'm not --
> MR. ALBA: Yes I --
> THE COURT: -- I'm not asking for you to agree with -- yes.
> MR. ALBA: I think I've already made that point clear. Yes, (indiscernible) yes, that's why if I remember correctly, there was no response from us --
> THE COURT: Right.
> MR. ALBA: -- in our opposition as to that point.
> THE COURT: Okay. And again, the lack of response does not indicate for the record agreement with the reasoning in the prior decision.
> MR. ALBA: Yes, I think that was fully briefed (indiscernible)
> THE COURT: Okay, all right, well at the very least, I will, I have an issue, I will indicate that I will grant Central Jersey's motion to dismiss, at least in part, as to Counts 10 through 15.

(Id. at 14:25-15:25). On the same day, the trial court entered an Order partially granting the CJO Defendants Motion to Dismiss the Second Amended Complaint as to Counts 10-15 in favor of arbitration consistent with its August 3, 2023 ruling dismissing Counts 1 and 4-9 of the Complaint in favor of arbitration. (Pa0001; 4T at 14:25-16:3).

Consequently, since Plaintiffs did not oppose or otherwise object to the trial court's dismissal of Counts 10-15 of the Complaint in favor of arbitration and, instead, consented to the dismissal of these claims, Plaintiffs waived their right to now challenge the trial court's June 28, 2024 Order partially granting the CJO Defendants' Motion to Dismiss as to Counts 10-15 of the Complaint.

In other words, without opposing or objecting to the dismissal of Counts 10-15 of the Complaint before the trial court, Plaintiffs lack standing to now challenge that ruling on appeal. Accordingly, for this reason alone, Plaintiffs' appeal is procedurally defective, should be denied, and the trial court's June 28, 2024 ruling should be affirmed.

B. Plaintiffs Did Not Timely Appeal the Trial Court's August 3, 2023 Order Partially Granting the PSR Defendants' Motion to Dismiss and Therefore Waived Their Appeal Rights as to this Ruling (Procedural Issue; Not Raised Below)

While Plaintiffs' now appeal the trial court's June 28, 2024 Order granting the CJO Defendants' Motion to Dismiss as to Counts 10-15 of the Complaint, that ruling is expressly based upon the trial court's prior August 3, 2023 Order granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 of the Complaint. (Pa0001; Pa0003; Pa0005; 4T at 14:25-16:3). Thus, through the current appeal, which is already procedurally deficient for the above reasons, Plaintiffs improperly attempt to bootstrap and appeal the trial court's August 3, 2023 ruling, as of right, pursuant to R. 2:2-3(b)(8). (Da0064; Da0090) (Noting that Plaintiffs' current appeal is "as of right pursuant to *R.* 2:2-3(b)(8)."). Plaintiffs should not be permitted to challenge the trial court's August 3, 2023 ruling through such backdoor means.

Pursuant to R. 2:2-3(a)(3), "appeals may be taken to the Appellate Division as of right … from final judgments of the Superior Court trial

divisions." According to the New Jersey Supreme Court, "all orders denying and granting arbitration should be treated as final for purposes of appeal." GMAC v. Pittella, 205 N.J. 572, 585 (2011). "Because the order shall be deemed final, a timely appeal on the issue must be taken then or not at all. A party cannot await the results of the arbitration and gamble on the results." Id. at 586. Litigants have forty-five (45) days to appeal any final judgment or final order. See R. 2:4-1(a).

Although filing a motion for reconsideration in the trial court tolls the time for appealing a final order, R. 2:4-3(e), the time to appeal begins to run once the trial court disposes of the reconsideration motion. Ibid. Moreover, the time to appeal that remains to a litigant is the remaining time had the motion for reconsideration not been filed. Ibid. Accordingly, "an untimely motion to reconsider does not" toll the time for appeal, Eastampton Ctr., LLC v. Planning Bd., 354 N.J. Super. 171, 187 (App. Div. 2002), and a reconsideration motion "cannot resurrect an appeal that is already time-barred," In re Hill, 241 N.J. Super. 367, 371 (App. Div. 1990). Where an appeal is "not perfected within the period provided by [R. 2:4-1(a)] and [R.] 2:4-4(a)," the Appellate Division lacks "jurisdiction to decide the merits of the appeal" and must dismiss the appeal as untimely. Id. at 372.

On February 11, 2022, the PSR Defendants filed a Motion to Dismiss the

Complaint pursuant to R. 4:6-2(e). (Pa0433). On September 9, 2022, the trial court heard arguments on the PSR Defendants' Motion to Dismiss, but reserved its decision. (1T at 66:15-67:3). On August 3, 2023, the trial court entered an Order and Letter Opinion partially granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 of the Complaint in favor of arbitration. (Pa0003; Pa0005; 2T at 37:21-38:12).

On August 22, 2023, Plaintiffs filed a Motion for Reconsideration of the trial court's August 3, 2023 Order and Letter Opinion. (Da0001). On October 6, 2023, the trial court heard arguments on the Motion for Reconsideration and denied the Motion. (Da0004; 3T at 15:4-19:5). On October 25, 2023, Plaintiffs filed a Motion for Leave to File an Interlocutory Appeal as to the trial court's August 3, 2023 Order and Letter Opinion partially granting the PSR Defendants' Motion to Dismiss. (Da0006). On November 21, 2023, the Appellate Division entered an Order denying Plaintiffs' Motion for Leave to File an Interlocutory Appeal. (Da0010). Despite having competent counsel and every opportunity to do so, Plaintiffs did not appeal the trial court's August 3, 2023 Order and Letter Opinion, as of right, pursuant to R. 2:2-3(b)(8).

Therefore, since Plaintiffs failed to appeal the trial court's August 3, 2023 ruling, as of right, within the time prescribed by R. 2:4-1(a) and R. 2:4-3(e), that ruling is not appealable. As a result, Plaintiff should not be permitted to

improperly bootstrap the trial court's August 3, 2023 ruling to its current appeal of the trial court's June 28, 2024 ruling, which, as set forth above, Plaintiffs did not oppose or object to in the first place. Accordingly, Plaintiffs' appeal is procedurally improper on multiple fronts, it should be denied, and the trial court's June 28, 2024 ruling should be affirmed.

II. ON BOTH AUGUST 3, 2023 AND JUNE 28, 2024, THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS ALLEGING PIP DISPUTES IN FAVOR OF ARBITRATION AND RETAINED JURISDICTION OVER PLAINTIFFS' IFPA CLAIMS (Pa0001; Pa0003; Pa0005; 1T at 66:15-67:3; 2T at 37:21-38:12; 3T at 15:4-19:5; 4T at 14:25-16:3)

On August 3, 2023, the trial court properly granted the PSR Defendants' Motion to Dismiss and dismissed Plaintiffs' claims alleging PIP disputes (Counts 1 and 4-9) in favor of arbitration, while retaining jurisdiction over Plaintiffs' claims alleging a "Runner and Kickback Scheme" under the IFPA (Counts 2-3). (Pa0001; Pa0003). Thereafter, on June 28, 2024, the trial court properly granted the CJO Defendants' Motion to Dismiss and dismissed Plaintiffs' additional claims alleging PIP disputes (Counts 10-15) in favor of arbitration, while retaining jurisdiction over Plaintiffs' additional claims alleging a "Kickback and Unlawful Referral Scheme" under the IFPA (Counts 17-18). (Pa0001).

As set forth below, on both August 3, 2023 and June 28, 2024, the trial court: (a) correctly recognized that the No-Fault Law applies specifically to PIP

claims and mandates that any dispute regarding the recovery of PIP benefits be arbitrated; (b) correctly distinguished claims alleging PIP disputes from claims alleging violations of the IFPA; (c) did not improperly ignore the language of the IFPA or deviate from the controlling case law; and (d) appropriately rejected Plaintiffs' argument that the PSR Defendants somehow waived their rights to have the PIP claims arbitrated by filing an Answer to the Complaint and demanding a jury trial on Plaintiffs' remaining claims. (Pa0001; Pa0003, Pa0005).[5]

A. The Trial Court Correctly Recognized that the No-Fault Law Applies Specifically to PIP Claims and Mandates that Any Dispute as to the Recovery of PIP Benefits be Arbitrated (Pa0001; Pa0003; Pa0005; 1T at 66:15-67:3; 2T at 37:21-38:12; 3T at 15:4-19:5; 4T at 14:25-16:3)

With their Complaint, Plaintiffs use a smokescreen of fraud in an attempt to circumvent the statutorily mandated PIP arbitration process for resolving what, on their face, are commonplace disputes over medical necessity, improper coding, and other issues that are typically addressed in PIP arbitration. (Pa0019; Pa0493; Pa0967). The trial court correctly found that these PIP disputes are

[5] Dismissal of a complaint pursuant to R. 4:6-2(e) is reviewed *de novo*. Wreden v. Twp. Of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). R. 4:6-2(e) provides that a motion to dismiss must be granted where a plaintiff fails to state a claim upon which relief can be granted. See also Reider v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) ("[D]ismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.").

required to be arbitrated under New Jersey law, and therefore, Counts 1, 4-9, and 10-15 of the Complaint fail to state claims upon which relief can be granted. (Pa0001; Pa0003; Pa0005).

New Jersey has a comprehensive regulatory regime for PIP benefits, which requires insurance providers to include coverage for medical benefits due to accident injuries in their automobile-insurance policies, regardless of whose fault led to the injuries. Under the No-Fault Law, N.J.S.A. 39:6B-1 to -3 and N.J.S.A. 39:6A-1 to -35, an insured can assign his or her right to PIP benefits to a medical provider in exchange for those services. The medical provider may then submit claims directly to the insurance provider to receive payment for medically necessary services provided to the insured. The insurance provider is, in turn, required to pay for PIP benefits for all treatments and services that are reasonable and appropriate.

To prevent fraud and compensate only for necessary treatment, New Jersey has established procedures to regulate PIP benefits. New Jersey law establishes "care paths" that dictate the medical treatment permitted for accident-related injuries, permits insurers to establish policies as to which medical procedures require precertification, and sets a tiered dispute-resolution system that involves review of compensation requests by insurers, an internal appeals process, and binding arbitration. PIP arbitration under the No-Fault Law

is mandatory and comprehensive. The purpose of requiring arbitration of PIP disputes was "to establish an informal system of settling tort claims arising out of automobile accidents in an expeditious and least costly manner, and to ease the burden and congestion of the State's courts." Churm v. Prudential Prop. & Cas. Ins. Co., 276 N.J. Super. 631, 634 (App. Div. 1994) (quoting N.J.S.A. 39:6A-24).

The right to proceed to arbitration to resolve PIP claim disputes is premised on N.J.S.A. 39:6A-5.1, which provides that: "Any dispute regarding the recovery of medical expense benefits or other benefits provided under personal injury protection coverage … may be submitted to dispute resolution on the initiative of any party to the dispute." The No-Fault Law confers the right on either party to compel arbitration of any "dispute" regarding PIP benefits.[6] See State Farm Mut. Auto. Ins. Co. v. Molino, 289 N.J. Super. 406, 410 (App. Div. 1996); Allstate Ins. Co. v. Sabato, 380 N.J. Super. 463, 470 (App. Div. 2005) (A PIP "dispute may proceed to court only if neither side chooses alternative dispute resolution."); Coal. for Quality Health Care v. New Jersey

[6] The language of N.J.S.A. 39:6A-5.1 is clear and unambiguous and can have only one meaning: all disputes relating to PIP benefits must be arbitrated. See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 202 (1999) ("Where the statutory language is 'clear and unambiguous,' courts will implement the statute as written without resort to judicial interpretation, rules of construction, or extrinsic matters.").

Dep't of Banking & Ins., 348 N.J. Super. 272, 311 (App. Div. 2002) (recognizing that it is appropriate for PIP disputes to be resolved through arbitration, at the option of any party to the dispute).

N.J.S.A. 39:6A-5.1(c) spells out the types of PIP "disputes" that are to be decided via arbitration, and explicitly incorporates the precise "disputes" raised by Plaintiffs in Counts 1, 4-9, and 10-15 of the Complaint, stating:

> Disputes involving medical expense benefits may include, but not necessarily be limited to, matters concerning: … (2) whether the treatment or health care service which is the subject of the dispute resolution proceeding is in accordance with the provisions of section 4 of P.L.1972, c. 70 (C.39:6A-4), section 4 of P.L.1998, c. 21 (C.39:6A-3.1) or section 45 of P.L.2003, c. 89 (C.39:6A-3.3) or the terms of the policy; (3) the eligibility of the treatment or service for compensation; (4) the eligibility of the provider performing the treatment or service to be compensated under the terms of the policy or under regulations promulgated by the commissioner, including whether the person is licensed or certified to perform such treatment; (5) whether the disputed medical treatment was actually performed; (6) whether diagnostic tests performed in connection with the treatment are those recognized by the commissioner; (7) the necessity or appropriateness of consultations by other health care providers; (8) disputes involving application of and adherence to fee schedules promulgated by the commissioner; and (9) whether the treatment performed is reasonable, necessary, and compatible with the protocols provided for pursuant to P.L.1998, c. 21 (C.39:6A-1.1 et al.).

Here, the bases for Counts 1, 4-9, and 10-15 of the Complaint expressly require arbitration under New Jersey law. Those allegations constitute "disputes" that fall squarely within N.J.S.A. 39:6A-5.1(c), which, upon election of the PSR Defendants (or the CJO Defendants), are to be submitted to arbitration. There is no dispute that the PSR Defendants promptly demanded arbitrations as to these disputes. (Pa0433). Further, the factual allegations in the Complaint mirror the disputes identified in N.J.S.A. 39:6A-5.1(c) as subject to mandatory PIP arbitration, including allegations regarding: (1) improper coding for initial examinations by using CPT Code 99205; (2) improper coding for initial examinations by using CPT Code 99204; (3) time spent on initial examinations; (4) failure to check boxes on medical claim forms; and (5) improper EDX testing performed.

While N.J.S.A. 39:6A-5.1(c) identifies certain "disputes" to be decided by an arbitrator, the word "dispute" is unqualified and not limited to the "disputes" listed. Molino, 289 N.J. Super. at 410. The Statute itself states that it is a non-exhaustive list. N.J.S.A. 39:6A-5.1(c). New Jersey courts have made clear that "any 'dispute' concerning a 'payment' of PIP benefits due 'pursuant to this act' is subject to binding arbitration" and to the extent "dispute" creates any ambiguity, "we must construe it liberally to harmonize the arbitration provision with [the] firm policy favoring prompt and efficient resolution of PIP disputes

without resort to the judicial process." Molino, 289 N.J. Super. at 410-11; see also State Farm Ins. Co. v. Sabato, 337 N.J. Super. 393, 396-97 (App. Div. 2001) (N.J.S.A. 39:6A-5.1(c) "should be read as broadly as the words themselves indicate, that statutory arbitrators are authorized to determine both factual and legal issues, and that coverage issues are to be decided by the arbitrator in the same manner as issues dealing with the extent of injury and the amount of recovery."); Amiano v. Ohio Cas. Ins. Co., 85 N.J. 85, 90 (1981) (The No-Fault Law is "intended to provide insureds with the prompt payment of medical bills, lost wages and other such expenses without making them await the outcome of protracted litigation."). This broad reading is consistent with the Supreme Court's directive that "approaches which minimize resort to the judicial process, or at least do not increase reliance upon the judiciary, are strongly to be favored." Gambino v. Royal Globe Ins. Cos., 86 N.J. 100, 107 (1981).

Courts have admonished insurers to not attempt end-runs around the statutory scheme: "Carriers should not be empowered to avoid arbitration simply by characterizing PIP disputes as questions of 'entitlement' or 'coverage' and then seeking judicial resolution of those issues." Molino, 289 N.J. Super. at 410-11. Efforts by carriers to avoid statutory arbitration by characterizing PIP disputes as issues of "fraud" have likewise been rejected. See Sabato, 337 N.J. Super. at 394; Rivera v. Allstate Ins. Co., 2011 N.J. Super. Unpub. Lexis 1127,

at *7 (App. Div. May 4, 2011) ("Since this is a dispute about payment of PIP benefits, even if Allstate raises fraud as a bar to payment of the claim, the matter must first be arbitrated."); Gov't Employees Ins. Co. v. Tri Cnty. Neurology & Rehab. LLC, 721 F. App'x 118, 120 n.2 (3d Cir. 2018) (holding allegations that healthcare provider was not in compliance with all significant requirements of law, including services that were not medically necessary, not performed, and using billing codes to misrepresent and exaggerate services, "fall[] under New Jersey's PIP arbitration statute."); Citizens United Reciprocal Exch. v. Meer, 321 F. Supp. 3d 479, 484, 488 (D.N.J. 2018) (finding allegations of medically unnecessary treatments, treatments that did not occur, and a prohibited referral practice "falls under New Jersey's PIP arbitration statute" which defendants "have a statutory right to compel arbitration to resolve.").

In Sabato, 337 N.J. Super. 393, the Appellate Division held that the insurer's fraud-related claims were "disputes" subject to arbitration. In that case, the medical provider filed an application for PIP benefits on behalf of three brothers alleged to be injured in a motor vehicle accident. The trial court enjoined the arbitration upon the insurer's request and held a hearing on the claims, concluding that one of the brothers lied to the insurer regarding his social security number, while another brother provided evasive information. The Appellate Division held that the trial court should have allowed the claims to

proceed to arbitration, the arbitrator in such a proceeding is empowered to determine the "issues of coverage and fraud," and the judgment should be reversed and the matter remanded for arbitration. Id. at 394. In so finding, the Appellate Division held that the "defenses asserted by State Farm – be they fraud or some other basis for alleged non-coverage – should have been resolved by an arbitrator." Id. at 396.

The Appellate Division has repeatedly reaffirmed Molino and Sabato, in published and highly persuasive opinions. In State Farm Indem. Co. v. National Liability & Fire Ins. Co., 439 N.J. Super. 532, 537 (App. Div. 2015), the Appellate Division reiterated that the broad reading of N.J.S.A. 39:6A-5.1(c) in Sabato was still applicable and "coverage issues are to be decided by the arbitrator in the same manner as issues dealing with the extent of injury and amount of recovery." Again, the Appellate Division stated that insurance carriers are not permitted to "avoid arbitration simply by characterizing PIP disputes as questions of coverage," including claims of fraud, to seek judicial resolution. Id. at 538. The Court reasoned,

> Our courts have acknowledged that "transactional efficiency" is the "legislative grail" of our State's no-fault auto insurance system. *Rutgers Cas. Ins. Co. v. Ohio Cas. Ins. Co.*, 299 *N.J.Super.* 249, 263, 690 *A.2d* 1074 (App.Div.1997), *aff'd o.b.*, 153 N.J. 205, 707 A.2d 1350 (1998); *see also Coalition for Quality Health Care v. N.J. Dep't of Banking & Ins.*, 348 *N.J.Super.* 272, 311, 791 *A.2d* 1085 (App.Div.), *certif. denied*, 174

> *N.J.* 194, 803 *A.2d* 1165 (2002). To that end, arbitration requirements in the statute are broadly construed in favor of the submission of all issues to arbitration rather than in favor of bifurcating issues between the courts and arbitration. *See Molino*, *supra*, 289 *N.J.Super.* at 409-11, 674 *A.2d* 189. [Id. at 536-37].

See also Endo Surgi Ctr., P.C. v. Liberty Mut. Ins. Co., 391 N.J. Super. 588, 594-95 (App. Div. 2007) (The sole remedy for fraud claims relating to PIP benefits is arbitration; otherwise an entitlement to a jury trial "would open the door to circumvention of the statutorily mandated alternative dispute resolution procedure provided by *N.J.S.A.* 39:6A-5.1.").

In Liberty Mut. Ins. Co. v. Brunswick Surgical Ctr., PC, 2008 N.J. Super. Unpub. Lexis 1166, at *1-2 (App. Div. July 18, 2008), Liberty Mutual refused to pay numerous claims for medical treatment submitted by the medical provider, asserting that such claims were fraudulent and unlawful since the provider made illegal self-referrals. Liberty Mutual filed a complaint against the provider for damages and declaratory judgments, including for violation of the IFPA. Id. The Appellate Division affirmed the dismissal of the IFPA complaint, finding that the arbitration system is the sole method for determining PIP disputes and the course selected by Liberty Mutual "evades the legislative intent to streamline the resolution of PIP coverage disputes." Id. at *16.

In Gov't Employees Ins. Co. v. MLS Med. Grp. LLC, 2013 U.S. Dist. Lexis 171983 (D.N.J. Dec. 6, 2013), relying Molino and Sabato, the court

dismissed an analogous action seeking a declaration that healthcare providers were not entitled to over a million dollars because the PIP claims were "fraudulent," were submitted pursuant to an illegal kickback scheme, involved illegal billing practices, and were not medically necessary. "Based on the PIP arbitration statute and the Appellate Division decisions *Molino* and *Sabato* … it would be inappropriate to entertain the declaratory judgment claim brought by GEICO." Id. at *15. The court reasoned:

> The claim, though couched in the language of the Declaratory Judgment Act, at bottom requests that this Court disrupt the statutory scheme created by the New Jersey legislature mandating that disputes regarding claims for PIP benefits be decided in arbitration…. Moreover, by lumping an unknown number of PIP disputes together into one declaratory judgment claim, GEICO asks this Court to make blanket determinations about claim-specific questions, including, to name a few, the medical necessity of treatment, whether the treatment was properly billed according to the appropriate CPT code and whether the treatment billed to GEICO was actually rendered at all. These grounds for denying coverage are enumerated by the governing statute as falling within the purview of a "dispute involving [PIP] medical expense benefits" and thus are within the power of the arbitrator to decide. [Id. at *17].

In Meer, 321 F. Supp. 3d 479, CURE alleged the providers submitted numerous fraudulent PIP claims and sought a declaration that it was not obligated to pay outstanding PIP claims because of the alleged fraud. The court dismissed CURE's claim because it lacked the authority to "enter a declaratory

judgment stating that CURE may withhold payment on allegedly fraudulent PIP claims." Id. at 488. Echoing the rationale in Sabato, the court reasoned that the "dispute falls under New Jersey's PIP arbitration statute" and defendants "have a statutory right to compel arbitration to resolve this dispute." Id.

In Gov't Employees Ins. Co. v. Tri Cnty. Neurology & Rehab. LLC, 721 F. App'x 118, 120 (3d Cir. 2018), GEICO alleged claims of declaratory judgment, racketeering, and insurance fraud against the provider and sought a declaration that it could withhold payment of $2,211,000.00 in PIP claims. The Third Circuit held that the declaratory judgment claim was defective and "should have been dismissed," reasoning that "disputes between medical providers and insurance companies over the payment of PIP claims must be resolved through a statutorily mandated arbitration process." Id. at 122-23. The Third Circuit continued: "Based on the PIP arbitration statute and the New Jersey Appellate Division decisions interpreting it, the District Court cannot provide a declaration stating that GEICO may withhold payment of $2,211,000.00 in PIP claims due to an alleged fraud." Id. The Third Circuit concluded that "this dispute falls under New Jersey's PIP arbitration statute, and GEICO and the Defendants each have the statutory right to compel arbitration to resolve this dispute." Id.

Most recently, in Gov't Employees Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A., 98 F.4th 463, 466 (3d Cir. 2024), the Third Circuit again considered whether claims brought under the IFPA are arbitrable. There, in three matters, GEICO alleged that the medical providers "defrauded GEICO of more than $10 million by abusing the personal injury protection ('PIP') benefits offered by its auto policies" and filed exaggerated claims for medical services (sometimes for treatments that were never provided), billed medically unnecessary care, and engaged in illegal kickback schemes." Id. GEICO asserted claims under the IFPA, which the providers sought to arbitrate under the No-Fault Law. Id. at 466-67.

In its analysis, the Third Circuit noted, under New Jersey law, that a statute bars arbitration "only if [its text] or its legislative history evidences an intention to preclude alternate forms of dispute resolution[.]" Id. at 468 (quoting Curtis v. Cellco P'ship, 413 N.J. Super. 26 (App. Div. 2010)) (alterations in original). Relying on the holdings in Molino and Sabato, the Third Circuit found that: (1) claims under the IFPA can be arbitrated; and (2) the No-Fault Law compels arbitration. Id. at 466-67. Therefore, based on its review of the applicable case law, and predicting how the Supreme Court of New Jersey would rule on the issue, the Third Circuit reversed the decisions of the lower court and remanded with instructions to compel arbitration of the IFPA claims. Id. at 469

("We therefore predict that the New Jersey Supreme Court would allow arbitration of IFPA claims.").[7]

Against this backdrop, the trial court correctly held that Counts 1, 4-9, and 10-15 of the Complaint fall squarely within the scope of N.J.S.A. 39:6A-5.1(c) and should proceed to arbitration as the exclusive resolution forum. (Pa0001; Pa0003; Pa0005). The trial court held that:

> Contrary to Plaintiffs' assertion that PIP arbitration is an inappropriate forum for all of their claims, the Appellate Division has clarified some cases of fraud are subject to arbitration, while a separate subset belongs under the NJ IFPA—fraud that constitutes "a violation of any provision" of that Act not pertaining to "recovery of PIP benefits." First, in State Farm Mutual Auto Ins. Co. v. Molino, the Appellate Division noted the word "dispute" in N.J.S.A. 39:6A–5 was unqualified by any additional language and should be construed liberally "to harmonize the arbitration provision with our firm policy favoring prompt and efficient resolution of PIP disputes without resort to the judicial process." 289 N.J. Super. 406, 410-11 (App. Div. 1996).
>
> In a further step, the court in State Farm Ins. Co. v. Sabato, held "the arbitrator … is empowered to determine the issues of coverage and fraud which the trial court improperly decided itself." 337 N.J. Super. 393, 396-97 (App. Div. 2001) (emphasis added). That court reiterated Insurers "should not be empowered to avoid arbitration by characterizing PIP disputes as

[7] At the time of its August 3, 2023 and June 28, 2024 rulings, the trial court did not have the benefit of this monumental opinion at its disposal, which, in addition to supporting those rulings, actually supports the dismissal of the entire Complaint in this matter, including the remaining IFPA claims.

> questions of 'entitlement' or 'coverage' and then seeking judicial resolution of those issues." Id. at 396 (quoting Molino, 289 N.J. Super. at 410). [Pa0011].

There is no reason to deviate from the measured approach taken by the Appellate Division and the other courts, particularly considering the liberal interpretation of "dispute" under N.J.S.A. 39:6A-5.1(c). Plaintiffs' attempt to use bald allegations of "fraud" to avoid arbitrating the PIP claims is the very tactic that has been flatly rejected, time and time again, by the Appellate Division and numerous other courts. Pared to their essence, Plaintiffs' allegations, which center upon medical necessity, improper billing and coding, improper EDX testing performed, and compliance with law, amount to nothing more than classic PIP disputes, which are required to be arbitrated.

As the trial court correctly recognized, the PSR Defendants have a statutory right, as a matter of law, to resolve the claims in this case via arbitration. (Pa0001; Pa0003; Pa0005). The right to arbitration trumps Plaintiffs' decision to file their Complaint in the Superior Court. Plaintiffs' claims against the PSR Defendants undoubtedly involve (1) disputes by Plaintiffs (2) involving the PSR Defendants' recovery of PIP benefits that (3) one party wishes to send to arbitration. Considering the complex regulatory scheme enacted to ensure that all disputes over PIP benefits are subject to arbitration, Counts 1, 4-9, and 10-15 of the Complaint were appropriately

dismissed in favor of arbitration. (Pa0001; Pa0003; Pa0005). Accordingly, the trial court's rulings should be affirmed.

B. The Trial Court Did Not Violate the Administrative Procedures Act and, Instead, Correctly Distinguished Claims Alleging PIP Disputes from Claims Alleging Violations of the IFPA (Pa0001; Pa0003; Pa0005; 1T at 66:15-67:3; 2T at 37:21-38:12; 3T at 15:4-19:5; 4T at 14:25-16:3)

In their Brief, Plaintiffs argue that the trial court erred in dismissing Counts 10-15 of the Complaint in favor of arbitration. (Pb17-26). Plaintiffs argue that the PIP arbitration forum "can never have jurisdiction over the Plaintiffs' Claims." (Pb17). Plaintiffs further argue that the trial court's August 3, 2023 and June 28, 2024 rulings "constituted unlawful 'Rule-Making' and violated the Administrative Procedures Act." (Pb20).

As an initial matter, Plaintiffs did not oppose the dismissal of Counts 10-15 of the Complaint on this basis (*i.e.*, an alleged violation of the Administrative Procedures Act), nor did Plaintiffs advance this argument in response to the PSR Defendants' Motion to Dismiss, which resulted in the trial court's August 3, 2023 Order dismissing Counts 1 and 4-9 of the Complaint in favor of arbitration. For this reason alone, Plaintiffs' arguments on this issue should be rejected and Plaintiffs' appeal should be denied.

Plaintiffs also fail to address the trial court's analysis of the statutory language and legislative histories of the No-Fault Law and the IFPA in the

context of this dispute. The trial court thoroughly analyzed the statutory construction of the No-Fault Law, the strong public policy in favor of arbitration of PIP disputes, and a series of cannons to harmonize potential conflicts in statutory language. (Pa0005). Based on its analysis, the trial court correctly concluded that while both contemplate fraud, the No-Fault Law (most recently amended) applies specifically to PIP payments, while the IFPA pertains to payment under generic insurance policies:

> This Court finds that between the violations section of the NJ IFPA, enacted in 1972, allowing a court of competent jurisdiction to review a "claim for payment or other benefit pursuant to an insurance policy," and the No-Fault Statute, amended in 1998, requiring arbitration of "disputes regarding the recovery of Personal Injury Protection benefits" at the behest of a single party, the general-specific and last-in-time canons of statutory construction favor the latter, towards arbitration of claims of PIP payment disputes. Compare N.J.S.A. 17:33A-4, with N.J.S.A. 39:6A-5.1(a). [Pa0006].

Thus, the trial court held that the No-Fault Law "applies to a narrower subset of fraud claim payment—PIP payment—and serves as an exception from the [IFPA's] earlier violations section." (Pa0014). As the trial court concluded, "the claims pertaining to fraudulent PIP benefit payments and unjust enrichment of wrongly paid PIP benefits are within the preview[sic] of [the No-Fault Law]." (Pa0014).

Further, contrary to Plaintiffs' assertions, the trial court appropriately cited Molino and Sabato, binding Appellate Division holdings, and subsequent binding and persuasive rulings applying Molino and Sabato in the context of the IFPA, including Nationwide Mutual Fire Insurance Co. v. Fiouris, 395 N.J. Super. 156 (App. Div. 2007), Rivera, 2011 N.J. Super. Unpub. Lexis 1127, and Meer, 321 F. Supp. 3d 479, among others. (Pa0005). In Molino, the Appellate Division held that N.J.S.A. 39:6A-5.1(c)'s definition of "dispute" is not "narrow" and covers "any disputes concerning benefits claimed to arbitration in lieu of court proceedings." 289 N.J. Super. at 410 (citation omitted). The Court defined "dispute" liberally to "harmonize the arbitration provision with [the] firm policy of favoring prompt and efficient resolution of PIP disputes" without judicial intervention by extending it to any "dispute[] concerning one's entitlement to a type of PIP benefit." Id. (citing N.J.S.A. 39:6A-16). "*N.J.S.A.* 39:6A-5c compels State Farm to submit to binding arbitration this dispute over defendant's entitlement to certain PIP benefits." Id.

In Sabato, the Appellate Division remanded an action to arbitration and held that "the [trial] court should have permitted the claims to proceed to statutory arbitration [and] that the arbitrator is empowered to determine the issues of coverage and fraud." 337 N.J. Super. at 394. State Farm argued that the trial court was authorized to "determine the threshold issue of whether there

was PIP coverage here, or whether the claimants were disqualified for fraud." Id. at 396. The Appellate Division rejected such "narrow and circumscribed" interpretation of N.J.S.A. 39:6A-5.1, which would effectively eliminate the arbitration requirement. Id. The Appellate Division affirmed that N.J.S.A. 39:6A-5.1 must be construed broadly in its applicability to PIP disputes. Id. (citing Molino, 289 N.J. Super. at 410). The Appellate Division held that the "defenses asserted by State Farm – be they fraud or some other basis for alleged non-coverage – should have been resolved by an arbitrator." Id. at 396; see also Endo Surgi Center, 391 N.J. Super. at 594 (dismissing allegations of fraudulent PIP claims).

The trial court also cited to Rivera and correctly recognized that while this holding is unpublished, it is highly persuasive in how past courts have delineated claims under the No-Fault Law and the IFPA. (Pa0005). There, the plaintiffs filed an action against Allstate seeking to compel PIP payments under their automobile policy. 2011 N.J. Super. Unpub. Lexis 1127, at *1-3. Allstate asserted the claim was fraudulent because the plaintiffs were not mentioned in the accident report, and Allstate expressly reserved its right to proceed pursuant to the IFPA. Id. The trial court dismissed the complaint because the policy, "as permitted by *N.J.S.A.* 39:6A-5.1A, required resolution of such claims by

'dispute resolution,' or arbitration, as opposed to litigation," and the Appellate Division affirmed this decision, reasoning:

> The law is clear that if the issuance of the policy itself was in dispute, such a conflict would not be arbitrable. *See Fiouris*, *supra*, 395 *N.J.Super.* at 160. Contrary to the Riveras' reading of the denial letter, however, Allstate did not shift its refusal to pay on account of the PIP claim into nullification of the policy in its entirety. Allstate did not assert fraud in the procurement of the policy. Since this is a dispute about payment of PIP benefits, even if Allstate raises fraud as a bar to payment of the claim, the matter must first be arbitrated. [Id. at *6-7].

Thus, in its Letter Opinion, the trial court ruled: "It is clear to this Court that the No-Fault arbitration provision requires disputes of the validity of PIP payments to be submitted to arbitration at the behest of either party." (Pa0012).

While Plaintiffs' claim that the trial court improperly disregarded or overlooked the holdings in Fiouris, 395 N.J. Super. 156 and Allstate v. Lopez, 311 N.J. Super. 600 (Law Div. 1998), they are mistaken. The trial court thoroughly analyzed Fiouris and recognized it did not concern an arbitrable PIP dispute under the No-Fault Law. (Pa0005). Instead, as the trial court noted, the question was whether the insured had a valid insurance policy at all. 395 N.J. Super. at 158. Nationwide brought an action against its insured and various providers to void a policy under which PIP benefits were sought due to a

misrepresentation in procuring the policy. Id. Nationwide claimed the misrepresentation constituted a violation of the IFPA. Id.

The Appellate Division permitted Nationwide's claim to proceed, reasoning that the No-Fault Law "requires arbitration of disputes regarding entitlement to or the amount of PIP benefits and … a dispute regarding the validity of an insurance policy under which PIP benefits are claimed is subject to judicial resolution." Id. at 159-60. As the Fiouris Court held:

> By the plain terms of this statute, it only requires arbitration of disputes "regarding the recovery [of PIP benefits]." It does not require arbitration of a claim of fraud in the inception of the policy or other claim involving the validity of the policy. A dispute regarding alleged fraud in the procurement of an insurance policy does not involve "interpretation of the [provisions of] the insurance contract" relating to PIP benefits, *N.J.S.A.* 39:6A-5.1(c)(1), but instead a dispute as to whether there is a valid insurance contract. *N.J.S.A.* 39:6A-5.1 only comes into play when there is a dispute regarding entitlement to or the amount of PIP benefits under a valid, operative automobile policy.

Id. Thus, the Fiouris Court concluded that, unlike disputes involving the propriety of medical treatment rendered or recovery of PIP benefits under valid policies, disputes over the validity of an insurance policy are "subject to judicial resolution" under the IFPA. Id. at 160. The present matter does not involve "a claim of fraud in the inception of the policy or other claim involving the validity of the policy." Instead, it involves disputes regarding the entitlement to and the

amount of PIP benefits, which, pursuant to the Fiouris Court, must be arbitrated. As the trial court properly recognized in its Letter Opinion, Fiouris supports the PSR Defendants' position here. (Pa0005).

The trial court also thoroughly analyzed Lopez, another case which supports the PSR Defendants' positions. (Pa0005). There, a massive insurance fraud ring (involving over 400 defendants) was alleged to have staged multiple accidents that involved the same scenarios and the same repeat players. 311 N.J. Super. at 663-68. Allstate sought a declaration that the policies were void for fraud. Id. As the trial court noted in its Letter Opinion, contrary to the allegations here, not only was there a commonality of facts, parties, and witnesses that ran through the underlying accidents in Lopez, but, critically, there was a common question of insurance coverage regarding whether the policies were void with respect to all claimants. (Pa0005).

Although the Lopez court recognized that issues of fraud could be proper issues for arbitration, the Court determined that the coverage issue should be determined in an action under the IFPA prior to arbitration because the single issue of coverage, if denied, would bar all claims and avoid the need for arbitration. 311 N.J. Super. at 671-73. In Sabato, the Appellate Division highlighted this distinction:

> However, *Lopez* involved what was described as a massive insurance fraud ring. The court there

> concluded that in order to avoid the unmanageable spectacle of innumerable individual arbitration proceedings, all susceptible to varying and inconsistent results, judicial economy as well as the entire controversy doctrine required resolution of all claims in a single action, and thus arbitration was inappropriate. That reasoning has no application here. We also note that if there is indeed an inconsistency between *Molino* and *Lopez,* the trial court decision in *Lopez* must, of course, give way to the appellate decision in *Molino.* [Sabato, 337 N.J. Super. at 397].

See also MLS Med. Grp. LLC, 2013 WL 6384652, at *5 ("[T]he *Sabato* decision, issued by the Appellate Division, clearly rejected *Lopez.* It not only distinguished the 'massive insurance fraud ring' at issue in *Lopez,* but also noted that to the extent *Molino* and *Lopez* were inconsistent, the appellate decision in *Molino* must control."); Tri Cnty. Neurology & Rehab, 721 Fed. Appx. at 123 n.4 ("GEICO argues that *[Lopez]* supports the proposition that it is not required to resolve the question of the pending PIP claims through arbitration. *Lopez* involved a declaratory judgment action in which the trial court held that Allstate, an automobile insurer, was not obligated to pay PIP claims resulting from an insurance fraud scheme involving over 400 defendants…. The instant case does not have the number of parties and case management complexities of *Lopez*.").[8]

[8] Lopez is a trial court opinion, which is not binding on this Court. See N.J. Highlands Coalition v. New .Jersey Dept. of Environmental Protection, 456 N.J. Super. 590, 602 n.8 (App. Div. 2017).

Here, as the trial court appropriately found, the accidents are not interrelated, and no single determination would moot all underlying PIP claim disputes from having to be individually litigated on the merits. (Pa0005).

Collectively, the case law instructs that certain IFPA claims may be litigated before the Superior Court, while others must be arbitrated as PIP disputes under the No-Fault Law.[9] Based on its thorough analysis, the trial court correctly ruled that Counts 1, 4-9, and 10-15 of the Complaint allege PIP disputes within the realm of the No-Fault Law and should therefore be dismissed in favor of arbitration, while Counts 2-3 and 17-18 of the Complaint allege viable claims under the IFPA outside the realm of the No-Fault Law and should therefore remain before the trial court. (Pa0001; Pa0003; Pa0005). As the trial court concluded: "Accordingly, this Court bifurcates the claims, dismissing those claims arising from PIP payments back to PIP arbitration while retaining the runner and kickback scheme Counts not contemplated under the No-Fault Statute and alleging violations of the NJ IFPA." (Pa0006).[10]

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[9] The only exception to the No-Fault Law's arbitration requirement carved out by binding case law is for IFPA claims disputing the validity of an insurance policy. See Fiouris, 395 N.J. Super. At 159. Here, there are no claims alleging that the underlying insurance policies are invalid and, therefore, even the limited exception is inapplicable.

[10] Plaintiffs' frustration with the Court's August 3, 2023 Order dismissing Counts 1 and 4-9 of the Complaint in favor of arbitration is likely grounded in the fact that Plaintiffs have not prevailed at the subsequent arbitrations to resolve the underlying PIP disputes. Since August 3, 2023, the PSR Defendants have

Contrary to Plaintiffs' arguments, the trial court did not hold that the PIP arbitration forum is the proper venue for all IFPA claims. (Pb21) (incorrectly arguing that the trial court "expand[ed] the definition of PIP dispute to include an insurer's affirmative claims for violations of the IFPA."). Nor did the trial court expand the definition of "any PIP dispute" set forth in N.J.S.A. 39:6A-5.1. Rather, the trial court correctly distinguished Plaintiffs' PIP claims from Plaintiffs' viable IFPA claims and ordered that the claims alleging pure PIP disputes must proceed to arbitration, while the viable IFPA claims must proceed before the Superior Court:

> [T]he statutory language controls, and when it comes to payment, the No-Fault statute applies to a narrower subset of fraud claim payment—PIP payment—and serves as an exception from the NJ IFPA's earlier violations section…. Accordingly, the claims pertaining to fraudulent PIP benefit payments and unjust enrichment of wrongfully paid PIP benefits are within the preview of that statute." [Pa0014].

The trial court's August 3, 2023 and June 28, 2024 rulings are consistent with the language of the No-Fault Law and the controlling case law. Accordingly, the trial court's rulings did not violate the Administrative Procedures Act, N.J.S.A.

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been awarded at arbitration, and have collected, the total amount of $219,644.01, reflecting 56 arbitration awards entered in the PSR Defendants' favor. On the other hand, since August 3, 2023, Plaintiffs have been awarded at arbitration, and have collected, the total amount of $0.00, reflecting 0 arbitration awards entered in Plaintiffs' favor.

52:14B-4(d), such rulings should be affirmed, and Plaintiffs' appeal should be denied.

C. The Trial Court Did Not Ignore the Language of the IFPA or Deviate from the Controlling Case Law, Including Lajara (Pa0001; Pa0003; Pa0005; 1T at 66:15-67:3; 2T at 37:21-38:12; 3T at 15:4-19:5; 4T at 14:25-16:3)

In their Brief, Plaintiffs also argue that the trial court ignored the plain language of the IFPA and disregarded controlling case law requiring all of Plaintiffs' IFPA claims to be adjudicated in the Superior Court. (Pb26-29, 36-40). Plaintiffs identify the following cases it contends the trial court improperly ignored or disregarded:

(1) Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129 (2015) (Pb26-28, 36-37);

(2) Allstate v. Northfield Medical Center, P.C., 228 N.J. 596 (2017) (Pb38-39);

(3) Material Damage Adjustment Corp. v. Open MRI of Fairview, 352 N.J. Super. 216 (Law Div. 2002) (Pb37-38);

(4) Allstate Ins. Co. v. Greenberg, 376 N.J. Super. 623 (Law Div. 2004) (Pb38); and

(5) Allstate Ins. Co. v. Orthopedic Evaluations, Inc., 300 N.J. Super. 510 (App. Div. 1997) (Pb39).

Plaintiffs are again mistaken. The cases cited by Plaintiffs did not even involve PIP disputes, did not involve requests for PIP arbitrations, or presented facts that are highly distinguishable from those in the present matter. For

example, the facts presented in Lajara and Northfield are nothing like those in the present matter and were, therefore, appropriately disregarded by the trial court. (Pa0003; Pa0005). Plaintiffs misstate the holding in Lajara in attempt to expand it beyond its four corners. There, the Supreme Court held that defendants facing IFPA claims are entitled to a jury trial. 222 N.J. at 134. The Supreme Court stated:

> In determining whether the jury-trial right applies to a statutory cause of action, we assess whether the grant of a jury trial is consistent with our common-law tradition. An IFPA claim meets that standard because compensatory and punitive damages are legal - not equitable - in nature and because the elements necessary to prove an IFPA claim are similar to common-law fraud. By this measure, we conclude that the right to a civil jury trial provided by … the New Jersey Constitution applies to private-action claims seeking compensatory and punitive damages under the IFPA. [Id.].

The Lajara Court's essential holding did not even touch upon – let alone adjudicate – the issues raised in this matter. There is no mention as to whether an insurer may avoid arbitrating PIP disputes by bringing an IFPA claim. Nonetheless, Plaintiffs seize upon one sentence in that opinion as indicating that its IFPA claims are viable in this matter. Plaintiffs' misstatement of the Lajara ruling was appropriately rejected by the trial court. (Pa0003; Pa0005).

In Northfield, the Supreme Court was not even presented with PIP disputes when analyzing plaintiff's claims under the IFPA. 228 N.J. at 599.

There, an attorney and a chiropractor were alleged to have violated the IFPA in their creation of a practice structure designed to circumvent regulatory requirements. Id. Based on those facts, and without any PIP disputes involved, the Supreme Court found that the practice structure violated the IFPA. Id. at 600. "Defendants extensively promoted a professional practice structure that a fact-finder could reasonably conclude was little more than a sham intended to evade well-established prohibitions and restrictions governing ownership and control of a medical practice by a non-doctor." Id. Since not a single PIP dispute was alleged, the Supreme Court did not even analyze the No-Fault Law. Id. Those facts, including the lack of the involvement of even a single PIP dispute, are highly distinguishable from those in the present matter.

Plaintiffs also cite to several other cases that are non-binding and/or inapplicable to the present matter because they did not even involve PIP disputes or requests for PIP arbitrations. See, e.g., Material Damage Adjustment, 352 N.J. Super. 216 (Trial court opinion where there was no mention of "arbitration" under the No-Fault Law); Orthopedic Evaluations, 300 N.J. Super. 510 (No mention of "arbitration" under the No-Fault Law); Greenberg, 376 N.J. Super. 623 (Trial court opinion where there was no mention of "arbitration" under the No-Fault Law). These cases are so distinguishable from the present matter that they warrant no further attention herein.

Thus, contrary to Plaintiffs' contentions, the trial court did not wrongfully overlook or overturn any binding decisions in dismissing Counts 1, 4-9, and 10-15 of the Complaint in favor of arbitration. Rather, the trial court appropriately relied upon the binding and persuasive case law in Molino, Sabato, Fiouris, Rivera, and Meer, among others, which collectively instruct that certain IFPA claims may be litigated before the Superior Court, while others must be arbitrated as PIP disputes under the No-Fault Law. (Pa0001; Pa0003; Pa0005). As the trial court concluded:

> Accordingly, because Counts One, Four, Five, Six, Seven, Eight, and Nine only complain of PIP medical expense benefits or request the Court declare that Plaintiffs have no obligation to pay the PIP benefits, as stated supra, they are dismissed as Defendants request they be handled in arbitration. Counts Two and Three, pertaining to the kickback and runner schemes, are not dismissed because they are violations under the NJ IFPA. [Pa0016-0017].

The trial court did not overlook or deviate from the case law relative to the adjudication of IFPA cases, as Plaintiffs now claim. Plaintiffs cannot use the IFPA as a vehicle to automatically remove certain claims which, as a matter of law, belong in PIP arbitration rather than before the Superior Court. There is ample legal authority supporting the trial court's bifurcation of certain claims in favor of arbitration, even those asserting "fraud" as a justification for the non-

payment of PIP benefits. Accordingly, the trial court's ruling was sound, it should be affirmed, and Plaintiffs' appeal should be denied.

D. The PSR Defendants Did Not Waive Their Right to Have the PIP Claims Arbitrated By Filing an Answer and Demanding a Jury Trial on Plaintiffs' Remaining Claims (Pa0001; Pa0003; Pa0005; 1T at 66:15-67:3; 2T at 37:21-38:12; 3T at 15:4-19:5; 4T at 14:25-16:3)

In their Brief, Plaintiffs also suggest that the PSR Defendants and other Defendants waived their right to have the PIP claims arbitrated by responding to the Complaint, demanding a jury trial on Plaintiffs' remaining claims, and/or proceeding through discovery on Plaintiffs' remaining claims. (Pb29-36). This argument also lacks merit and should be disregarded.

As an initial matter, Plaintiffs did not oppose the dismissal of Counts 10-15 of the Complaint on this basis (*i.e.*, an alleged waiver by Defendants), nor did Plaintiffs advance this argument in response to the PSR Defendants' Motion to Dismiss, which resulted in the trial court's August 3, 2023 Order dismissing Counts 1 and 4-9 of the Complaint in favor of arbitration. For this reason alone, Plaintiffs' arguments on this issue should be rejected and Plaintiffs' appeal should be denied.

Furthermore, after Plaintiffs' filed their initial Complaint on November 4, 2021, the PSR Defendants promptly filed their Motion to Dismiss the Complaint on February 11, 2022, arguing, *inter alia*, that Plaintiffs' claims belong in PIP

arbitration and not before the Superior Court. (Pa0433).[11] This, in and of itself, preserved the PSR Defendants' right to arbitration of the PIP claims at issue and cuts the legs out from underneath Plaintiffs' arguments that the PSR Defendants somehow waived their right to arbitrate the PIP claims by subsequently filing Answers and/or Counterclaims demanding a jury trial on the remaining claims.

Moreover, the fact that the PSR Defendants (or any Defendants) subsequently filed Answers and/or Counterclaims and, therein, demanded a jury trial on any and all claims remaining following the Court's decision on the PSR Defendants' Motion to Dismiss does not act as a *de facto* waiver over the PSR Defendants' right to have the PIP claims arbitrated in accordance with the No-Fault Law. In fact, it was only at the trial court's directions that the PSR Defendants even filed their Answer to the Complaint while their Motion to Dismiss was still pending and yet-to-be decided. (Pa0366). Nor does the fact that the PSR Defendants (and any other Defendants) subsequently complied with their obligations under the New Jersey Court Rules by serving and responding to discovery requests act as a waiver over the PSR Defendants' right to have the

[11] Plaintiffs attempt to muddy the waters by suggesting the PSR Defendants filed their Answers and Counterclaims prior to filing their Motion to Dismiss in favor of arbitration. (Pb4-5). While not dispositive of the issues to be decided, the record reflects that the PSR Defendants filed their Motion to Dismiss on February 11, 2022, before they filed their initial Counterclaim on July 25, 2022 and their initial Answer on November 21, 2022. (Pa0433; Pa0310; Pa0365).

PIP claims arbitrated in accordance with the No-Fault Law. The case law cited by Plaintiffs does not support their suggestion that the PSR Defendants waived their right to have the underlying PIP claims arbitrated. (Pb29-36).

The record is abundantly clear that the PSR Defendants promptly acted and made their intentions known from the inception of this action that they sought, and continue to seek, arbitrations on the underlying PIP disputes. Of course, to the extent that any of Plaintiffs' IFPA claims remain before the Superior Court and proceed to trial, the PSR Defendants continue to demand a jury trial as to those claims. However, contrary to Plaintiffs' suggestions, the PSR Defendants' demand for a jury trial on any claims that may ultimately proceed to trial does not waive the PSR Defendants' prior demands for or rights to arbitration as to the underlying PIP claims.

Additionally, Plaintiffs fail to note to the Court that, within their Answers to the Complaint, the PSR Defendants' specifically stated in its Separate and Affirmative Defenses that: (a) the Complaint fails to state any claim on which relief can be granted; (b) Plaintiffs' claims are barred, in whole or in part, on the basis of lack of jurisdiction and/or improper venue; (c) Plaintiffs' claims are barred, in whole or in part, by the applicable provisions of the No-Fault Law; and (d) Plaintiffs' claims are required to be submitted to arbitration for their resolution. (Pa0407-0408; Pa0849-0850; Pa1354-1355). The Answers submitted

on behalf of the other Defendants asserted the same or similar Separate and Affirmative Defenses in response to the Complaint. (Pa0251; Pa0303; Pa0929-0930; Pa1160; Pa1453-1454; Pa1528-1529; Pa1594).

Accordingly, the PSR Defendants' promptly acted and, at all times, provided notice to Plaintiffs, the trial court, and all other parties of their intention to proceed to arbitration on the underlying PIP claims. At no point did the PSR Defendants waive their right to proceed to arbitration on the PIP claims, as Plaintiffs now suggest. Thus, Plaintiffs' arguments should be disregarded and the trial court's August 3, 2023 and June 28, 2024 rulings should be affirmed.

CONCLUSION

For the foregoing reasons, the PSR Defendants submit that the trial court's decisions should be affirmed and Plaintiffs' appeal should be denied.[12]

Respectfully submitted,

BROWN & CONNERY, LLP
Attorneys for Defendants-Respondents, PENNSAUKEN SPINE AND REHAB, P.C., DOMINIC MARIANI, D.C., MARK A. BOLINGER, D.C., and MICHAEL ROSS, D.C.

Dated: December 2, 2024

/s/ Jonathan L. Triantos
William M. Tambussi, Esq.
Jonathan L. Triantos, Esq.

[12] Plaintiffs' claims are also defective for several additional reasons argued before the trial court, but not raised by Plaintiffs in the present appeal.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY CO.; ALLSTATE INS. CO.; ALLSTATE NEW JERSEY INS. CO.; ALLSTATE PROPERTY AND CASUALTY INSURANCE. Plaintiffs/Appellants,	:Docket A-003819-23 : : : :On Appeal from an Order of :The Superior Court of New :Jersey, Law Division, Mercer :County :Docket No. MER-L-2288-21
PENNSAUKEN SPINE & REHAB; DOMINIC MARIANI, D.C.; MARK BOLLINGER, D.C., MICHAEL ROSS, D.C.; WILFREDO CASTRO A/K/A "FREDDIE CASTRO" "WILFREDO S. CASTRO" "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSITIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOPSEPH KEPKO, D.O; SILVERS LANGSAM & WEITZMAN ASSOCIATES P.C. (F/K/A SILVERS LANGSAM& WEITZMAN, P.C.); DEAN WEITZMAN ESQ.; BROWNSTEIN PEARLMAN,WIEZER, NEWMAN & COOK, P.C.(F/K/A BROWNSTEIN PEARLMAN,WIEZER & NEWMAN P.C.); CURTIS BRACEY;JOHN DOE 1-50; JOHN ROE 1-50; ABC CORP 1-50; XYZ P.C. 1-50 Defendants/Respondents	: :Sat Below: :Hon. R. Brian McLaughlin, J.S.C.

DEFENDANTS-RESPONDENTS, CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, JOHN HOCHBERG, M.D., COLLEEN MULRYNE, D.C., BRADLEY BODNER, D.O., AND JOSEPH KEPKO, D.O. BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANTS APPEAL OF THE TRIAL COURT'S JUNE 28, 2024 ORDER DISMISSING COUNTS TEN THROUGH 15 OF THE SECOND AMENDED COMPLAINT.

Submitted: December 9, 2024

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative code

Rules

DEFENDANTS-RESPONDENTS INDEX OF APPENDIX

PRELIMINARY STATEMENT

This matter comes before the Court on Plaintiffs-Appellants, Allstate Fire & Casualty Insurance Company, Allstate Indemnity Company, Allstate Insurance Company, Allstate New Jersey Insurance Company, Allstate New Jersey Property & Casualty Insurance, and Allstate Property & Casualty Insurance Company (collectively, "Plaintiffs") appeal of the trial court's June 28, 2024 order dismissing Counts Ten through Fifteen of its Second Amended Complaint against Defendants-Respondents, Central Jersey Orthopedic and Neurodiagnostic Group, LLC, John. L Hochberg, M.D., Colleen Mulryne, D.C., Bradley A. Bodner, D.O., and Joseph Keiko, D.O. (collectively, "the Central Jersey Defendants" or "CJONG").

This appeal should, respectfully, be denied due to the fact: Plaintiffs failed to oppose the motion to dismiss Counts Ten through Fifteen; Plaintiffs currently assert arguments not made below; Plaintiffs are attempting to circle back and appeal the trial court's August 3, 2024 prior decision concerning other parties despite being out of time; and the trial court's August 3, 2023 decision properly analyzed controlling precedent concerning Personal Injury Protection ("PIP") arbitration despite whatever labels Plaintiffs attach to the predicate facts.

On August 3, 2024 the trial court granted in part Defendants Pennsauken Spine and Rehab, P.C., Dominic Mariani, D.C., Mark A Bolinger, D.C., and Michael Ross, D.C. (Collectively "the Pennsauken Spine Defendants") motion to

dismiss Plaintiffs' Second Amended Complaint in favor of PIP arbitration. The trial court properly dismissed those limited counts in the complaint whose origin related to PIP disputes. Plaintiffs sought leave to appeal that order, which was denied, but never sought appeal as of right.

When presented with the Central Jersey Defendants subsequent motion to dismiss certain counts of Plaintiffs Second Amended Complaint to be consistent with the trial court's order decided months earlier, Plaintiffs chose not to oppose that application. The Central Jersey Defendants motion to dismiss Counts Ten through Fifteen of Plaintiffs Second Amended Complaint in favor of PIP arbitration was an alternative application to its comprehensive motion to dismiss the entirety of the complaint and which joined similar motions filed by all other defendants. Those motions to dismiss the entirety of the complaint were all denied and only the Central Jersey Defendants' alternative application was granted.

Thus, based on an unopposed motion to dismiss Plaintiffs illegitimately attempt to reach back and appeal the August 3, 2023 order and decision.

In its August 3, 2023 order and decision the trial court exhaustively analyzed and compared the No Fault Act and Insurance Fraud Prevention Act ("IFPA") N.J.S.A. 17:33A-1 et seq., as well as related Appellate precent. Based on an in-depth analysis of the acts, precedents, and legislative histories the trial court dismissed certain counts against the Pennsauken Spine Defendants. The trial court's decision properly ascertained that when counts are premised exclusively on

traditional PIP related disputes, those matters are subject to arbitration no matter what label or cause of action is attempted to be plead.

For these reasons, and those set forth below, it is respectfully asserted Plaintiffs appeal should be denied.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On November 4, 2021, Plaintiffs filed their Complaint against the Central Jersey Defendants as well Pennsauken Spine Defendants, among others. (Pa0019).

The allegations against the Pennsauken Spine Defendants were contained in Counts One through Nine of Plaintiffs initial complaint. (Pa0101-0128). Plaintiffs use the same predicate facts to assert three causes of action. (Pa0019). The First, Second, and Third Counts allege these defendants engaged in a runner and kickback scheme. (Pa0101-0112). The First Count sought remedies only related to the payment of PIP benefits including a judgment declaring it has no obligation to pay. (Pa0101). The Second Count sought damages based on an unjust enrichment theory. (Pa0103 The Third Count sought damages under the Insurance Fraud Prevention Act. (Pa0106).

The Fourth, Fifth, and Sixth Counts allege the Pennsauken Spine Defendants engaged in a "Billing Scheme" which violated the No Fault Act, N.J.S.A. 39:6A-1 et seq., as well as The New Jersey Board of Chiropractic regulations, N.J.A.C.

[1] The Procedural History and Statement of Facts have been combined for the convenience of the Court as they are substantially related.

13:44E-2.11. (Pa0113-0131). The counts allege the Pennsauken Spine Defendants billed for initial chiropractic examinations under CPT Codes 99205 and 99204 when the services provided did not meet the requirements for these codes. (Pa0113-0131). As such, Plaintiffs allege the services were not reimbursable under the No Fault Act. (Pa0113-0131).

The Fourth Count against the Pennsauken Spine Defendants sought a judgment declaring the Plaintiff's had no obligation to pay PIP benefits to the defendants based on upon the improper billing. (Pa0113). The Fifth Count sought damages based on an Unjust Enrichment theory. (Pa0119). The Sixth Count sought damages under the New Jersey Insurance Fraud Prevention Act. (Pa0127).

The Seventh, Eighth, and Ninth Counts allege the Pennsauken Spine Defendants submitted claims to Plaintiff for which the defendants had not physically examined the patients, did not consider previously performed testing, and did not properly document patient files. (Pa0132 to Pa0142). The Seventh Count sought declaratory judgment. (Pa0132). The Eighth Count sought damages under an unjust enrichment theory. (Pa0134). The Ninth Count sought Insurance Fraud Prevention Act damages. (Pa0142).

The allegations against the Central Jersey Defendants were contained in Counts Ten through Fifteen. (Pa0146-0179). As with the Pennsauken Spine Defendants, Plaintiffs plead three counts for each predicate set of facts.

The Tenth, Eleventh, and Twelfth Counts allege the Central Jersey Defendants maintained an improper practice structure by having a chiropractor partial owner and performing EMG and NCV testing as part of its services. (Pa0146-0179). Accordingly, Plaintiffs allege the Central Jersey Defendants were not eligible for PIP benefits under the No Fault Act. (Pa0146-0179).

The Tenth Count sought a judgment declaring the Plaintiffs had no obligation to pay PIP benefits to the defendants. (Pa0146). The Eleventh Count sought damages under an unjust enrichment theory. (Pa0152). The Twelfth Count sought damages under the Insurance Fraud Prevention Act. (Pa0156).

The Thirteenth, Fourteenth, and Fifteenth Counts allege the Central Jersey Defendants failed to comply with applicable medical standards when performing electrodiagnostic testing on Plaintiffs' insureds. (Pa0161-0179). Plaintiffs allege the testing was not clinically supported, lacked clinical value, and was performed only to generate revenue. (Pa0161-0179).

The Thirteenth Count sought a judgment declaring the Plaintiffs had no obligation to pay PIP benefits to the defendants. (Pa0161). The Fourteenth Count sought damages under an unjust enrichment theory. (Pa0167). The Fifteenth Count sought damages under the Insurance Fraud Prevention Act. (Pa0175).

The Central Jersey Defendants answered the complaint on February 9, 2022 and denied all allegations. (Pa0189).

On February 11, 2022 the Pennsauken Spine Defendants filed a motion to dismiss the Complaint. (Pa433). The Pennsauken Spine Defendants sought dismissal based on arguments including that PIP arbitration was statutorily favored, waiver, equitable estoppel, and lack of specific fraud pleading. (Pa0433). The Plaintiffs opposed the motion but did not argue improper rule making or waiver in defense of the motion. (CJONG Da0001).

The motion was ultimately decided on August 3, 2023 and the trial court issued a written opinion which is ultimately and inappropriately the subject of the current appeal. (Pa0003; Pa0005).

In its August 3, 2023 letter opinion, the Court held:

> This Court finds that between the violations section of the NJ IFPA, enacted in 1972, allowing a court of competent jurisdiction to review a "claim for payment or other benefit pursuant to an insurance policy," and the No-Fault Statute, amended in 1998, requiring arbitration of "disputes regarding the recovery of Personal Injury Protection benefits" at the behest of a single party, the general-specific and last-in-time canons of statutory construction favor the latter, towards arbitration of claims of PIP payment disputes. Compare N.J.S.A. 17:33A-4, with N.J.S.A. 39:6A- 5.1(a).
>
> Additionally, this Court finds the numerosity argument for retaining the claims in litigation unpersuasive. The parties may consolidate the claims arising from PIP payment, given the Commissioner of Banking and Insurance's promulgation of N.J.A.C. 11:3-5.4(b)-2, and the 2022 rules of the current Dispute Resolution Organization ("DRO"), Forthright, both prefer consolidation in arbitration. N.J.A.C. 11:3-5.4(b)-2 ("The plan shall provide for consolidation of claims into a single proceeding where appropriate in order to promote prompt, efficient resolution of PIP disputes consistent with fairness and due process of law"); New Jersey No-Fault PIP Arbitration Rules § 9 (2022).

> Accordingly, this Court bifurcates the claims, dismissing those claims arising from PIP payments back to PIP arbitration while retaining the runner and kickback scheme Counts not contemplated under the No-Fault Statute and alleging violations of the NJ IFPA.

(Pa0006).

In its holding, the trial court dismissed in favor of arbitration only those claims whose gravamen concerned issues relating to qualification for and payment of PIP benefits. (Pa0006). The court retained jurisdiction of the runner and kickback alleged scheme pursuant to the IFPA. (Pa0006).

Plaintiffs sought leave to appeal the trial court's August 3, 2023 order which was denied by the Appellate Division on November 27, 2023. (CJONG Da0002). Plaintiffs never sought an appeal as of right regarding the August 3, 2023 order.

Ultimately, on March 20, 2024 Plaintiffs filed their Second Amended Complaint. (Pa0967).

The improper runner and kickback allegations against the Pennsauken Spine Defendants contained in the Second and Third Counts were again asserted. (Pa 1962-1073). The First and Fourth through Ninth Counts were omitted as subject to the trial courts prior orders. (Pa1073).

The Tenth, Eleventh, and Twelfth Counts against the Central Jersey Defendants were identical to its earlier Complaints and alleged these defendants maintained an improper practice structure disqualifying them from PIP benefits.

(Pa1073-1087). Plaintiffs sought damages including a declaration they owed no PIP benefits, and under unjust enrichment and IFPA theories. (Pa1073-1087).

The Thirteenth, Fourteenth, and Fifteenth Counts again alleged the Central Jersey Defendants failed to comply with applicable medical standards when performing electrodiagnostic testing on Plaintiffs' insureds because the testing was not clinically supported, lacked clinical value, and was performed only to generate revenue. (Pa1088-1107). Again Plaintiffs sought declaratory judgment, unjust enrichment damages, and damages under the IFPA. (Pa1088-1107).

New to the Second Amended Complaint, Plaintiffs added a Seventeenth and Eighteenth Count against the Pennsauken Spine and Central Jersey Defendants alleging these parties engaged in a referral and Kickback scheme. (Pa1107-1114). The Seventeenth Count sought damages under an unjust enrichment theory and the Eighteenth Count sought IFPA damages. (Pa1107-1114).

The factual allegation supporting these Counts was that the Central Jersey Defendants paid no rent to the Pennsauken Spine Defendants for use of a portion of their facility when performing electrodiagnostic testing on Plaintiffs' insureds. (Pa1060). The Plaintiffs specifically cited N.J.A.C. 13:35-6.17 et seq. which mandates any rent paid be at fair market value *or less*, to somehow support its allegations. (Pa1060).

In response to the Second Amended Complaint, on May 2, 2024 the Central Jersey Defendants moved to dismiss the complaint. (Pa1133). The Central Jersey

Defendants' motion to dismiss joined recently filed motions from all other defendants. (Pa1123; Pa1127; Pa1130).

The motions filed by all defendants sought dismissal of the entire matter in favor of PIP arbitration in part based on a recently decided United States Third Circuit Court of Appeals decision. (Pa1123; Pa1127; Pa1130; Pa1133). The Central Jersey Defendants joined those motions and alternatively moved to dismiss those counts related to matters whose gravamen concerned qualification for or payment of PIP benefits consistent with the Courts August 3, 2023 order concerning the Pennsauken Spine Defendants. (Pa0005; Pa1136; T11:21-T12:8).

While Plaintiffs opposed the multiple Defendants motions globally, they did not oppose the Central Jersey Defendants alternative request to dismiss counts ten through fifteen of the complaint as consistent with the court's prior August 3, 2023 order. (T15:25 - T15:15). Specifically, at oral argument Plaintiffs acknowledged that portion of the motion was unopposed:

> The Court: All right, thank you. I'll turn
> now to Mr. Alba. And I'm first going to put you on the
> spot. Because I note —I know it does not reflect
> Allstate's agreement with the Court's earlier rulings,
> but consistent with the Courts earlier rulings, do you
> agree that dismissing Counts 10 to 15 as raised by
> Central Jersey would be consistent with the Court's
> prior ruling, again I'm not —
> Mr Alba: Yes I —
> The Court: — I'm not asking for you
> agree with —yes
> Mr. Alba: I think I've already made that
> point clear. Yes, (indiscernible) yes, that's why if I

> remember correctly, there was no response from us—
> The Court: Right.
> Mr. Alba: —in our opposition as to that point.
> The Court: Okay. And again, the lack of response does not indicate for the record agreement with the reasoning in the prior decision.
> Mr Alba: Yes, I think that was fully briefed (indiscernible)
> the Court: Okay, all right, well at the very least, I will, I have an issue, I will indicate that I will grant Central Jersey's motion to dismiss, at least in part, as to counts 10 through 15. And with that, with the intro out of the way, Mr. Alba, I'll hear from you on the, on the whole universe of these motions to dismiss(emphasis supplied)

(T14:25 - 16:3).

The transcript is devoid of any assessment by, or argument before, the trial court concerning the predicate facts underlying Counts Ten through Fifteen as that portion of the motion was unopposed and therefore not argued. (T1:1-T35:25).

As it did not oppose the Central Jersey Defendants motion to dismiss Counts Ten through Fifteen, Defendants did not assert improper rule making as a defense to that application. (T15:25-T16:15). Even concerning the global motions to dismiss, Plaintiffs did not assert a rule making argument as to the Central Jersey or Pennsauken Spine Defendants. (Da0015).

Similarly, at no time during the consideration of the motion to dismiss Counts Ten through Fifteen or the global motions to dismiss the entire case did

Plaintiffs argue that the Central Jersey Defendants had waived their right to compel arbitration. (Da0015; T9:15 - T29:11).

On June 28, 2024 the trial court granted the Central Jersey Defendants motion to dismiss Counts Ten through Fifteen of the Second Amended Complaint in favor of PIP arbitration, but denied all defendants motions to dismiss the entirety of the case including the new Counts Seventeen and Eighteen. (Pa0001; T34:22 - T35:3).

Since its inception, this case has been a whirlwind of legal maneuvering and motion practice chiefly among Plaintiffs and the Pennsauken Spine Defendants. (Pa452-485). Those parties have engaged in countless motions to: stay proceedings; transfer venue; quash subpoenas; compel discovery; dismiss for failure to state a claim; show cause; numerous reconsiderations; summary judgement; deposit funds into court; withdraw deposited funds; and various discovery disputes. (Pa452-485). These motions have seriously delayed the matter. (Pa452-485) Of all the motions, the Central Jersey Defendants have only participated in opposing Plaintiffs' application to file a Second Amended Complaint and the subject motion to dismiss. (Pa452-485).

The Central Jersey Defendants and Plaintiffs have not filed dispositive motions against one another except the subject motion to dismiss decided June 28, 2024. (Pa452-485).

Neither Plaintiffs or the Central Jersey Defendants have exchanged answers to interrogatories or specific requests for production of documents. (Central Da0003). The Central Jersey Defendants have received documents from Plaintiffs only in relation to its demand contained in its answer pursuant to R. 4:18-2, as well as Plaintiffs' responses to other Defendants' requests. (Pb16)

No depositions have occurred in this case. (CJONG Da0003)

Additionally, as noted from the docket, almost every subpoena served by the Plaintiffs and Pennsauken Spine Defendants has resulted in a motion to quash and very few records have been produced. (Pa452-485).

Due to the stalled nature of this case, the trial court conducted a case management conference on October 25, 2024. (CJONG Da0003; 0006). Based on the continued disputes over subpoenas, outstanding discovery, and the failure to resolve these disputes, the trial court found exceptional circumstances and ordered the appointment of a Special Adjudicator. (CJONG Da0003).

No proceedings with the Special Adjudicator have occurred to date.

Plaintiffs now appeal the portion of the June 28, 2024 order dismissing counts ten through fifteen against the Central Jersey Defendants, which was unopposed. (T15:25-16:3)

LEGAL ARGUMENT

POINT I

PLAINTIFFS LACK STANDING TO APPEAL THE JUNE 28, 2024 ORDER DISMISSING COUNTS TEN THROUGH FIFTEEN OF THE SECOND AMENDED COMPLAINT BECAUSE THEY DID NOT OPPOSE THE MOTION FOR DISMISSAL AND WAIVED THEIR DEFENSE (T14:25 - 16:3)

It is well settled in New Jersey that when a party does not oppose a motion for dismissal they have no standing to appeal that order. Yun v. Ford Motor Company 276 N.J. Super. 142 (App Div 1994), reversed on other grounds 143 N.J. 162 (1995); Infante v. Gottesman 233 N.J. Super. 310 (App Div. 1989); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67(1954).

In Yun, *supra*, 276 N.J. Super. 142, plaintiffs sued Ford Motor Company and others as a result of the death of Chang Had Yun who was struck by another

vehicle on the Garden State Parkway while he was retrieving a spare tire which had fallen off his vehicle. The suit alleged the apparatus connecting the spare tire to the rear of his vehicle was defective. Id. The defendants included Ford Motor Company as the manufacturer of the vehicle, an entity who converted the vehicle and installed the spare tire and connecting device, and a prior owner of the vehicle, among others. Id.

Prior to trial, the defendants moved for summary judgment alleging there was no proximate cause between the defective connecting device and the death of Mr. Yun. Id. The defendants argued that after the tire fell off the vehicle the plaintiff was able to safely come to rest before exiting the vehicle and crossing the Garden State Parkway when he was hit. Id. The summary judgments were granted and plaintiffs appealed. Id. No opposition to Defendant Ford's motion was submitted to the trial court but it was included in the appeal. Id. The issue on appeal concerned proximate cause. Id.

Regarding Defendant Ford, the majority of the Appellate panel concluded that by failing to oppose their motion for summary judgement, plaintiffs had "no standing to appeal." Id. at 149. In his dissent, which was adopted by the Supreme Court, Judge Baime stated: "I agree that the judgment in favor of Ford Motor

Company should be affirmed because plaintiffs offered no opposition to that defendants motion for a dismissal of the complaint." Id. at 158.

Infante v. Gottesman, 233 N.J. Super. 310 (App Div. 1989), is even more factually on point to the present case. The Infante plaintiff instituted a two count lawsuit against an attorney for allegedly unpaid investigation and paralegal services. Id. Plaintiff sought recovery based on breach of contract, quantum meruit and constructive contract theories. Id. On July 8, 1986 the trial court granted defendants summary judgment on the first count of the complaint and partially on the second count. Id. That portion of the second count which was allowed to proceed concerned services rendered on matters in which the plaintiff was not the originating party. Id.

Subsequently, after further discovery the plaintiff asserted claims related to 139 matters on which he had worked. Id. The defendant again sought summary judgment on grounds the claims were: 1) barred by the Statute of Limitations; 2) the plaintiff consented to a prior summary judgement regarding 40 matters in which he was the originating party; 3) the prior July 8, 1986 summary judgement; and 4) plaintiff had already been paid. Id. The plaintiff did not oppose the motion which was granted on March 31, 1988. Id.

On appeal, the plaintiff argued that he did not oppose the March 31, 1988 summary judgement because he had intended to appeal all the summary judgements when they became final. Id.

Despite plaintiff having previously opposed prior summary judgment applications, the Infante Court held:

> Finally, plaintiff cannot appeal from the summary judgment order with respect to the claims for services on the 139 matters. Since plaintiff offered no opposition to defendant's motion for summary judgment as to these matters in the trial court, he will not be heard to complain that the trial court accepted as true the uncontradicted facts in defendant's moving papers, and thus he cannot challenge the summary judgement order entered in defendant's favor.

Id. at 319.

The Infante Court was specifically aware the plaintiff had opposed the earlier summary judgements and the case overall was hotly contested. Id. Nevertheless, because the plaintiff did not oppose the later summary judgment motion, he had no standing to appeal.

An almost identical scenario exists in the present case. In this matter, the trial court issued its August 3, 2023 order and decision and thereafter the Plaintiffs sought leave to appeal. (Pa0001; CJONG Da0002). Leave to appeal was denied

and the Plaintiffs never sought appeal as of right pursuant to R. 2:2-3(b)(8). (CJONG Da0002).

Furthermore, when presented with the Central Jersey Defendants alternative application to the trial court which relied in part on the August 3, 2023 order, the Plaintiffs chose not to oppose that portion of the motion. Plaintiffs actions in this regard are clear and unambiguous. At oral argument it was confirmed:

> The Court: All right, thank you. I'll turn now to Mr. Alba. And I'm first going to put you on the spot. Because I note —I know it does not reflect Allstate's agreement with the Court's earlier rulings, but consistent with the Courts earlier rulings, **do you agree** that dismissing Counts 10 to 15 as raised by Central Jersey would be consistent with the Court's prior ruling, again I'm not —
> Mr Alba: Yes I —
> The Court: — I'm not asking for you agree with —yes
> Mr. Alba: I think I've already made that point clear. **Yes, (indiscernible) yes, that's why if I remember correctly, there was no response from us—**
> The Court: Right.
> Mr. Alba: —**in our opposition as to that point**.
> (emphasis supplied)

T14:25-15:26.

Because they did not oppose that portion of the order which is now before the Appellate Division, Plaintiffs have no standing with respect to the current

appeal. Our courts have consistently held that in order to appeal a party must preserve the record below. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354 (App. Div. 2010); State v. Jones, 232 N.J. 308 (2018). Plaintiffs failed to do so.

As stated, the true nature of this appeal is an attempt to address the trial court's August 3, 2023 decision. The Plaintiffs had forty-five days to appeal as of right following the August 3, 2023 order. R. 2:2-3(b)(8); R. 2:4-1. The time in which to appeal that decision has long since expired. Further, in GMAC v. Pittella 205 N.J. 572 (2010), the Supreme Court clarified the time frame and type of appeal applicable to parties when the order below concerns arbitration. In fact, the Supreme Court went so far as to issue a warning to litigants and parties going forward that orders concerning arbitration are appealable as final and the applicable time limits apply. Id. at 587. In deciding the matter, the Supreme Court admonished:

> We do so with the following warning: as of today, litigants and lawyers in New Jersey are on notice that *all* orders compelling and denying arbitration shall be deemed final for purposes of appeal, regardless of whether such orders dispose of all issues and parties, and the time for appeal therefrom starts from the date of the entry of that order.
>
> Id. at 587-588.

There is little room for doubt the strongly worded decision of the Supreme Court that Plaintiffs attempt to revisit the August 3, 2023 order and decision runs afoul of GMAC. Id.

It is true that Plaintiffs may have believed it was futile to oppose the Central Jersey Defendants May 2, 2024 alternative application, but the fact remains it went unopposed. Now to have Plaintiffs appeal and address the trial courts August 3, 2023 order and decision via an unopposed motion would circumvent the our court rules and the Supreme Court's clear mandate in GMAC. Id.

Moreover, as noted in the Procedural History and Statement Of Facts, *supra*., because this portion of motion was unopposed there was no argument related to it and thus no record of the trial courts factual or legal analysis concerning the counts dismissed.

Accordingly, it is respectfully requested Plaintiffs' appeal be dismissed for lack of standing.

POINT II

PLAINTIFFS' RULE MAKING AND WAIVER ARGUMENTS SHOULD NOT BE CONSIDERED AS THEY WERE NOT ARGUED BELOW AND THE TRIAL COURT DID NOT ENGAGE IN RULE MAKING (T14:25 - 16:3; Da0015)

Just as Plaintiffs failed to oppose the Central Jersey Defendants motion to dismiss Counts Ten through Fifteen, they failed to assert an improper rule making or waiver argument against these defendants at any point in the proceedings. (T14:25-15:26; Da0015). Despite these omissions, Plaintiffs nevertheless appeal from that portion of the June 28, 2024 order asserting the trial court engaged in impermissible rule making and the Central Jersey Defendants waived their right to compel arbitration. (Pb17; Pb29).

It is axiomatic that in not opposing that portion of the June 28, 2024 order which dismissed Counts Ten through Fifteen, Plaintiffs did not put forth an impermissible rule making or waiver argument. (T14:25-16:3). Further, Plaintiffs at no time asserted waiver or rule making arguments against these defendants in response to the broader alternative motions to dismiss the entirety of the case either in their papers or at oral argument. (T16:4 -29:13; Da0015).

As noted previously, this appeal is Plaintiff's attempt to circle back and untimely appeal the trial courts August 3, 2023 order and decision. (Pa0005). However, Plaintiffs never raised the issue of rule making, the Administrative Procedures Act, or waiver when opposing the Pennsauken Spine Defendants' motion to dismiss. (CJONG Da0001). Thus, Plaintiffs did not assert rule making

or waiver arguments before the trial court in opposition to either the June 28, 204 or August 3, 2023 orders. Accordingly, these arguments should not be considered.

It has long been the New Jersey Appellate principle that issues presented on appeal will not be considered if not presented to the trial court. Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542 (App. Div. 1959), *certif. den.* 31 N.J. 554(1960); Alan J. Cornblatt, Pa.A. v. Barrow 153 N.J. 218(1998); Potter v. Vill. Bank of N.J. 225 N.J. Super. 547(App. Div. 1988).

The Reynolds court stated:

> It is a well established principle that our appellate courts will not consider questions not properly presented to the trial court when an opportunity for such presentation was available, unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.
>
> Id. at 548.

In this matter, Plaintiffs had the opportunity to assert its rule making argument on multiple occasions and failed to do so. (CJONG Da0001). It also failed to assert waiver against The Central Jersey Defendants when it had the opportunity to do so. The first time Plaintiffs argue rule making or waiver against the Central Jersey Defendants is in the present appeal.

Because Plaintiffs did not argue rule making or waiver before the trial court, the August 3, 2023 decision does not address this issue. Nevertheless, the trial court engaged in a thorough analysis of the controlling authorities and did not engage in rule making. See POINT IV, *infra*. Thus, Plaintiffs' rule making and waiver arguments should not be considered.

POINT III

THE TRIAL COURT DID NOT IGNORE THE RIGHT TO TRIAL BY JURY AND THE CENTRAL JERSEY DEFENDANTS DID NOT WIAVE THEIR RIGHT TO COMPEL ARBITRATION BY ASSERTING A JURY TRIAL DEMAND(Pa0001; Pa0005; Pa0005; Pa0452-485; CJONG Da0003; T14:25-16:3)

Despite lacking standing and having waived the argument, the Plaintiffs assert the Central Jersey Defendants waived their right to compel arbitration by demanding a jury trial and due to participation in the litigation below. Plaintiffs simply ignore critical facts and circumstances which make this argument meritless.

A. THE TRIAL COURT DID NOT IGNORE THE PARTIES RIGHT TO TRIAL BY JURY (Pa0003;T14:25 - 16:3)

First, it must be recalled that the trial court did not dismiss Counts Seventeen and Eighteen of the Second Amended Complaint against both the Central Jersey Defendants and the Pennsauken Spine Defendants, or Counts Three and Four against the Pennsauken Spine Defendants. (Pa0001; Pa0003; Pa0005). These were specifically retained by the trial court as they concern IFPA issues and were not contemplated under the No-Fault Act. (Pa0001; Pa0003; Pa0005). The trial court only dismissed those claims whose predicate facts were related to claims for PIP benefits specifically contemplated under the No Fault Act. (Pa0005-Pa0018). In fact the trial court exhaustively analyzed both the factual and legal underpinnings of each count of Plaintiffs Second Amended Complaint and concluded that those claims relating to recovery of medical expenses should be arbitrated. Id. See also, Point IV, *infra*.

Therefore Plaintiffs argument that the trial court somehow ignored the Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129 (2015) decision is puzzling. There can be little dispute the Lajara Court conclusively established the parties right to a jury trial of IFPA claims. Id. As such, the trial court properly did not dismiss those counts of the Second Amended Complaint which asserted IFPA

claims and involved issues which were not contemplated by the No Fault Act. (Pa0005).

Furthermore, Plaintiffs make a great deal over the fact the defendants, including the Central Jersey Defendants, demanded a jury trial. (Db29). Simply put, the Central Jersey Defendants still demand a jury trial regarding any claims which withstand dismissal and continued litigation. (Pa1536). Lajara, confirms this right. Id.

The Plaintiffs have put forth no support for the proposition that once a jury trial is demanded a party loses its right to seek dismissal, summary judgement, or any other dispositive application.

As such the trial court properly dismissed those counts involving PIP benefits and retained those counts involving IPFA claims as will be discussed more fully in Point IV, *infra*.

B. THE CENTRAL JERSEY DEFENDANTS DID NOT WAIVE THE RIGHT TO SEEK DISMISSAL AND PLAINTIFFS PRESENTATION OF THE PROCEEDINGS BELOW IS MISLEADING (Pa0003; T14:25 - 16:3)

Plaintiffs contend the Central Jersey Defendants waived their right to compel arbitration through inaction and litigation participation. Ironically,

Plaintiffs assert this waiver argument for the first time in this appeal, after not opposing the dismissal of Counts Ten through Fifteen and thus waiving the right to make this argument presently. Nevertheless, the Plaintiffs assertions regarding The Central Jersey Defendants do not withstand scrutiny.

Before proceeding further, the portion of the transcript which Plaintiffs cite in their point heading and brief (T29:13-35:3) concerning this argument does not apply or relate to that portion of the June 28, 2024 order dismissing Counts Ten through Fifteen. Thus it should not have been cited by Plaintiffs because as stated previously that portion of order on appeal was not opposed.

The transcript portion cited by Plaintiffs represents argument concerning all of the defendants application to dismiss all counts based on the recently decided United States Third Circuit Court of Appeals decision in Gov't Emps. Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A., 101 F.4th 272 (3d. Cir. 2024). Those motions were denied. (Pa0001, T34:22-T35:3). Nevertheless, even against those motions, Plaintiffs never argued waiver against the Central Jersey Defendants. (T29:13-35:3; Da0015).

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v Smeal, 178 N.J. 167, 177 (2003). Waiver can be inferred through the

action of a party. Cole V Jersey City Medical Center, 215 N.J. 265 (2013). "An agreement to arbitrate can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum." Id. at 276, quoting Spaeth v Srinivasan, 403 N.J. Super. 508 (App. Div. 2008). The failure to list arbitration as an affirmative defense is not dispositive. Id. at 281. Further "any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances." Id at 280.

In Cole, the Supreme Court set forth factors which courts should evaluate when assessing a claim or waiver.

> Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive. (emphasis supplied)

Id. at 280-281.

A review of these factors applied to the present case clearly demonstrates the Central Jersey Defendants did not waive their right to compel arbitration.

As will be explained below the Cole, factors weigh strongly against waiver because: any delay was the result of extremely litigious circumstances of this matter which did not involve the Central Jersey Defendants and caused delay; no dispositive motions were filed between Plaintiffs and these Defendants except the matter on appeal; the litigation strategy adopted by these Defendants does not support waiver; discovery is still in its infancy and there is no trial date; and there is no prejudice to Plaintiffs and none was argued. Id.; (CJONG Da0003).

Since its inception, this case has been a whirlwind of legal maneuvering and motion practice chiefly among Plaintiffs and the Pennsauken Spine Defendants. (Pa452-485). Those parties have engaged in countless motions to: stay proceedings; transfer venue; quash subpoenas; compel discovery; dismiss for failure to state a claim; show cause; numerous reconsiderations; summary judgement; deposit funds into court; withdraw deposited funds; and various discovery disputes. (Pa452-485). Of the dozens of motions, the Central Jersey Defendants have only participated in opposing Plaintiffs application to file a Second Amended Complaint and the subject motion to dismiss. (Pa452-485).

The excessive and extraordinary motion practice not only burdened the trial court but delayed discovery as the parties fought. (Pa452-485). Again the Central

Jersey Defendants did not participate except to the least extent necessary. As noted in Plaintiffs argument, the Central Jersey Defendants participated in mandatory case management conferences; filed two answers; produced responses to requests for admissions; and received production of documents in response to the demand contained in its answer pursuant to R. 4:18-2, as well as Plaintiffs responses to other Defendants.

Neither Plaintiffs or the Central Jersey Defendants have exchanged answers to interrogatories or specific requests for production of documents. (CJONG Da0003). Further, not a single deposition of any person has occurred in this case. (CJONG Da0003).

Additionally, as noted from the docket, almost every subpoena served by the Plaintiffs and Pennsauken Spine Defendants has resulted in a motion to quash and very few records have been produced. (Pa452-485).

Frankly, this case from a discovery standpoint is still in its infancy.

Due to the stalled nature of this case, the trial court conducted a case management conference on October 25, 2024. (CJONG Da0005). Based on the continued disputes over subpoenas, outstanding discovery, and the failure to resolve these disputes, the trial court found exceptional circumstances and ordered

the appointment of a Special Adjudicator. (CJONG Da0003). No proceedings before the Special Adjudicator have occurred.

Pursuant to the trial courts most recent case management order written discovery remains open until March 24, 2025. (Pa1608). Depositions and expert reports follow and the discovery end date is almost a year away, October 8, 2025. (Pa1609). These dates have been extended multiple times. (Pa1606). No trial date has been set at any point in this litigation. (Pa452-485).

Neither Plaintiffs or the Central Jersey Defendants have filed a dispositive motion against the other except for the current motion to dismiss which is the subject of this appeal. (Pa452-485).

On February 11, 2022 the Pennsauken Spine Defendants filed a motion to dismiss for failure to state a claim and sought to compel arbitration. (Pa0452). After numerous adjournments the motion was decided on August 3, 2023 and granted the Pennsauken Spine Defendants a partial dismissal of those counts related to the No Fault Act. (Pa0003;Pa0005).

On March 20, 2024 Plaintiffs filed a Second Amended Complaint. (Pa0967). Forty Three days later, on May 2, 2024 the Central Jersey Defendants sought dismissal of the entire matter and in the alternative those counts consistent with the

trial courts recent August 3, 2024 order. (Pa1133; Pa0005). As noted, all Defendants participated in the global motion to dismiss based partly on the recent decision of Gov't Emps. Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A., 101 F.4th 272 (3d. Cir. 2024). Only the Central Jersey Defendants contained alternative relief regarding the trial courts earlier August 3, 2024 decision. This portion of the motion was unopposed.

Against this backdrop, a question arises with respect to the litigation strategy between Plaintiffs and Defendants. From the outset of the litigation, the Central Jersey Defendants have expressed a strong desire to avoid the time consuming and expensive nature of litigation and therefore an interest in amicably resolving the matter. (CJONG Da0003). Counsel for Plaintiffs and the Central Jersey Defendants have had multiple telephonic conversations regarding the subject and in which both parties agreed it was likely a case that could and should be settled. (CJONG Da0003).

Plaintiffs can not point to any instance where the Central Jersey Defendants have acted in a manner which would indicate ulterior motives for its conduct.

Therefore based on the factors articulated in Cole, *supra*., 215 N.J. 265 waiver of the right to compel arbitration can not be established. Nevertheless,

Plaintiffs assert the Central Jersey Defendants conduct was more egregious than either of the parties who waived arbitration in Cole, *supra*., 215 N.J. 265 or Marmo and Sons General Contacting, LLC v. Biagi Farms, LLC 478 N.J. Super. 593(App. Div. 2024).

Plaintiffs make this argument despite the fact discovery has not progressed generally, no dispositive motions motions have been filed, no trial date has been set, no ulterior trial strategy exist, and targeted discovery between Plaintiffs and the Central Jersey Defendants has not been exchanged.

The conduct of Liberty Anesthesia Associates, LLC in Cole, s*upra*. 215 N.J. 265 included engaging in and receiving significant discovery, obtaining a partial summary judgment, and made its application for arbitration three days prior to trial. None of those factors apply in this matter.

Likewise, the plaintiff in Marmo, s*upra*. 478 N.J. Super. 593 obtained significant discovery including interrogatory answers, used the court system to its advantage before moving for arbitration, and was the plaintiff despite an arbitration provision in its own contract. Again the Central Jersey Defendants have not received interrogatory answers and has not used the court system to its advantage.

For these reasons, Plaintiffs argument regarding waiver must be rejected.

POINT IV

THE TRIAL COURT PROPERLY DISMISSED COUNTS TEN THROUGH FIFTEEN OF PLAINTIFFS SECOND AMENDED COMPLAINT IN FAVOR OF PIP ARBITRATION (T14:25 - 16:3)

For the last forty five years New Jersey has maintained a comprehensive statutory and regulatory scheme concerning PIP benefits and related disputes. N.J.S.A. 39:6A-1 to 35; N.J.A.C. 11:3-4.1 to 5.12. The "No Fault Act" provided a prompt and efficient means of recovering insurance benefits for medical expenses incurred as a result of being injured in an automobile accident regardless of fault. It also established a means of resolving disputes over those benefits in an efficient manner. Plaintiffs now seek to undue this scheme by mischaracterizing PIP disputes as those subject to the IFPA with its protracted litigation.

Since inception, the "No Fault Act" was designed to provide the prompt orderly payment of PIP benefits without litigation. The Supreme Court in Amiano v. Ohio Casualty Ins. Co., 85 N.J. 85, (1980) recognized:

> … the Act itself requires us to construe its provisions liberally in order to effect the legislative purpose to the fullest extent possible. N.J.S.A. 39:6A-16. The No Fault Act is social legislation intended to provide insureds with the prompt payment of medical bills, lost wages and other such expenses without making them await the outcome of protracted litigation. Mandated as a social necessity, PIP coverage should be given the broadest application consistent with the statutory language.

Id. at 90.

N.J.S.A. 39:6A-4 mandates that every automobile insurance policy provide PIP coverage without regard to negligence. Medical expenses which are mandated in PIP coverage are defined as:

> "Medical expenses" means reasonable and necessary expenses for treatment or services as provided by the policy, including medical, surgical, rehabilitative and diagnostic services and hospital expenses, provided by a health care provider licensed or certified by the State or by another state or nation, and reasonable and necessary expenses for ambulance services or other transportation, medication and other services as may be provided for, and subject to such limitations as provided for, in the policy, as approved by the commissioner. "Medical expenses" shall also include any nonmedical remedial treatment rendered in accordance with a recognized religious method of healing.
>
> N.J.S.A. 39:6A-2.

When there is a dispute concerning the payment of PIP benefits either the insurer or party seeking benefits, including medical providers proceeding via an assignment of benefits, are entitled to arbitrate. Specifically, N.J.S.A. 39:6A-5.1(a) provides:

> **Any dispute** regarding the recovery of medical expense benefits or other benefits provided under personal injury protection coverage pursuant to section 4 of P.L. 1972, c. 70 (C. 39:6A-4), section 4 of P.L. 1998, c. 21 (C. 39:6A-3.1) or section 45 of P.L. 2003, c. 89 (C. 39:6A-3.3) arising out of

> the operation, ownership, maintenance or use of an automobile may be submitted to dispute resolution **on the initiative of any party to the dispute**, as hereinafter provided. (emphasis supplied).

Thus, it is clear by the statute's plain wording that "any" dispute concerning PIP benefits may be submitted to arbitration by either party. Coalition for Quality Health Care v. New Jersey Dept. of Banking and Ins., 348 N.J. Super. 272 (App. Div. 2002); Allstate Ins. Co. v. Sabato, 380 N.J. 463 (App. Div. 2005)(noting that after AICRA any dispute can proceed to court only if neither side chooses alternative dispute resolution); N.J.A.C. 11:3-5.6.

The legislature also specified what issues could be submitted to arbitration:

> Disputes involving medical expense benefits may include, but not necessarily be limited to, matters concerning: (1) interpretation of the insurance contract; (2) whether the treatment or health care service which is the subject of the dispute resolution proceeding is in accordance with the provisions of section 4 of P.L. 1972, c. 70 (C. 39:6A-4), section 4 of P.L. 1998, c. 21 (C. 39:6A-3.1) or section 45 of P.L. 2003, c. 89 (C. 39:6A-3.3) or the terms of the policy; (3) the eligibility of the treatment or service for compensation; (4) the eligibility of the provider performing the treatment or service to be compensated under the terms of the policy or under regulations promulgated by the commissioner, including whether the person is licensed or certified to perform such treatment; (5) whether the disputed medical treatment was actually performed; (6) whether diagnostic tests performed in connection with the treatment are those recognized by the commissioner; (7) the necessity or appropriateness of consultations by other health care providers; (8) disputes involving application of and adherence to fee schedules promulgated by the commissioner; and (9) whether the treatment performed is reasonable, necessary, and compatible with the protocols provided for pursuant to P.L. 1998, c. 21 (C. 39:6A-1.1 et al.). (emphasis supplied).

N.J.S.A. 39:6A-5.1(c).

This Statute specifically included: interpretation of insurance contracts; eligibility of the provider to be compensated; whether appropriate treatment protocols were followed; and whether the disputed medical treatment was actually performed. Id. It is difficult to conceive how a claim for PIP benefits for treatment not actually performed would not be fraudulent.

Pursuant to the authority granted in the enabling statutes, DOBI then enacted regulations: concerning the designation of the arbitration administrator, N.J.A.C. 11:3-5.3; ensuring impartiality and fairness of the dispute resolution organization and arbitrators, N.J.A.C. 11:3-5.4 & 11:3-5.5, respectively; as well as guidelines for conducting the arbitration proceeding. N.J.A.C. 11:3-5.6.

It is against this background that the Court must consider Plaintiffs current appeal.

A. THE TRIAL COURT PROPERLY DISTINGUISHED CLAIMS ARISING FROM PIP DISPUTES AS OPPOSED TO IFPA CLAIMS(Pa0003; T14:15 - 16:3)

At the outset, it must be recalled that Plaintiffs method of pleading in its Second Amended Complaint consisted of alleging three causes of action for each set of predicate facts claimed to actionable. See Procedural History and Statement of Facts, *supra.,* The Tenth, Eleventh, and Twelfth Counts underlying allegation was that the Central Jersey Defendants were not properly structured and therefore ineligible for PIP Benefits. Id. Declaratory Judgment, unjust enrichment, and violation of the IFPA counts were asserted based on these allegations. Id.

Similarly, Plaintiffs asserted declaratory Judgment, unjust enrichment, and violation of the IFPA claims in Counts Thirteen, Fourteen, and Fifteen, respectively, based on allegations the Central Jersey Defendants improperly conducted electrodiagnostic testing. Id. The Sixteenth and Seventeenth Counts alleging a kickback scheme were not dismissed. Id.

Because there was no argument or opposition to the application to dismiss those Counts Ten through Fifteen, the analysis of the underlying facts by the trial court is difficult to ascertain. Nevertheless, the trial court dismissed the counts as consistent with his prior August 3, 2023 decision and order. Id.; (Pa0001).

Presumably, the trial court found that the underlying facts of improper structure and allegedly improperly performed EMG testing were matters for arbitration pursuant to N.J.S.A. 39:6A-5.1(c)(4) & (9). This presumption is made as these two statute provisions enunciate that a providers eligibility for PIP payment and whether the treatment is compatible with accepted protocols are issues for arbitration. N.J.S.A. 39:6A-5.1(c)(4) & (9). Whether that analysis by the trial court was performed or not, it is clear that both sets of underlying facts are specifically included as types of dispute subject to PIP arbitration. Id.

Additionally, in the August 3, 2023 decision the trial court performed a thorough reconciliation of those matters for which arbitration is the preferred method of resolution versus those matters for which IFPA claims in Superior Court are appropriate. (Pa0005). The trial court relied, in part, upon State Farm Ins. Co.

v. Sabato, 337 N.J. Super. 393 (App. Div. 2000) and State Farm Mut. Auto. Ins. Co. v. Molino, 289 N.J. 406 (App. Div. 1996). (Pa0009 - 0012).

In Molino, *supra*., 289 N.J. 406, State Farm denied defendants income and essential service PIP claims and filed a declaratory judgment action to resolve the matter. State Farm argued that the issue to be decided was not a factual dispute but a question of coverage not contemplated under N.J.S.A. 39:6A-5. Id. The Molino Court noted that N.J.S.A. 39:6A-5.1(c) specifically provided that "any" dispute concerning the payment of PIP benefits is subject to arbitration. Id. at 410. The Molino Court, citing Roig v Kelsey, 135 N.J. 500 (1994), also specified that to the extent it is asserted certain disputes are not arbitrable, the statute is to be liberally construed to promote the firm policy favoring prompt and efficient resolution of PIP disputes without judicial intervention. Id. at 410. In this regard the Court stated:

> Carriers should not be empowered to avoid arbitration simply by characterizing PIP disputes as questions of "entitlement" or "Coverage" and then seeking judicial resolution of those issues.
>
> Id. at 410.

Similarly, in State Farm Ins. Co. v. Sabato, 337 N.J. Super. 393 (App. Div. 2000) the Court rejected State Farm's attempt to avoid arbitration in a dispute that concerned matters beyond the extent of injury and amount of recovery of PIP benefits. In Sabato, defendants sought PIP benefits through arbitration from State

Farm after an accident. Id. State Farm investigated the claims and alleging fraud and lack of coverage sought a restraining order preventing the arbitration. Id. The trial court conducted a hearing and dismissed Defendants PIP claims. Id. The defendants appealed and the Appellate Division remanded the matter to arbitration. Id.

The Sabato Court relied upon Molino, *supra.,* 289 N.J. 406 and reiterated the propositions that arbitration is mandatory and that carriers should not attempt to avoid arbitration by characterizing PIP disputes as something other. Id. at 396-397. The Sabato Court stated: "However, we are satisfied that the defenses asserted by State Farm—be they fraud or some other basis for alleged non coverage—should have been resolved by an arbitrator." Id. At 396. Accordingly, the Sabato Court clearly noted that even matters concerning claims of fraud were subject to mandatory arbitration. Id.

The holdings of Molino and Sabato have been relied upon be multiple subsequent courts which have repeatedly reaffirmed the central tenant that PIP matters should be subject to arbitration no matter how packaged. State Farm Indem. Co. v National Liability & Fire Ins. Co. 439 N.J. Super. 532 (App. Div. 2015); Endo Surgi Ctr., P.C. v. Liberty Mut. Ins. Co. 391 N.J. Super. 588 (App Div. 2007).

In its August 3, 2023 decision, the trial court engaged in a comprehensive analysis of the No Fault statute compared to IFPA. The trial court used a series of

canons to compare the statutes including: 1)general-specific; 2) last-in-time; and 3) repeal by implication is disfavored. (Pa0010 - 0013). The Plaintiffs in this appeal do not argue that manner of analysis was improper.

The trial court properly concluded the No Fault statute was more narrowly constructed to apply to PIP disputes. In the analysis the trial court gave due deference to the Appellate holdings in Molino, *supra.,* 289 N.J. 406 and Sabato, *supra*., 337 N.J. Super. 393. The trial court also noted that Nationwide Mutual Fire Insurance Co. v. Fiouris, 395 N.J. Super. 156 (App. Div. 2007) did not concern a PIP dispute but rather fraud in the inducement of insurance policy and therefore was distinguishable. Accordingly, the trial court concluded the No Fault statute was more specific to PIP disputes than the IFPA.

The trial court also concluded the last-in-time canon favored arbitration of PIP disputes. (Pa0012). The trial court found the 1998 amendments to the No Fault statute concerning either parties right to arbitrate "any" PIP dispute dispositive and stated:

> This No-Fault Arbitration provision came even later than the most recent amendment—in 1997—to the NJ IFPA, providing the cause of action by insurers against violators of that act. L. 1997, c. 151, § 5, eff. June 30, 1997 (codified at N.J.S.A. 17:33A-7). This Court concludes, under the last-in-time canon, legislative intent is best effectuated by emphasizing the No-Fault Statute where the statutes conflict.

As such, the trial court concluded the general-specific and last-in-time canons compelled arbitration of those matters in which a PIP dispute is the basis of

a claim by any party. Importantly, contrary to Plaintiffs' assertions, the trial court also specifically recognized that certain disputes did not arise from PIP matters contemplated under the No Fault statute and thus had to remain in Superior Court. (Pa0013). Accordingly, the trial court in no way ignored Appellate precedent or the fact state courts have adjudicated IFPA claims since 1994.

B. THE TRIAL COURT DID NOT IGNORE ESTABLISHED PRECEDENT IN COMPELLING ARBITRATION OF CERTAIN PIP DISPUTES(Pa0003; T14:25-16:3)

Plaintiffs assert the trial court ignored established precent by remanding the PIP disputes to arbitration. (Pb36). As discussed below this argument is not supported by the facts or law.

Plaintiffs rely upon Lajara, *supra*. 222 N.J. 129 (2015) contending the Supreme Court mandates IFPA claims must be in court based on the right to trial by jury and the damages available. However, Plaintiffs misread Lajara, and attempt an unsupported extension of its holding. Id. The singular issue in Lajara concerned a parties right to a jury trial in an IFPA matter. The Laraja Court did not in any way address the issue in this matter concerning the right to compel arbitration. Id. Any attempt to extend Lajara to the situation here is simply not supported by the decision.

Plaintiffs next rely on Material Damage Adjustment Corp. v. Open MRI of Fairview, 352 N.J. 216 (Law Div. 2002). Again Plaintiffs rely on a case which did

not remotely consider the issue before this court. Id. Open MRI of Fairview, concerned cross motions for summary judgement on the issue of whether an MRI facility was liable for IFPA damages for knowingly operating without a license. Id. The issue of whether arbitration of those claims could be compelled was not in any way discussed. Id.

Similarly, Plaintiffs' reliance on Allstate v. Northfield Medical Center, 228 N.J. 596 (2017) and Allstate Ins. Co. v. Greenberg, 376 N.J. Super. 623 (Law Div. 2004) is misplaced. Northfield Medical Center, *supra*., 228 N.J. 596 involved claims that the defendants purposefully assisted in the creation of a medical practice designed to circumvent regulations bearing on the provision of medical services. Id. The defendants were not New Jersey Medical practitioners and had not submitted PIP claims. Greenberg, *supra.*, 376 N.J. Super. 623, involved claims that the defendant engaged in impermissible self referral to an unlicensed mobile diagnostic facility. Neither of these cases considered whether arbitration of those claims could be compelled.

Essential to the trial court's holding is the fundamental understanding that simply labeling something as IFPA does not undue that the nature of the claim concerning PIP benefits. This holding also is analogous to New Jersey courts decisions concerning claims of bad faith by insurers claims practices concerning PIP benefits.

C. THE TRIAL COURT'S DECISION IS ANALAGOUS TO NEW JERSEY JURISPRUDENCE CONCERNING CLAIMS OF BAD FAITH IN PIP MATTERS(Pa0003; T14:25 - 16:3)

The holding of the trial court August 3, 2024 decision is that disputes which arise from and concern PIP benefits are subject to arbitration no matter how packaged or labeled. In other words, consistent with Appellate precedent, insurers and insureds alike can not avoid applicable PIP regulations in this highly regulated insurance scheme by mischaracterizing their claims. To effectuate the highly regulated PIP scheme, this principle goes both ways and has been applied against insureds and by extension medical providers.

In Milcarek v. Nationwide Ins. Co., 190 N.J. Super. 358 (App. Div. 1983), the court considered whether an insured can recover punitive damages for an insurer's wrongful failure to pay PIP benefits. The Milcarek plaintiff suffered a fractured femur as a result of an auto accident. Id. The defendant voluntarily paid PIP benefits related to the initial treatment. Id. When the plaintiff re-fractured her femur seven months after the accident the defendant ceased paying PIP benefits. Id. The trial court granted summary judgment of count I of the plaintiffs complaint finding PIP benefits were owed, but dismissed count II seeking punitive damages. Id.

On appeal Plaintiff sought punitive damages and also argued that the insurers conduct in contravention of the No Fault Act constituted the tort of

intentional infliction of emotional distress. Id. The Milcarek court declined to allow the intentional infliction of emotional distress and punitive damage claim in relation to an insurers failure to pay a claim. Id. Plaintiff was instead limited to the exclusive remedies provided in the No Fault Act and R. 4:42-9(a)(6) for this PIP dispute. Id.

Similarly, in Kubiak v Allstate Ins. Co., 198 N.J. Super. 115 (App. Div. 1984) the court reiterated the holding in Milcarek, *supra*., 190 N.J. Super. 358, and denied the plaintiff's claim for punitive damages based on the asserted special relationship with the insurer. Instead the plaintiff was again limited to the damages provided under the No Fault Act. Id.

In Pierzga v. Ohio Casualty Group of Ins. Cos., 208 N.J. Super. 40 (App. Div. 1986) a plaintiff sought punitive damages based on her insurer's wrongful failure to pay PIP benefits. Plaintiff also sought treble damages based on a consumer fraud claim alleging her insurers conduct was a false promise and a deceptive commercial practice. Id. In denying these claims, the Pierzga Court noted that the No Fault Act provides an expedited system for resolving disputes. Id. Additionally the court noted: "Finally, we observe that by allowing punitive damage claims the court would encourage litigation, a policy directly contrary to that of the No Fault Act." Id. at 45. As such, the Pierzga Court declined to allow the plaintiff to re-package what was a PIP dispute into a consumer fraud claim. Id.

Lastly, in Pickett v. Lloyd's, 131 N.J. 457 (1992) the Supreme Court considered the question of whether an insurers conduct handling a first party claim could support a claim of bad faith and extracontractual damages. The court was asked to extend its Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974) decision to first party claims. Id. The plaintiff lost his tractor trailer in an accident and sought physical damage benefits from his insurer. Pickett, *supra*., 131 N.J. 457. The insurer failed to timely pay causing the plaintiff damages other than the loss of his truck. Id. The Supreme Court found there was sufficient basis in our law to find the duty of good faith and fair dealing when processing a first party claim and ultimately allowed extracontractual damages. Id. However, the court specifically noted:

> We also concur with the courts holding, in the highly-regulated area of personal injury protection, see N.J.S.A. 39:6A-5, that wrongful failure to pay benefits, wrongful withholding of benefits or other violation of the statute does not thereby give rise to a claim for punitive damages.(Citing Kubiak and Milcarek).
>
> Id. at 476.

The Supreme Court acknowledged that PIP matters are part of a highly regulated scheme in which the legislature and DOBI have created specific remedies and methods of dispute resolution.

In total, the Supreme Court and Multiple Appellate panels have rejected varying attempts to circumvent the applicable PIP regulations by re-characterizing the dispute. This has been applied to both sides.

CONCLUSION

For the foregoing reasons, The Central Jersey Defendants respectfully request that Plaintiffs appeal from the Trial court's June 28, 2024 Order dismissing Count Ten through Fifteen of the Second Amended Complaint be denied.

Respectfully Submitted,

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ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY & CASUALTY INSURANCE, AND ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiffs/Appellants, v. PENNSAUKEN SPINE AND REHAB, P.C.; DOMINIC MARIANI, D.C.; MARK A. BOLINGER, D.C.; MICHAEL ROSS, D.C.; WILFREDO W. CASTRO, A/K/A "WILFREDO S. CASTRO," "FREDDIE CASTRO," "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOSEPH KEPKO, D.O.; SILVERS LANGSAM & WEITZMAN ASSOCIATES, P.C. (F/K/A SILVERS, LANGSAM & WEITZMAN, P.C.); DEAN WEITZMAN, ESQUIRE; BROWNSTEIN PEARLMAN WIEZER NEWMAN & COOK, P.C. (F/K/A BROWNSTEIN PEARLMAN WIEZER & NEWMAN, P.C.); CURTIS BRACEY; JOHN DOE 1-50; JOHN ROE 1-50; ABC CORP. 1-50; XYZ, P.C. 1-50, Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003819-23 On Appeal From: Superior Court of New Jersey Law Division, Mercer County **Sat below:** Honorable R. Brian McLaughlin, J.S.C. Trial Court Docket No.: MER-L-2288-21

REPLY BRIEF OF PLAINTIFFS-APPELLANTS
Submitted on December 12, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

TABLE OF JUDGMENTS, ORDERS, AND RULINGS ON APPEAL

PROCEDURAL HISTORY AND STATEMENT OF FACTS

1. The Pennsauken Spine Defendants based their March 26, 2024 Motion to Dismiss Plaintiffs' Second Amended Complaint ("PSR MTD") in its entirety in favor of alternative dispute resolution ("ADR") on Allstate Ins. Co., et al. v. Carteret Compr. Med. Care, P.C., et al., MID-L-1469-23 (October 27, 2023). (Pa1611).

2. When the CJON Defendants filed their May 2, 2024 Motion to Dismiss Plaintiffs' Second Amended Complaint ("CJON MTD") in its entirety in favor of ADR, they joined the Pennsauken Spine Defendants' arguments and also relied upon Gov't Emps. Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A., Nos. 23-1378, 23-2019, 23-2053, 24 U.S. App. Lexis 8964 (3d Cir. Apr. 15, 2024). (Pa1618).

3. Alternatively, the CJON Defendants sought dismissal of Counts Ten through Fifteen of the Second Amended Complaint, based on the trial court's August 3, 2023 Order and Decision. (Pa1618).

4. On May 30, 2024, Plaintiffs filed a global opposition brief responding to the collective Defendants' Motions to Dismiss the Second Amended Complaint ("Defendants' MTD") in its entirety. (Pa1624).

5. The Plaintiffs raised the following relevant arguments in their global opposition: 1) there is no ADR jurisdiction over affirmative IFPA claims and, if the Court decides otherwise, that

is unlawful rule-making in violation of the Administrative Procedures Act ("APA") (Pa1644); (2) the parties have a constitutional right to a jury trial of IFPA claims under Lajara that the parties repeatedly demanded a jury trial, and that the Plaintiffs do not agree to waive a jury trial (Pa1653); (3) the Superior Court has consistently adjudicated IFPA claims since 1994 (Pa1655); and (4) the Mount Prospect and Carteret cases are not precedential or binding on this court and contain patently flawed interpretations of the relevant law (Pa1661).

6. Neither the CJON Defendants nor the PSR Defendants filed Reply Briefs in further support of Defendants' MTD addressing any of the above arguments. (Pa0452).

7. On June 28, 2024, the Court held oral argument with regard to the Defendants' MTD. (T9:15-35:3)[1].

LEGAL ARGUMENT

POINT I

PLAINTIFFS OPPOSED THE CJON MTD IN ITS ENTIRETY, INCLUDING COUNTS TEN THROUGH FIFTEEN, AND DID NOT WAIVE ANY ISSUE RAISED ON APPEAL. (Pa1624, T16:4-24:16, T28:16-29:12)

On May 30, 2024, Plaintiffs submitted a global opposition to the Defendants' MTD, *in its entirety*. (Pa1624). Plaintiffs focused

[1] June 28, 2024 Transcript.

their opposition on the Defendants' current arguments that the Carteret and Mount Prospect decisions, both of which were rendered after the trial court's August 3, 2023 Order and Decision, supported dismissal of Plaintiffs' Second Amended Complaint in its entirety to ADR. (Pa1624).

Thus, when the trial court put Plaintiffs' counsel "on the spot" during oral argument on June 28, 2024, regarding *the alternative relief* that the CJON Defendants' sought specific to Counts Ten through Fifteen, Plaintiffs acknowledged that based upon the trial court's August 3, 2023 Decision, Counts Ten through Fifteen would be dismissed. (T14:25-15:21). Both the trial court and Plaintiffs repeatedly made it clear that Plaintiffs did not agree with the August 3, 2023 Order and Decision. (T14:25-15:21).

The Court's June 28, 2024 decision, however, did not address the Plaintiffs' global opposition arguments as they related to Counts Ten through Fifteen or the rest of the Second Amended Complaint. (T14:25-35:3). Plaintiffs argued the global opposition arguments during oral argument on June 28, 2024. (T16:4-24:14; 28:16-29:11). But the trial court never considered or addressed the Plaintiffs' global opposition arguments. (T29:15-35:3). The record is clear that Plaintiffs did oppose the CJON MTD, in its entirety, which includes Counts Ten through Fifteen.

Moreover, Plaintiffs did not waive any rights with respect to their appeal of the trial court's June 28, 2024 Order dismissing Counts Ten through Fifteen. It is clear that Plaintiffs asserted all of its appellate arguments in opposition to Defendants' MTD, in its entirety. (Pa1624). In sum, the Appellate Division should, respectfully, reject the Defendants' unsupported arguments concerning standing and waiver.[2]

POINT II

PLAINTIFFS ARGUED BOTH WAIVER AND UNLAWFUL RULE-MAKING BELOW AND THE DEFENDANTS DID NOT OPPOSE PLAINTIFFS' ARGUMENTS. (Pa1624, Pa0452, T16:4-24:16, T28:16-29:12)

The PSR Defendants and the CJON Defendants again mislead the Court regarding the parties' arguments to the trial court by suggesting that the Plaintiffs did not raise "waiver" or "rule-making" below. (CJON Def. Br. at pp. 19-24; PSR Def. Br. at p. 33). While parties must preserve issues at the trial level, which the Plaintiffs did do here, they may raise different theories in support of a litigated issue on appeal. See Docteroff v. Barra Corp. of Am., 282 N.J. Super. 230, 237 (App. Div. 1995) ("[W]e will consider the same issues [raised below] as presented to us, regardless of whether plaintiffs' principal theory has changed.").

[2] The June 28, 2024 Order, at issue in this appeal, applies only to the CJON Defendants, and not the PSR Defendants. Thus, the PSR Defendants' arguments as to standing and waiver are moot.

Plaintiffs preserved the issue of rule-making and waiver and may raise additional theories regarding these issues on appeal.

A. Plaintiffs argued "rule-making" below. (Pa1648, T16:4-24:16, T28:16-29:12)

As Plaintiffs' Brief to the trial court in opposition to the Defendants' MTD demonstrates, Plaintiffs argued that if the Court granted the Defendants' MTD, in its entirety (including Counts 10 through 15), subjecting affirmative IFPA claims to ADR, this would be considered "rule-making" in violation of the APA, N.J.S.A. 52:14B-4(d). (Pa1648).[3] There is no question that Plaintiffs preserved the rule-making argument to the trial court.

[3] In New Jersey Healthcare Coalition, et al. v. New Jersey Department of Banking and Insurance, 440 N.J. Super. 129, 134-35 (March 31, 2015), the Appellate Division stated:

> From the beginning, we have made clear that it is not our role to second guess the Department's policy choices concerning the implementation of the legislative scheme aimed at reducing insurance costs while expediting medical treatment **for accident victims**. *See Coalition I*, *supra*, 323 N.J. Super. at 269. We find no basis to do so here, and we affirm the Department's adoption of the challenged regulations.
>
> Our standard of review on this appeal is well-understood and limited. "Administrative regulations are accorded a presumption of validity." That deference "stems from the recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are 'particularly well equipped to read and understand the massive documents and to evaluate the factual and technical issues that . . . rulemaking would invite.'" *Ibid.* (Emphasis added).

B. Plaintiffs argued "waiver" below and have expanded upon the argument in this Appeal by raising an additional theory of waiver. (Pa1653, T16:4-24:16, T28:16-29:12)

Similarly, Plaintiffs' Brief to the trial court in opposition to the Defendants' MTD in its entirety demonstrates that Plaintiffs also argued "waiver." (Pa1653). Plaintiffs argued that under Allstate v. Lajara, 222 N.J. 129 (2015), the parties have a constitutional right to a jury trial and that the parties repeatedly demanded a jury trial. (Pa1653). Plaintiffs explained that pursuant to R. 4:35-1(d), all parties must consent to waive the jury demand and Plaintiffs do not consent. (Pa1653). In their Appellate Brief, Plaintiffs expanded upon these arguments as related to the CJON Defendants by demonstrating that the CJON Defendants have waived any theoretical right to compel ADR of Plaintiffs' IFPA claims, not only by virtue of their jury demands, but also as their voluntary and intentional conduct in litigation for three-years demonstrates. (Plt. Br. at pp. 30-36).

The CJON Defendants agree that the Lajara Court conclusively established the right to a jury trial of IFPA claims, but they believe that because the trial court retained jurisdiction over some of the counts of Plaintiffs' Second Amended Complaint, the trial court did not ignore the parties right to a jury trial. (CJON Def. Br. at pp. 22-23). Plaintiffs submit that based upon the

arguments on appeal, the dismissal of Counts 10 through 15 of the Second Amended Complaint deprives the parties of their right to a jury trial under Lajara. This is especially so in light of the Plaintiffs' discussion and analysis of the enabling statute, N.J.S.A. 39:6A-5.1(a), and its reference to N.J.S.A. 39:6A-4, which establishes the types of disputes subject to ADR and the parties subject to ADR. (Plt. Br. at pp. 17-20). Thus, deprivation of a jury trial on any of the counts of the Plaintiffs' Second Amended Complaint is not only contrary to AICRA, but to Lajara as well.

C. The CJON Defendants' voluntary and intentional conduct over three-years clearly indicated waiver of the theoretical right to ADR. (Pa1653, T16:4-24:16, T28:16-29:12)

While the PSR Defendants' February 2022 Motion to Dismiss remained pending until the trial court's August 3, 2023 decision, the CJON Defendants choose not to join in that motion or file their own Motion to Dismiss. (Pa0452). It was only after the PSR Defendants filed their Third Motion to Dismiss in March 2024, that the CJON Defendants joined that motion seeking to dismiss the entirety of the Second Amended Complaint. (Pa0452, Pa1123, Pa1133).

For three years, the CJON Defendants voluntarily and intentionally litigated this case and choose not to move to compel

the case to arbitration, even after the August 3, 2023 decision. (Pa0452). The CJON Defendants admitted their conduct in this litigation on p. 27 of their Appellate Brief. For the reasons set forth in Plaintiffs' Appellate Brief, and under both Cole v. Jersey City Medical Center, 215 N.J. 265 (2013) and Marmo and Sons General Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593 (App. Div. 2024), the CJON Defendants' conduct demonstrates clear and unequivocal waiver of any theoretical right to ADR of Plaintiffs' IFPA claims.[4]

POINT III

THE DEFENDANTS' ARGUMENTS CONCERNING THE TRIAL COURT'S AUGUST 3, 2023 ORDER AND DECISION DISREGARD THE CLEAR LANGUAGE OF THE ENABLING STATUTE, JUST AS THE TRIAL COURT DID WHEN ISSUING THE JUNE 28, 2024 ORDER DISMISSING COUNTS TEN THROUGH FIFTEEN. (Pa0001, T16:4-24:16, T28:16-29:12, T29:13-35:3)

In Point II of their Appellate Brief, Plaintiffs discuss the law conferring PIP ADR jurisdiction and that the PIP ADR Forum can never have jurisdiction over the Plaintiffs' IFPA claims. (See Plt. Br. at pp. 17-26). Plaintiffs raised this argument to the trial court. (Pa1644). The PSR Defendants and CJON Defendants' jurisdictional arguments, and the trial Court's June 28, 2024

[4] None of the Defendants cite to anything in the record that establishes a contract between them and the Plaintiffs providing a right to ADR of Plaintiffs' IFPA claims.

decision (Pa0001), rely upon an improper reading of the enabling statute.

The PSR Defendants cite to N.J.S.A. 39:6A-5.1(a), but commit the same error as the trial court, by including ellipses and deleting the reference to N.J.S.A. 39:6A-4. (PSR Def. Br. at p. 21; Pa0009). Analyzing §5.1(a), without analyzing §4, is a fatal flaw when determining whether an insurer's affirmative IFPA claims are subject to PIP ADR. But, the PSR Defendants' entire argument on pp. 18-43 is based upon this fatal flaw.

The CJON Defendants do not include the ellipses in their recitation of §5.1(a), but they also do not analyze §4 in its entirety. (CJON Def. Br. at p. 33). Thus, they miss that the types of disputes that are subject to ADR are limited to disputes for payment of benefits paid **to** the named insured, injured persons (i.e. accident injury victims), and/or a medical provider with an assignment of benefits. Insurer's affirmative IFPA claims are not subject to ADR jurisdiction under §5.1(a) or §4. N.J.S.A. 39:6A-5.1(c), delineating "PIP disputes," contains the same limitation with a reference to §4. The CJON Defendants' arguments on pp. 32-44 are therefore also fatally flawed and belied by the clear and unambiguous language of the enabling statute and the implementing regulation – N.J.A.C. 11:3-5.1(a-b). The Court's June 28, 2024

Order, dismissing Counts Ten through Fifteen in favor of ADR, was erroneous and in violation of the law. (Pa0001, Pa0003, Pa0005).

Published case law from the Appellate Division supports Plaintiffs' discussion of ADR jurisdiction under the enabling statutes. The [PIP arbitration] statute's overall purpose is to reduce costs and expedite the decision of claims. N.J. Healthcare Coal., 440 N.J. Super. at 144.[5] "The evident purpose of [N.J.S.A. 39:6A-5.1 and N.J.S.A. 39:6A-4] is to establish an expeditious non-judicial procedure for resolving any dispute regarding the payment of PIP benefits, in furtherance of the No-Fault Act's objectives of facilitating 'prompt and efficient provision of benefits for all accident injury victims'. . ." Endo Surgi Ctr., P.C. v. Liberty Mut. Ins. Co., 391 N.J. Super. 588, 594 (App. Div. 2007).[6] Again, disputes that are subject to ADR are disputes for payment of benefits paid **to** the named insured, injured persons, and medical providers with an assignment of benefits.

[5] "There appears to be no dispute that few DRP hearings currently involve oral testimony. *See* 44 N.J.R. 2688." Ibid.

[6] The Appellate Division has "previously recognized that because PIP benefits are statutory in nature, the procedures and remedies provided by the No-Fault Act for enforcement of an **insured's** right to PIP benefits are exclusive." Id. at 592-593. (citations omitted) (emphasis added).

POINT IV

THE DEFENDANTS' ARGUMENTS REGARDING CONTROLLING LAW ARE FALSE AND MISLEADING. (Pa0001, Pa0003, Pa0005)

The CJON Defendants' arguments in Point IV(B) demonstrate they failed to comprehend the significance of the State Court IFPA cases Plaintiffs cited relative to IFPA jurisdiction. Each of the cases demonstrates that New Jersey State Courts have consistently adjudicated IFPA claims since 1994. See e.g., Lajara, 222 N.J. at 153; Open MRI of Morris and Essex, L.P. v. Frieri, 405 N.J. Super. 576, 583 (App Div. 2009) and Allstate v. Northfield Medical Center, 228 N.J. 596, 600 (2017) (both citing Allstate Ins. Co. v. Greenberg, 376 N.J. Super. 623, 637 (Law Div. 2004) ("The Fraud Act expressly provides that the forum for the adjudication of claims under the Act is in the Superior Court."); and Material Damage Adjustment Corp. v. Open MRI of Fairview, 352 N.J. Super. 216, 230 (Law Div. 2002) cited by Northfield, 228 N.J. at 623.[7] The fact that the medical providers and their counsel did not seek to compel arbitration in any of those cases or that since 1998 they did not sue the Department of Banking and Insurance ("DOBI")

[7] See also, Allstate v. Lopez, 311 N.J. Super. 660 (Law Div. 1998); Allstate v. Schick, 328 N.J. Super. 611 (Law Div. 1999), adopted by Northfield, 228 N.J. at 626; Varano, Damian & Finkel v. Allstate, 366 N.J. Super. 1 (App. Div. 2004); Allstate v. Cherry Hill Pain and Rehab, 389 N.J. Super. 130 (App. Div. 2006); and Nationwide Mutual Fire Insurance Co. v. Fiouris, 395 N.J. Super. 156 (App. Div. 2007), cert. den. 192 N.J. 598 (2007).

to change their regulations to compel arbitration is acknowledgment that the State Court is the proper jurisdiction.[8]

The CJON Defendants state that "simply labeling something as IFPA does not undue that the nature of the claim concerning PIP benefits." [sic] (CJON Def. Br. at p. 41). These cases are not simply being labeled as "IFPA." They are cases brought pursuant to the IFPA, N.J.S.A. 17:33A-1, et. seq., wherein the insurers, including PIP insurers, are seeking all damages available to them under N.J.S.A. 17:33A-7 (i.e. compensatory damages, including reasonable investigation expenses, costs of suit, and attorney's fees and treble damages), none of which can be awarded in ADR.

The PSR Defendants and the CJON Defendants suggest that cases such as State Farm Mutual Auto Ins. Co. v. Molino, 289 N.J. Super. 406 (App. Div. 1996), Rivera v. Allstate Ins. Co., 2011 N.J. Super. Unpub. LEXIS 1127 (App. Div. May 4, 2011), and State Farm Insurance Co. v. Sabato, 337 N.J. Super. 393 (App. Div. 2001) are controlling. However, none of those cases were IFPA cases and the

[8] The medical providers and their counsel have repeatedly sued DOBI with regard to DOBI's promulgation of PIP regulations. See, e.g., In re Adoption of N.J.A.C. 11:3-29, 410 N.J. Super. 6 (App. Div.), cert. denied, 200 N.J. 506 (2009); Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 358 N.J. Super. 123 (App. Div. 2003) (Coalition III); In re Comm'r's Failure to Adopt 861 CPT Codes, 358 N.J. Super. 135 (App. Div. 2003); Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272 (App. Div.), cert. denied, 174 N.J. 194 (2002) (Coalition II); and N.J. Coal. of Healthcare Prof'ls. Inc. v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207 (App. Div.), cert. denied, 162 N.J. 485-86 (1999) (Coalition I).

trial court's reliance on those cases in the August 3, 2023 Decision was patently flawed. (Pa0001, Pa0003, Pa0005). In Molino, the Appellate Division found that an insurer's denial of extended income continuation and essential services benefits created a dispute that "triggered [the deceased insured's] right to demand binding arbitration." Molino, 289 N.J. Super. at 408. Neither fraud nor the IFPA were even mentioned in the Molino decision.

In Sabato, the Defendant medical provider requested arbitration and State Farm sought a restraining order against the medical provider proceeding with that arbitration, which the Court granted and dismissed the claims of the medical provider. Sabato, 337 N.J. Super. at 396. The Appellate Division held that State Farm's defenses to coverage, whether the insured's fraud or some other basis for alleged non coverage, should be resolved by an arbitrator. Ibid. Sabato, however, was not an IFPA case and the potential fraud by the insured in the procurement of the insurance policy is factually distinguishable from the Defendants' pattern of fraudulent conduct in the unlawful procurement and treatment of over 300 of their patients.

Finally, the Rivera decision should be completely disregarded as it is an unpublished and non-binding case.[9]

[9] The trial court erroneously relied upon this case because it has no legal precedential value, as it is unpublished. Badiali v. New Jersey Mfrs. Ins.

POINT V

THE APPELLATE DIVISION IS EMPOWERED TO EXERCISE ORIGINAL JURISDICTION OVER ISSUES NOT RAISED BY THE PARTIES ON APPEAL.

Plaintiffs submit that the Appellate Division can and should exercise original jurisdiction in its review of issues raised in Plaintiffs' Appellate Briefs and the trial court's June 28, 2024 Order. The trial court's Order does not require any further fact-finding for this Court to perform a complete determination of the significant issues raised on appeal, including whether the law requires IFPA cases to be arbitrated in PIP ADR. R. 2:10-5 provides: "[t]he appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." See also Price v. Himeji, LLC, 214 N.J. 263, 294 (2013) ("Appellate courts are empowered to exercise original jurisdiction within the bounds set forth in our rules . . . We have observed that the exercise of original jurisdiction is appropriate when there is 'public interest in an expeditious disposition of the significant issues raised[.]'").

Plaintiffs submit that a review of the issues raised in

Group, 220 N.J. 544, 559 (2015); and Sciarrotta v. Global Spectrum, 194 N.J. 345, 353 n.5 (2008) (declining to address an argument based on an unpublished Appellate Division opinion). On June 28, 2024, the trial court admitted its error when stating that it is clear that the Appellate Division has guided trial courts that they are not to cite [to unpublished cases]. (T34:18-21).

Plaintiffs' Briefs and the trial court's order is necessary in order for the Appellate Division to perform a complete determination of the matter. As stated above, the issues herein seriously implicate the insurance industry's interest in fighting insurance fraud and following the clear mandates of the Legislature in enacting the IFPA. See Liberty Insurance Corp. v. Techdan, LLC, 253 N.J. 87, 109 (2022) ("Because the IFPA is remedial legislation, "we must construe the Act's provisions liberally to accomplish the Legislature's broad remedial goals.").

CONCLUSION

Based on the foregoing, it is respectfully requested that this Honorable Court reverse the trial court's June 28, 2024 Order dismissing Counts 10 through 15 of the Plaintiffs' Second Amended Complaint to arbitration.

Respectfully submitted,

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By: */s/ Douglas M. Alba*
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Dated: December 12, 2024

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY & CASUALTY INSURANCE; and ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

PENNSAUKEN SPINE AND REHAB, P.C.; DOMINIC MARIANI, D.C.; MARK A. BOLINGER, D.C.; MICHAEL ROSS, D.C.; WILFREDO W. CASTRO, A/K/A "WILFREDO S. CASTRO," "FREDDIE CASTRO," "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOSEPH KEPKO, D.O.; SILVERS LANGSAM & WEITZMAN ASSOCIATES, P.C. (F/K/A SILVERS, LANGSAM & WEITZMAN, P.C.); DEAN WEITZMAN, ESQUIRE; BROWNSTEIN PEARLMAN WIEZER NEWMAN & COOK, P.C. (F/K/A BROWNSTEIN PEARLMAN WIEZER & NEWMAN, P.C.); CURTIS BRACEY,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003819-23T2

Civil Action

On Appeal From:
Superior Court of New Jersey,
Law Division, Mercer County

Trial Court Docket No.:
MER-L-2288-21

Sat Below:
Hon. R. Brian McLaughlin, J.S.C.

Submitted on: January 15, 2025

Defendants-Respondents.

BRIEF OF AMICUS CURIAE THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE AND THE NEW JERSEY OFFICE OF THE INSURANCE FRAUD PROSECUTOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Administrative Rules

Court Rules

INTEREST OF AMICUS CURIAE

This appeal concerns the proper forum for an insurance company to litigate affirmative claims for insurance fraud under the Insurance Fraud Prevention Act ("IFPA"), N.J.S.A. 17:33A-1 to -30. The IFPA sets up statutory and regulatory structures to protect the public from insurance fraud.

The IFPA created the Bureau of Fraud Deterrence ("BFD") within the Department of Banking and Insurance ("Department"). N.J.S.A. 17:33A-8(a)(1). The IFPA's powerful remedies include authorizing the Commissioner of the Department to bring a civil action for penalties, including fines and restitution, for any violation of the IFPA. And under N.J.S.A. 17:33A-7(d), "the commissioner may join in [an insurer's] action for the purpose of seeking judgment for the payment of a civil penalty authorized under [N.J.S.A. 17:33A-5]."

Additionally, the Commissioner may request the Attorney General to bring a criminal action under applicable criminal statutes, for violations of the IFPA. N.J.S.A.17:33A-5(a). The IFPA also created the Office of the Insurance Fraud Prosecutor ("OIFP") under the direction and supervision of the Attorney General. N.J.S.A. 17:33A-16. The statute tasks both BFD and OIFP to work in consultation with one another to "investigat[e] allegations of insurance fraud"

and to "implement[] programs to prevent insurance fraud and abuse." N.J.S.A. 17:33A-8(a)(1).

Because the Legislature designated BFD and OIFP as the agencies "to whom its enforcement is entrusted," this court affords their interpretation of the IFPA "great weight." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 69-70 (1978). As the agencies charged with combating insurance fraud and enforcing the IFPA in this State, the Department and the OIFP have a substantial interest in ensuring the correct interpretation of the IFPA and that its enforcement goals are not unduly hindered. Thus, the agencies have a strong interest in the outcome of this case, which concerns the appropriate forum to hear claims filed by insurance companies under the IFPA. And because insurance companies play a significant role in combating civil and criminal insurance fraud in New Jersey through use of the IFPA, including in ways that impact the Department and OIFP's work, both the Department and the OIFP appear as amicus to shed light on how the decision below has significant consequences on how fraud claims are heard and resolved.

Moreover, the Department's interest in this case also stems from the fact that it is also the agency charged by the Legislature with promulgating regulations for and supervising the administration of the Personal Injury Protection ("PIP") no-fault dispute resolution statute. The Automobile

Insurance Cost Reduction Act ("AICRA"), N.J.S.A. 39:6A-1.1 to -35, delegates to the Commissioner the responsibilities to promulgate rules and regulations regarding such dispute resolution and to designate an organization to administer the proceedings. N.J.S.A. 39:6A-5.l(b); see also N.J.S.A. 39:6A-1.2 ("The commissioner may promulgate any rules and regulations . . . deemed necessary in order to effectuate the provisions of this amendatory and supplementary act."). The Commissioner of the Department designates the organization that administers the dispute resolution proceedings regarding medical expense benefits under PIP coverage. N.J.S.A. 39:6A-5.1(b). Thus, it is in a unique position to provide this court with context on how PIP dispute resolution operates.

In short, this case bears directly on the functions of the Department and the OIFP in protecting the public from insurance fraud. The Law Division's decision to bifurcate the Superior Court case and send certain claims in Allstate's IFPA complaint to PIP no-fault dispute resolution will significantly impact the prosecution of civil and criminal insurance fraud cases, and limit the Department's and the OIFP's ability to protect the public. The Department and the OIFP seek to ensure that the court has a full understanding of the issues, and of the perspectives of the Department and the OIFP on why this bifurcation is improper.

PRELIMINARY STATEMENT

The outcome of this appeal is controlled by the recent published decision in Allstate v. Carteret Comprehensive Medical Care, P.C., ___ N.J. Super. ___ (App. Div. 2025). In that decision, the court ruled that no part of a Superior Court case asserting fraud claims under the IFPA is subject to PIP no-fault dispute resolution under AICRA. The trial court's decision here should therefore be reversed.

New Jersey has a strong public policy against insurance fraud. The New Jersey Supreme Court has repeatedly stated that insurance fraud in this State is "a problem of massive proportions that currently results in substantial and unnecessary costs to the general public in the form of increased rates." Merin v. Maglaki, 126 N.J. 430, 436 (1992). In furtherance of the goal of reducing such fraud, the IFPA authorizes a private right of action in the Superior Court for an insurance company damaged as a result of any violation. An insurance company filing suit under the IFPA may recover compensatory damages, including costs of investigation, costs of suit and attorneys' fees. An insurance company also may be entitled to an award of treble damages where a pattern of fraud is established. The IFPA further authorizes the Commissioner to intervene in any case brought by an insurance company alleging a violation of the IFPA.

By contrast, the AICRA's PIP no-fault dispute resolution proceedings are designed to handle only simple disputes over individual PIP claims between insured parties and insurance companies, such as disagreements over the amount or legitimacy of medical expenses and related costs. PIP dispute resolution is generally limited in subject matter and scope to one accident and one injured person. The proceeding is a one-way process. The claim is either allowed or denied. While PIP arbitrators can consider evidence of fraud as a defense when making their decisions, they cannot grant affirmative relief to insurance companies in the form of any of the IFPA's remedies, such as damages or costs and attorneys' fees.

The decision below held that AICRA required that certain causes of action in an insurance company's multi-faceted IFPA complaint against medical providers, law firms, an attorney and patient brokers/runners, be determined in PIP no-fault dispute resolution rather than in Superior Court. As this court just held in Allstate v. Carteret, the trial court's decision was wrong. IFPA causes of action belong in Superior Court, not in PIP dispute resolution under AICRA. The trial court's decision to send certain causes of action in Allstate's IFPA complaint to PIP no-fault dispute resolution improperly bifurcated the IFPA case into two incompatible and unworkable parts. This decision is contrary to Allstate v. Carteret, which held that PIP dispute resolution under AICRA was

designed for limited disputes concerning PIP benefits, not complex insurance fraud claims.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Department and the OIFP mainly rely on the procedural history and statement of facts as presented by Appellant Allstate (Pb3),[2] and highlight the following.

This is an IFPA action by Allstate against medical providers, law firms, an attorney and patient brokers/runners. (Pa968-974). The allegations in Allstate's Second Amended Complaint encompass six general schemes in violation of statutes and regulations applicable to the provision of healthcare in New Jersey and/or the rules governing the practice of law in this State, and the IFPA. (Pa968). These schemes were referred to as follows: (1) the "Pennsauken Spine Runner and Kickback Scheme" (First through Third Counts); (2) the "Pennsauken Spine Fraudulent Billing Scheme" (Fourth through Sixth Counts); (3) the "Pennsauken Spine Concealment of Past Medical History Scheme" (Seventh through Ninth Counts); (4) the "CJON Unlawful Practice Structure Scheme" (Tenth through Twelfth Counts); (5) the "CJON Fraudulent EDX Testing Scheme" (Thirteenth

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[1] Because the procedural history and facts are closely related, this brief combines them for efficiency and for the court's convenience.

[2] "Pa" refers to Appellant Allstate's Appendix; "Pb" refers to Allstate's amended brief filed on October 15, 2024.

through Fifteenth Counts); and (6) "the Pennsauken Spine/CJON Kickback and Unlawful Referral Scheme" (Sixteenth through Eighteenth Counts). (Pa977-980). Allstate alleged that these schemes were "inter-related and overlapping" and were "designed to defraud" Allstate and other insurance companies. (Pa976).

This appeal arises from the Law Division's June 28, 2024 Order dismissing Counts Ten through Fifteen of Allstate's Second Amended Complaint to PIP no-fault dispute resolution. (Pa1-2). The Law Division relied upon its Order and decision of August 3, 2023, dismissing Counts One and Four through Nine of Allstate's Complaint to PIP no-fault dispute resolution. (Pa3-18).

In its August 3, 2023 decision, the Law Division bifurcated Allstate's IFPA case, and decided, sua sponte, that certain of Allstate's IFPA claims constituted fraud and should remain in Superior Court (Counts Two and Three), while the rest of Allstate's IFPA claims were actually PIP payment disputes subject to PIP no-fault dispute resolution (Counts One and Four through Nine). (Pa8-18). On June 28, 2024, the Law Division likewise ordered that Counts Ten through Fifteen of Allstate's Second Amended Complaint constituted PIP disputes and were subject to PIP no-fault dispute resolution. (Pa1-2).

In that August 3, 2023 decision, the Law Division concluded that claims based on the payment of (or obligation to pay) PIP benefits (Counts One and Four through Nine) must be dismissed and submitted to PIP dispute resolution. (Pa16-17). The

Law Division stated that the kickback and runner scheme counts (Counts Two and Three) were not dismissed because they were not addressed in the no-fault statute, and were violations under the IFPA. (Pa17).

On August 12, 2024, Allstate filed an Amended Notice of Appeal under Rule 2:2-3(b)(8) (permitting appeals as of right from orders compelling arbitration). The Department and the OIFP submit this amicus curiae brief in connection with this appeal pursuant to Rule 1:13-9(e).

ARGUMENT

POINT I

THE DECISION IN ALLSTATE v. CARTERET ESTABLISHED THAT CLAIMS FOR DAMAGES UNDER THE INSURANCE FRAUD PREVENTION ACT ARE NOT SUBJECT TO PERSONAL INJURY PROTECTION NO-FAULT DISPUTE RESOLUTION UNDER N.J.S.A. 39:6A-5.1(a).

The trial court's decision is contrary to Allstate v. Carteret, ___ N.J. Super. ___ (App. Div. 2025) (slip op. at 24), which held that PIP dispute resolution under AICRA was designed for limited disputes concerning PIP benefits, not complex insurance fraud claims, and that insurance fraud claims under the IFPA "are not subject to PIP arbitration under AICRA." Id. at 4-5. Therefore, no part of a Superior Court case asserting fraud claims under the

IFPA is subject to PIP no-fault dispute resolution, and the trial court's decision in this case should be reversed.

The IFPA was enacted "to confront aggressively the problem of insurance fraud in New Jersey." N.J.S.A.17:33A-2. It provides that an "insurance company damaged as the result of a violation of any provision of this act may sue therefor in any court of competent jurisdiction . . . ." N.J.S.A.17:33A-7(a). See Allstate v. Carteret, ___ N.J. Super. at 11-12, 20-23. On the other hand, the goal of PIP and AICRA dispute resolution is to "provide prompt medical treatment for those who have been injured in automobile accidents without having that treatment delayed because of payment disputes." Id. at 17 (quoting Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 609 (2012)). "The role of arbitration in automobile insurance matters is to provide for the prompt payment of PIP benefits to ensure that people legitimately injured because of an automobile accident receive reasonable and necessary medical treatment in a prompt and expeditious manner." Allstate Ins. Co. v. Lopez, 311 N.J. Super. 660, 678 (Law Div. 1998).

"The evident purpose of [N.J.S.A. 39:6A-5.1] is to establish an expeditious non-judicial procedure for resolving any dispute regarding the payment of PIP benefits, in furtherance of the No-Fault Act's objectives of facilitating 'prompt and efficient provision of benefits for all accident injury

victims . . . .'" Endo Surgi Ctr., P.C. v. Liberty Mut. Ins. Co., 391 N.J. Super. 588, 594 (App. Div. 2007) (quoting Gambino v. Royal Globe Ins. Cos., 86 N.J. 100, 105, 107 (1981)).

Under the AICRA, N.J.S.A. 39:6A-1.1 to -35, New Jersey operates under a no-fault insurance system. This means that in the event of an auto accident, an individual's own insurance company covers their medical expenses and other related costs, regardless of who was at fault. N.J.S.A. 39:6A-4. Every standard automobile liability insurance policy issued or renewed in this State must provide for the payment of PIP benefits to the named insured and members of the insured's family residing in the insured's household without regard to negligence, liability or fault. Ibid. Those benefits include medical expenses, lost wages, and certain other costs resulting from an auto accident, up to the policy limits. Ibid. See also Allstate v. Carteret, ___ N.J. Super. at 13.

Disputes can arise regarding the amount or legitimacy of PIP claims. When such disputes occur, a specially created dispute resolution proceeding provides a way to efficiently resolve these issues so that overdue medical bills can be paid. Allstate v. Carteret, ___ N.J. Super. at 14. The AICRA provides the following parameters for how PIP claims are resolved:

> Any dispute regarding the recovery of medical expense benefits or other benefits provided under personal injury protection coverage . . . arising out of the operation, ownership, maintenance or use of an

> automobile may be submitted to dispute resolution on the initiative of any party to the dispute, as hereinafter provided.
>
> [N.J.S.A. 39:6A-5.1(a).]

The language of N.J.S.A. 39:6A-5.1(a) clearly states that PIP dispute resolution is applicable to the recovery of medical expense benefits or other benefits provided under the PIP coverage found in automobile insurance policies. Thus, PIP dispute resolution only applies to disputes over payment of medical expense benefits with an insured, an injured person, or a medical provider who has an assignment of benefits. See N.J.S.A. 39:6A-4; N.J.S.A. 39:6A-5.1; Allstate v. Carteret, ___ N.J. Super. at 13-15. Here, Allstate's Second Amended Complaint seeks compensatory damages and other remedies allowed under the IFPA. (Pa1065; Pa1071-1073; Pa1078-1079; Pa1082-1083; Pa1087-1088; Pa1093-1094; Pa1102; Pa1106-1107; Pa1109-1110; Pa1113-1114). The payment of medical expenses is not at issue.

Allstate v. Carteret, ___ N.J. Super. at 19, explained that the purposes and plain language of the IFPA and AICRA are clear. PIP no-fault dispute resolution is intended by the Legislature to resolve expeditiously uncomplicated claims by an insured, an injured person, or a medical provider who has an assignment of benefits, related solely to payment of medical benefits stemming from single accidents, and not broad, complex, multi-defendant IFPA claims. Id. at 20, 25.

Affirmative IFPA cases brought by insurance companies therefore belong in Superior Court, and one-way disputes over the payment of PIP benefits that qualify belong in PIP dispute resolution. Id. at 33.

This result is not only reflected in the language of the IFPA and AICRA respectively, but also in the rules and regulations governing PIP dispute resolution, including the implementing regulations at N.J.A.C. 11:3-5.1 to -5.12, and the rules of Forthright, the current Administrator of New Jersey's No-Fault PIP Arbitration Program designated by the Commissioner of the Department pursuant to N.J.S.A. 39:6A-5.1(b). See https://www.nj-no-fault.com/rules (last accessed Dec. 16, 2024) ("Forthright's Rules"). See also Allstate v. Carteret, ___ N.J. Super. at 16.

Allstate's Second Amended Complaint alleged six inter-related and overlapping schemes in violation of statutes and regulations applicable to the provision of healthcare in New Jersey, the rules governing the practice of law in this State, and the IFPA. (Pa977-980). The trial court's decision to send certain causes of action to PIP no-fault dispute resolution improperly bifurcated the case into two incompatible and unworkable parts. (Pa8-18). As held in Allstate v. Carteret, ___ N.J. Super. at 33, and as discussed herein, no part of an IFPA claim brought by an insurance company in Superior Court is subject to PIP dispute resolution.

The trial court asserted that the insurance company's need for discovery and consolidation of multiple related claims was addressed by the Personal Injury Protection Dispute Resolution Plan ("Dispute Resolution Plan") that Forthright developed pursuant to the Department's regulation requiring that, "[t]he plan shall provide for consolidation of claims into a single proceeding where appropriate in order to promote prompt, efficient resolution of PIP disputes consistent with fairness and due process of law." (Pa16) (quoting N.J.A.C. 11:3-5.4(b)(2) (alteration in original)). However, the Department's regulation and the Dispute Resolution Plan only provide for consolidation of interdependent garden-variety PIP disputes into one proceeding, and do not expand the limited scope discovery provided for by Forthright under its arbitration rules. Allstate v. Carteret, ___ N.J. Super. at 20-22. Nor do they provide the insurance company with a viable forum to assert affirmative IFPA claims against multiple defendants, many of whom are not insureds or direct providers of medical treatment to the insureds. Id. at 20-25. Further, the Commissioner cannot intervene in, or otherwise be a party to, PIP dispute resolution. Id. at 23.

And finally, this court in Allstate v. Carteret not only held that the Third Circuit's decision in Government Employees Ins. Co. v. Mount Prospect Chiropractic Ctr., P.A., 98 F.4th 463 (3d Cir. 2024) ("GEICO"), is not precedential

or binding here, but its conclusions should be completely rejected. Id. at 31-32. See State v. O'Donnell, 255 N.J. 60, 81 (2023) (On questions that involve state statutory law, federal court opinions are looked to "for their persuasive reasoning, but their conclusions are not binding authority."). As Allstate v. Carteret, ___ N.J. Super. at 19-24, held, and as discussed above, neither the plain language of the IFPA, AICRA, the Department's regulations or Forthright's Rules, allow an insurer to obtain an affirmative recovery in PIP dispute resolution, much less the remedies allowed by the IFPA. The trial court's decision to bifurcate fraud claims under the IFPA here should be reversed.

POINT II

SERIOUS HARM TO THE PUBLIC WILL RESULT IF INSURANCE FRAUD PREVENTION ACT CLAIMS ARE LIMITED TO PERSONAL INJURY PROTECTION NO-FAULT DISPUTE RESOLUTION.

As noted, the Legislature enacted the IFPA "to confront aggressively the problem of insurance fraud in New Jersey." N.J.S.A. 17:33A-2. In Merin, 126 N.J. at 436, the Supreme Court recognized the magnitude of the problem of insurance fraud in the State, and noted that fraud constitutes "approximately ten to fifteen percent of all insurance claims." Consequently, courts "must construe the Act's provisions liberally to accomplish the Legislature's broad remedial goals" in enacting the IFPA. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 173

(2006).

Yet the decision below bifurcating the case between Superior Court and PIP dispute resolution has the opposite effect. Insurance companies — whose role in investigating and bringing actions to enforce against insurance fraud is significant — would be unable to fully use the IFPA to combat the huge problem of fraud in the insurance industry if an in-court forum was restricted or not available. But that also has significant downstream consequences. The efforts of the Department and the OIFP in protecting the public from insurance fraud receive invaluable assistance from investigations and referrals from, and the prosecution of IFPA cases by, insurance companies. By hampering the ability of insurance companies to investigate and bring such actions, the decision below also constrains the State's ability to do the same.

The Department, through its Bureau of Fraud Deterrence, is charged with protecting the public from insurance fraud — a mission that is encumbered by the PIP dispute resolution decision below. See N.J.S.A. 17:33A-8(a)(1). The IFPA provides for a civil enforcement action under the police power of the State against any person who violates the statute and establishes sanctions in the form of civil penalties, attorneys' fees and costs. See N.J.S.A. 17:33A-1 to -30 ("The purpose of this act is to confront aggressively the problem of insurance fraud in New Jersey by facilitating the detection of insurance fraud, [and] eliminating

the occurrence of such fraud through the development of fraud prevention programs"). The Department is allowed to, and does, intervene in IFPA cases filed by insurance companies to also seek civil penalties. See Allstate v. Lajara, 222 N.J. 129, 152 (2015) ("[T]he Commissioner may join in [an insurer's] action for the purpose of seeking judgment for the payment of a civil penalty authorized under [N.J.S.A. 17:33A-5]." (quoting N.J.S.A. 17:33A-7(d)) (alterations in original)).

In such cases, the Department works in conjunction with insurance companies to combat insurance fraud. N.J.S.A. 17:33A-7(d). But the Department cannot intervene in IFPA cases that are sent to PIP dispute resolution, in whole or in part, since those proceedings do not contemplate intervenor action by the Department to enforce the IFPA. See Allstate v. Carteret, ___ N.J. Super. at 23. As a result, the Department cannot exercise its authority to assess statutory civil penalties in IFPA cases in PIP dispute resolution. Thus, shunting IFPA claims to PIP dispute resolution is to also foreclose an important tool for the Department's efforts to combat insurance fraud.

The decision below affects the work of the OIFP as well. In addition to coordinating all insurance-related anti-fraud activities of State and local departments and agencies, the IFPA directs the OIFP to provide any assistance

necessary to any State agency in overseeing administrative enforcement activities. N.J.S.A. 17:33A-24(a). Under the direction of the Attorney General, the OIFP shall also "[f]ormulate and evaluate proposals for legislative, administrative and judicial initiatives to strengthen insurance fraud enforcement." N.J.S.A. 17:33A-24(b). The OIFP investigates a wide range of insurance fraud schemes and serves as the focal point for prosecuting all insurance fraud in the State of New Jersey. N.J.S.A. 17:33A-8(a)(1). And pursuant to the IFPA, the OIFP is obligated to investigate all referrals it receives from insurers, State agencies, or county and municipal governments, and prosecute where appropriate. N.J.S.A. 17:33A-19.

In fact, most cases investigated by the OIFP are the result of referrals from the Special Investigations Units of insurance companies, which are required by law to refer matters of suspected insurance fraud to the OIFP. N.J.S.A. 17:33A-9. If the referral is deemed appropriate for a civil investigation, it may be handled by the Department for civil investigation and recovery. Ibid. If deemed appropriate for a criminal investigation, the case may be assigned to the OIFP or a County Prosecutor's Office. Ibid. But if insurance companies are unable to access a Superior Court forum for their insurance fraud claims, or their access is limited, there will undoubtedly also be a commensurate impact on their will and ability

to investigate insurance fraud. That hinders an important source of information for OIFP's own criminal investigations.

As noted, the stated purpose of the IFPA is to aggressively confront the problem of insurance fraud in New Jersey. N.J.S.A. 17:33A-2. With regard to remedies, the IFPA directs the Department and the OIFP to prioritize the restitution of moneys to insurers and others who are defrauded as a major priority. N.J.S.A. 17:33A-2; N.J.S.A. 17:33A-26. In furtherance of this stated objective, insurance companies must also continue to have access to all of the powerful remedies listed within the IFPA, such as the recovery of compensatory damages, treble damages, costs of investigation, costs of suit, and attorneys' fees, to fight and deter insurance fraud. N.J.S.A. 17:33A-7. Any statutory interpretation that limits the relief ensured by the IFPA would have the unintended effect of undermining the purpose of the IFPA while also incentivizing insurance fraud.

Nor is there any indication that by enacting AICRA to manage and expeditiously resolve PIP disputes by medical providers, the Legislature intended to change the intent and remedial goals of the IFPA. AICRA also contributes to the public policy of aggressively confronting insurance fraud by supplementing, not supplanting, existing fraud prevention measures like the IFPA. The Legislature recognized that, "whether in the form of inappropriate

medical treatments, inflated claims, staged accidents, falsification of records, or any other form," insurance fraud must be "uncovered and vigorously prosecuted," and "greater consolidation of agencies" was needed for "sufficient coordination to aggressively combat fraud," which thus led to the creation of the OIFP. N.J.S.A. 39:6A-l.1. Moreover, AICRA calls for more, not less, statewide fraud fighting capabilities. Ibid. Thus, sending IFPA claims to PIP dispute resolution is contrary to both the spirit and the letter of the IFPA and the AICRA. See N.J.S.A. 17:33A-9 (requiring referrals to the BFD and OIFP of alleged violations for investigation); Allstate v. Carteret, ___ N.J. Super. at 23-24.

A decision that will in whole or in part send insurance fraud claims from Superior Court to PIP no-fault dispute resolution proceedings will negatively impact the fight against insurance fraud, and will severely weaken the collective ability of carriers, the Department, and the OIFP to combat insurance fraud within the State of New Jersey. The Legislature did not so intend.

CONCLUSION

For these reasons, this court should hold that claims under the Insurance Fraud Prevention Act are not subject to Personal Injury Protection No-Fault Dispute Resolution under N.J.S.A. 39:6A-5.1(a), and reverse the decision below.

Respectfully submitted,

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By: s/Jeffrey S. Posta
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Dated: January 15, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY CO.; ALLSTATE INS. CO.; ALLSTATE NEW JERSEY INS. CO.; ALLSTATE PROPERTY AND CASUALTY INSURANCE. Plaintiffs/Appellants, PENNSAUKEN SPINE & REHAB; DOMINIC MARIANI, D.C.; MARK BOLLINGER, D.C., MICHAEL ROSS, D.C.; WILFREDO CASTRO A/K/A "FREDDIE CASTRO" "WILFREDO S. CASTRO" "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSITIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOPSEPH KEPKO, D.O; SILVERS LANGSAM & WEITZMAN ASSOCIATES P.C. (F/K/A SILVERS LANGSAM& WEITZMAN, P.C.); DEAN WEITZMAN ESQ.; BROWNSTEIN PEARLMAN,WIEZER, NEWMAN & COOK, P.C.(F/K/A BROWNSTEIN PEARLMAN,WIEZER & NEWMAN P.C.); CURTIS BRACEY;JOHN DOE 1-50; JOHN ROE 1-50; ABC CORP 1-50; XYZ P.C. 1-50 Defendants/Respondents	:Docket A-003819-23 : : :On Appeal from an Order of :The Superior Court of New :Jersey, Law Division, Mercer :County :Docket No. MER-L-2288-21 : : :Sat Below: :Hon. R. Brian McLaughlin, J.S.C. : : : : : : : : : : : : : : : : : :

DEFENDANTS-RESPONDENTS, CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, JOHN HOCHBERG, M.D., COLLEEN MULRYNE, D.C., BRADLEY BODNER, D.O., AND JOSEPH KEPKO, D.O., REPLY BRIEF TO *AMICUS* NEW JERSEY OFFICE OF ATTORNEY GENERAL

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

Given the the recent published decision in Allstate v. Carteret Comprehensive Medical Care, P.C., ___ N.J. Super ___ (App. Div. 2025), the question now before the court is whether an insurer can relabel or repackage common Personal Injury Protection ("PIP") disputes into an Insurance Fraud Prevention Act ("IFPA") claim and abrogate New Jersey's Personal Injury Protection ("PIP") system. Respectfully, the *amicus* brief filed on behalf of the New Jersey Office of Attorney General ("OAG") substantially misses this point and misinterprets Allstate v. Carteret.

With that question in mind, the trial court's June 28, 2024 order dismissing Counts Ten through Fifteen of Plaintiffs' Second Amended Complaint against Defendants-Respondents, Central Jersey Orthopedic and Neurodiagnostic Group, LLC, John. L Hochberg, M.D., Colleen Mulryne, D.C., Bradley A. Bodner, D.O., and Joseph Kepko, D.O. (collectively, "the Central Jersey Defendants" or "CJONG") is entirely consistent with the recent published decision in Allstate v. Carteret, ___ N.J. Super ___ (App. Div. 2025).

The trial court's June 28, 2024 order was based on its earlier August 3, 2023 order and decision granting in part Defendants Pennsauken Spine and Rehab, P.C., Dominic Mariani, D.C., Mark A Bolinger, D.C., and Michael Ross, D.C.

(Collectively "the Pennsauken Spine Defendants") motion to dismiss Plaintiffs' original Complaint in favor of PIP arbitration.

In its June 28, 2024 and August 3, 2023 orders the trial court properly analyzed Plaintiffs' underlying claims and properly retained jurisdiction of Insurance Fraud Prevention Act ("IFPA") matters, consistent with Allstate v Carteret, while remanding to PIP arbitration those matters which involved common PIP disputes. In doing so, the trial court recognized that relabeling a PIP dispute as an IFPA claim circumvented N.J.S.A. 39:6A1.1 to 35, and prior Appellate precedent rejecting the practice of insurers attempting to avoid arbitration through repackaging or relabeling PIP disputes.

Concerning both the Pennsauken Spine Defendants and Central Jersey Defendants, the trial court retained jurisdiction of runner and kickback claims which are plainly IFPA related, but remanded to arbitration common PIP disputes involving: alleged upcoding of chiropractic evaluations; alleged poor patient documentation; alleged faulty physical examinations; qualification for EMG testing reimbursement; and allegedly performing EMG testing without clinical support or value. In short, the claims remanded involved issues which are routinely handled at PIP arbitration on a daily basis.

As such, the trial court's June 28, 2024 is consistent with Allstate v. Carteret, ___ N.J. Super ___ (App. Div. 2025) and Plaintiffs' appeal should be denied.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Central Jersey Defendants will rely on the procedural history and statement of facts previously submitted submitted. (CJONGb 3).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S JUNE 28, 2024 ORDER PROPERLY DISMISSED PLAINTIFFS' COMPLAINT PERTAINING TO COMMON PIP DISPUTES (Pa0001; Pa0003; Pa0005)

It is important to reiterate Plaintiffs method of pleading is to use a three count system using the same predicate facts to support three causes of action. (Pa0019; Pa0967). This is necessary as the OAG fails to perform any analysis of the underlying allegations in its reliance on Allstate v Carteret___ N.J. Super ___ (App. Div. 2025). The same facts are used to support declaratory judgment, unjust enrichment, and IFPA causes of action.

Against the Pennsauken Spine Defendants, the allegations in counts two and three of the initial Complaint concerned a "runner and kickback scheme" and were

[1] The Procedural History and Statement of Facts have been combined for the convenience of the Court as they are substantially related.

recognized by the trial court to be IFPA related and therefore jurisdiction was retained. (Pa0003).

Counts four, five and six were dismissed. (Pa0003). These three counts were labeled a "billing scheme." (Pa01130-0131). The facts alleged to support the allegations were that the chiropractic exams were upcoded meaning a higher level Current Procedural Terminology ("Cpt") code was billed than performed. This is a very routine defense in PIP arbitrations and easily handled by arbitrators who consult the Cpt code definitions published by the American Medical Association when evaluating the code billed. Accordingly these counts were dismissed to arbitration. (Pa0003).

Counts seven, eight, and nine against the Pennsauken Spine Defendants were creatively labeled a "Concealment of Past Medical History Scheme." (Pa0132-0142). However, the facts supporting these counts were again routine PIP disputes regarding whether or not a medical provider properly supported the treatment requested or rendered. Id. The allegations were that those defendants did not consider previously performed testing, did not properly document patient files and did not physically examine patients. As these were also common PIP disputes, the counts were dismissed to arbitration. (Pa0003).

Concerning the Central Jersey Defendants, counts ten, eleven, and twelve of the Second Amended Complaint (identical to the initial complaint) alleged that the provider was not eligible for PIP benefits related to EMG testing as it had a

chiropractor as a partial owner[2]. (Pa1073-1087). This was labeled "CJON Unlawful Practice Structure Scheme." Plaintiffs relied upon certain Board of Medical Examiner and Board of Chiropractic regulations. Id. Interpreting pertinent board regulations is an every day occurrence in PIP arbitration. Therefore the trial court dismissed these counts. (Pa0003).

The thirteenth, fourteenth, and fifteenth counts alleged CJONG failed to comply with applicable medical standards when performing electrodiagnostic testing. (Pa1088-1107). The counts were packaged as "CJON Fraudulent EDX Testing Scheme." However the allegations supporting these counts were that the testing lacked clinical value and was not clinically supported. In PIP parlance the claim was that the testing was not "medically necessary." Medical necessity questions exist in the overwhelming majority of the Forty Five Thousand PIP arbitrations filed each year and are at the very core what is considered by a PIP arbitrator. Due to this being a basic PIP dispute question, the counts were remanded to arbitration. (Pa0003).

Relative to the Second Amended Complaint, new counts sixteen and seventeen were added and alleged a kickback schemed based on free rent against both the Pennsauken and Central Jersey Defendants. (Pa1107-1114). These counts

[2] It should be noted these defendants denied the allegation due to the fact they comprised a multi-disciplinary medical practice, were not a diagnostic testing facility within the meaning of the regulation, and the chiropractor owner has not existed for the past five years. (Pa0189).

were retained as they included IFPA claims which did not involve true PIP disputes. (Pa0967).

Recently the Appellate Division issued its decision in Allstate v. Carteret Comprehensive Medical Care, P.C., ___ N.J. Super ___ (App. Div. 2025). The court recited in detail the history, purpose, and scope of New Jersey's No Fault Insurance laws and regulations as well as the Insurance Fraud Prevention Act. After reconciling the IFPA and No Fault insurance law the court found: "Therefore, we conclude claims under the Fraud Act and Rico do not fall within the ambit of PIP arbitration under AICRA." Allstate v. Carteret, ___ N.J. Super at 24. (App. Div. 2025).

In its brief in opposition to this appeal, the Central Jersey Defendants also recited the relevant portions of the No Fault Act and referenced extensive Appellate precedence for the proposition that PIP is statutorily favored and insurers can not simply bundle, repackage, and relabel common PIP disputes to avoid arbitration of those routine defenses. (CJONGb 32). For the sake of brevity those statutes, regulations, and cases will not be summarized again herein. However, those cases in which prior Appellate panels rejected insurers attempts to repackage and relabel common PIP disputes were not overturned or distinguished in Allstate v Carteret. Id.

The Allstate v Carteret decision is easily reconciled with the present appeal. The decision regarding IFPA claims being properly venued in Superior Court is

clear. However, there also was no holding in this decision which ignored the long standing precedent that routine PIP matters should be in arbitration. Allstate v. Carteret, ___N.J. Super. ___(App. Div. 2025). Further, there was no blanket pronunciation that trial courts should not readily assess the underlying predicate facts to determine the true nature of the claims before making a decision on retaining IFPA claims or remanding appropriate PIP claims to arbitration.

In this matter, the trial court comprehensively evaluated Plaintiffs' claims to determine if they were legitimate IFPA claims or involved routine PIP issues. (Pa0005). This analysis is consistent with established precedent. See State Farm Ins. Co. v. Sabato, 337 N.J. Super. 393 (App. Div. 2000); State Farm Mut. Auto. Ins. Co. v. Molino, 289 N.J. Super. 406 (App. Div. 1996); State Farm Indem. Co. v National Liability & Fire Ins. Co. 439 N.J. Super. 532 (App. Div. 2015); Endo Surgi Ctr., P.C. v. Liberty Mut. Ins. Co. 391 N.J. Super. 588 (App Div. 2007).

Accordingly, it is respectfully asserted that while Allstate v. Carteret___N.J. Super. ___(App. Div. 2025) compels Superior Court litigation of true IFPA matters, it should not be extended to prevent trial courts from conducting an assessment of the nature of the underlying claims and remand those composed of routine PIP disputes. To conclude otherwise would allow insurers to relabel the most basic medical necessity matter into an IFPA claim simply by inserting the requisite prayer for relief. This would allow insurers the ability to abrogate our entire PIP scheme by allowing them to pick and choose at will whether to litigate or arbitrate.

Furthermore, to allow insurers to improperly repackage and bundle otherwise routine PIP disputes into an IFPA matters would harm New Jersey citizens and providers. The OAG's assertion that the public would be seriously harmed by the trial court's rulings turns existing case law upside down and is palpably incorrect.

As noted by the Supreme Court in Amiano v v. Ohio Casualty Ins. Co., 85 N.J. 85 (1980), the No Fault is social legislation intended to provide insureds with prompt payment of medical bills. Allowing insurers to repackage and relabel routine PIP disputes into protracted litigation of IFPA claims directly thwarts the intent of our No Fault insurance laws and harms the public. This harm to the public certainly outweighs the harm alleged by the OAG's in its apparent support of insurers being able to insert IFPA prayers for relief into routine PIP matters.

CONCLUSION

For the foregoing reasons, The Central Jersey Defendants respectfully request that Plaintiffs' appeal from the Trial court's June 28, 2024 Order dismissing Count Ten through Fifteen of the Second Amended Complaint be denied.

Respectfully Submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY; ALLSTATE INDEMITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE NEW JERSEY INSURANCE COMPANY; ALLSTATE NEW JERSEY PROPERTY & CASUALTY INSURANCE; and ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

PENNSAUKEN SPINE AND REHAB, P.C.; DOMINIC MARIANI, D.C.; MARK A. BOLINGER, D.C.; MICHAEL ROSS, D.C.; WILFREDO W. CASTRO, A/K/A "WILFREDO S. CASTRO," "FREDDIE CASTRO," "FRED SERRANO"; CENTRAL JERSEY ORTHOPEDIC AND NEURODIAGNOSTIC GROUP, LLC; JOHN L. HOCHBERG, M.D.; COLLEEN MULRYNE, D.C.; BRADLEY A. BODNER, D.O.; JOSEPH KEPKO, D.O.; SILVERS LANGSAM & WEITZMAN ASSOCIATES, P.C. (F/K/A SILVERS, LANGSAM & WEITZMAN, P.C.); DEAN

Docket No. A-003819-23

On Appeal from:
Superior Court of New Jersey, Law Division, Mercer County
Docket No. MER-L-002288-21

Sat Below:
Hon. R. Brian McLaughlin, J.S.C.

WEITZMAN, ESQUIRE; BROWNSTEIN PEARLMAN WIEZER NEWMAN & COOK, P.C. (F/K/A BROWNSTEIN PEARLMAN WIEZER & NEWMAN, P.C.); CURTIS BRACEY; JOHN DOE 1-50; JOHN ROE 1-50; ABC CORP. 1-50; XYZ, P.C. 1-50,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS, PENNSAUKEN SPINE AND REHAB, P.C., DOMINIC MARIANI, D.C., MARK A. BOLINGER, D.C., AND MICHAEL ROSS, D.C., IN RESPONSE TO *AMICUS* BRIEF OF THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE AND THE NEW JERSEY OFFICE OF THE INSURANCE FRAUD PROSECUTOR

Dated: January 31, 2025

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

PRELIMINARY STATEMENT

Captured by Plaintiffs, Allstate Insurance Company, *et al.*'s ("Plaintiffs'"), exorbitant annual spending, lobbying, and support, the New Jersey Office of Attorney General ("OAG") has filed a biased *amicus* brief on behalf of its subdivisions, the New Jersey Department of Banking and Insurance and New Jersey Office of the Insurance Fraud Prosecutor. Therein, OAG blindly supports Plaintiffs' positions, without even endeavoring to understand the facts, claims, or issues pending in this appeal. While OAG presents itself as a neutral "friend of the Court," OAG is undoubtedly an ally of Plaintiffs. Other than parroting Plaintiffs' arguments and lobbying for a decision on Plaintiffs' behalf, OAG provides no assistance to the Court on the issues to be decided.

For three independent, but equally compelling reasons set forth below, Defendants, Pennsauken Spine and Rehab, P.C., Dominic Mariani, D.C., Mark A. Bolinger, D.C., and Michael Ross, D.C. ("the PSR Defendants"), submit that OAG's arguments should be rejected, Plaintiffs' appeal should be denied, and the trial court's August 3, 2023 and June 28, 2024 rulings should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The PSR Defendants hereby incorporate by reference the Procedural History and Statement of Facts set forth in their initial Respondents' Brief filed on December 2, 2024.

LEGAL ARGUMENT

I. OAG WHOLLY IGNORES THAT PLAINTIFFS WAIVED THEIR APPEAL RIGHTS AS TO THE RULINGS NOW ON APPEAL (Respondents' Brief, pp. 10-18)

As an initial matter, it should be noted that OAG does not address (or even attempt to address) the inescapable legal conclusion that Plaintiffs waived their appeal rights as to the rulings presented on appeal. (*Amicus* Brief, pp. 1-20). These arguments are front and center in the PSR Defendants' initial Respondents' Brief at pages 10-18. (Respondents' Brief, pp. 10-18).

As set forth therein, Plaintiffs failed to timely appeal the trial court's August 3, 2023 Order granting the PSR Defendants' Motion to Dismiss as to Counts 1 and 4-9 in favor of PIP arbitration. (Id. pp. 15-18). Consequently, since Plaintiffs failed to appeal the August 3, 2023 Order, as of right, within the 45-day deadline prescribed by R. 2:4-1(a) and R. 2:4-3(e), that ruling is not appealable and this Court lacks jurisdiction to decide the merits of this appeal. See GMAC v. Pittella, 205 N.J. 572, 587 (2011); see also Hayes v. Turnersville Chrysler Jeep, 453 N.J. Super. 309, 311 (App. Div. 2018); In re Hill, 241 N.J. Super. 367, 371 (App. Div. 1990). Critically, the time restriction imposed by R. 2:4-1(a) and R. 2:4-3(e) may not be relaxed by this Court. See Hayes, 453 N.J. Super. at

312 ("Because the order shall be deemed final, a timely appeal on the issue must be taken then or not at all.").[1]

As also set forth therein, Plaintiffs failed to oppose or object to the trial court's June 28, 2024 Order granting the Motion to Dismiss filed on behalf of Defendants, Central Jersey Orthopedic and Neurodiagnostic Group, LLC, John L. Hochberg, M.D., Colleen Mulryne, D.C., Bradley A. Bodner, D.O., and Joseph Kepko, D.O. ("the CJO Defendants"), as to Counts 10-15 in favor of PIP arbitration. (Respondents' Brief, at pp. 10-15). Therefore, since Plaintiffs failed to oppose or otherwise object to the June 28, 2024 Order and, instead, consented to the dismissal of Counts 10-15 in favor of PIP arbitration, Plaintiffs waived their right, and lack standing, to now appeal the June 28, 2024 Order. See Yun v. Ford Motor Co., 276 N.J. Super. 142, 149 (App. Div. 1994); Infante v. Gottesman, 233 N.J. Super. 310, 319 (App. Div. 1989).

In sum, Plaintiffs waived their appeal rights as to the trial court's August 3, 2023 and June 28, 2024 Orders and, without even getting to the merits, Plaintiffs' appeal is jurisdictionally and procedurally deficient. These deficiencies damn Plaintiffs' appeal and, by extension, OAG's *amicus* brief,

[1] Due to Plaintiffs' failure to timely file an appeal, as of right, as to the August 3, 2023 Order, the parties have already proceeded to PIP arbitration on the underlying disputes, virtually all of which have been disposed of in the PSR Defendants' favor.

which fails to even challenge said deficiencies.[2] For this reason alone, OAG's positions should be rejected and the trial court's rulings should be affirmed.

II. OAG MISINTERPETS THE CARTERET HOLDING, MISUNDERSTANDS THE FACTS AND ISSUES IN THIS ACTION, AND/OR FAILS TO RECOGNIZE THAT THE CARTERET HOLDING IS CONSISTENT WITH THE TRIAL COURT'S RULINGS IN THIS ACTION (*Amicus* Brief, pp. 8-14)

In addition to Plaintiffs' fatal jurisdictional issues and procedural mishaps, which OAG conveniently ignores, OAG's arguments substantively lack merit. OAG relies primarily on this Court's recent holding in Allstate N.J. Ins. Co. v. Carteret Comprehensive Med. Care, PC, No. A-0778-23, 2025 N.J. Super. Lexis 3 (App. Div. Jan. 9, 2025) to suggest, "[t]he trial court's decision here should therefore be reversed." (*Amicus* Brief, at p. 4) (also asserting, "[t]he outcome of this appeal is controlled by the recent published decision in [Carteret]."). Contrary to OAG's

[2] It is not surprising OAG chose to overlook these inescapable defects considering its real motives in entering its appearance and filing its *amicus* brief in this appeal. Captured by Plaintiffs' exorbitant annual spending, lobbying, and support, OAG blindly supports Plaintiffs' positions in this action, without even endeavoring to understand the facts, claims, or issues actually pending in this appeal. In 2023 alone, Plaintiffs' aggregate expenditures in the public policy area were approximately $10.8 million, which represents a fraction of a percent of overall revenues for Plaintiffs. It is no surprise, therefore, that Plaintiffs have been able to influence OAG to lobby on their behalf in this action. While OAG presents itself as a "friend of the Court," it instead acts as an ally of Plaintiffs. See Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The term '*amicus curiae*' means friend of the court, not friend of a party.") (citation omitted). Accordingly, OAG's *amicus* brief is abusive, impermissible, and unhelpful. It should be rejected for these additional reasons.

suggestions, Carteret provides further support for the trial court's August 3, 2023 and June 28, 2024 Orders. OAG either misinterprets Carteret, misunderstands the facts and issues in this action, or fails to recognize Carteret is actually ***consistent*** with the trial court's rulings in this action. (*Amicus* Brief, at pp. 8-14).

In Carteret, this Court analyzed Plaintiffs' claims under the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 *et seq.* ("IFPA"), and the New Jersey Anti-Racketeering Act, N.J.S.A. 2C:41-1 *et seq.* ("RICO"), relating to alleged "Runner and Kickback" and "Self-Referral" schemes by medical provider and non-medical provider defendants to defraud Plaintiffs out of millions of dollars in insurance benefits. 2025 N.J. Super. Lexis 3, at *3. Based on the facts alleged in Carteret, this Court held that Plaintiffs pled viable IFPA claims, which belonged in the Superior Court, rather than PIP arbitration under New Jersey's Compulsory Insurance Law, N.J.S.A. 39:6B-1 *et al.*, and the Automobile Reparation Reform Act, N.J.S.A. 39:6A-1 *et al.* ("the No-Fault Law"). Id.

Moreover, in Carteret, this Court recognized that permitting a jury trial as to any PIP dispute with a "fraud" or "IFPA" label "would open the door to circumvention of the statutorily mandated alternative dispute resolution procedure provided by *N.J.S.A.* 39:6A-5.1." Id. at *28 (quoting Endo Surgi Center, P.C. v. Liberty Mut. Ins. Co., 391 N.J. Super. 588, 594-95 (App. Div. 2007)). Thus, in its analysis in Carteret, this Court made a critical distinction between viable IFPA

claims alleging actual "insurance fraud" and the pure PIP disputes recognized under the No-Fault Law. Id. Pure PIP disputes should proceed to arbitration, while viable IFPA claims should remain before the Superior Court. Id.

The facts, claims, and issues in this action are highly distinguishable from the facts, claims, and issues in Carteret. (Pa0019; Pa0967). Here, it is true Plaintiffs asserted IFPA claims relating to alleged "Runner and Kickback" and "Referral and Kickback" schemes against both medical provider and non-medical provider defendants to defraud Plaintiffs out of insurance benefits (Counts 2-3, 17-18). (Id.). Significantly, Plaintiffs also asserted claims solely against the medical provider defendants, alleging pure PIP disputes relating to medical necessity determinations, improper coding assertions, and alleged billing issues (Counts 1, 4-15). (Id.).[3]

For example, in Counts 4-6, which are asserted solely against the PSR Defendants, Plaintiffs allege the PSR Defendants subjected virtually every patient to a "cookie-cutter" course of treatment regardless of medical necessity. (Id.). Plaintiffs allege the "cookie cutter treatments and canned reports was not designed by the [PSR] Defendants to treat the legitimate complaints of the Allstate Claimants or the Other No Fault Patients." (Id.). Plaintiffs further allege the PSR Defendants submitted PIP claims to Plaintiffs with certain billing codes (CPT Codes) that did not match up with the amount of time Plaintiffs contend should have been spent with

[3] It should be noted there are no RICO claims asserted here. (Pa0019; Pa0967).

the patients to provide the treatments and services. (Id.). Thus, in Counts 4-6, Plaintiffs assert a dispute as to the eligibility of the PSR Defendants to be compensated for the treatments and services provided. (Id.).

Similarly, in Counts 7-9, which are also asserted solely against the PSR Defendants, Plaintiffs allege the PSR Defendants submitted PIP claims to Plaintiffs with patient medical histories missing on certain areas of the cover forms accompanying the claims. (Id.). Plaintiffs allege the medical histories of each patient should have been included on the cover forms, despite that the same information was plainly included in other areas of the submissions. (Id.). Thus, in Counts 7-9, Plaintiffs assert a dispute as to whether the treatments and services provided were reasonable and necessary. (Id.).

A review of the claims dismissed by the trial court on August 3, 2023 and June 28, 2024 demonstrate those claims allege specialized and technical medical issues solely between Plaintiffs and medical providers, which the arbitrators are appropriately educated, equipped, and statutorily required to handle in PIP arbitration. (Id.). Those claims encompass a host of individualized PIP "disputes" falling squarely within N.J.S.A. 39:6A-5.1(c), which, upon election of either party, are to be submitted to arbitration. In other words, at their core, those claims are pure "PIP disputes." Those claims are certainly not "affirmative claims for insurance fraud," as OAG dismissively characterizes them. (*Amicus* Brief, at p. 1). Upon actual

review with unbiased lenses, OAG should agree the claims dismissed in favor of arbitration included disputes over the recovery of PIP benefits, *i.e.* "disagreements over the amount or legitimacy of medical expenses and related costs." (Id. at p. 5).

As the trial court ruled on August 3, 2023 (and, by extension, on June 28, 2024), Counts 2-3 and 17-18 allege viable IFPA claims that should remain before the Superior Court, while Counts 1 and 4-15 fail to state viable IFPA claims and, instead allege pure PIP disputes that belong in arbitration under the No-Fault Law. (Pa0001; Pa0003; Pa0005; 2T at 37:21-38:12; 4T at 14:25-16:3). Stated another way, Plaintiffs' efforts to cloak its allegations in "fraud" do not alter that arbitration is the proper forum for resolution of the individualized, technical PIP disputes. (Id.).

With these rulings, the trial court found that Plaintiffs' IFPA claims relating to the alleged "Runner and Kickback" and "Referral and Kickback" schemes involve interrelated accidents, where a single determination may moot all underlying PIP disputes from being individually litigated on the merits. (Id.). On the other hand, the trial court properly found that the other asserted claims involve hundreds of individualized PIP disputes that must be reviewed independently and cannot be disposed of via a single determination by the trial court. (Id.). The trial court, therefore, appropriately bifurcated pure PIP disputes involving disagreements over the amount or legitimacy of medical expenses and related costs solely between Plaintiffs and medical providers from viable IFPA claims involving both medical

providers and non-medical provider defendants and grand, multi-faceted schemes to allegedly defraud Plaintiffs. (Id.).

In each case, the underlying allegations and claims must be independently assessed to determine whether they allege viable IFPA claims that should remain in the Superior Court or pure PIP disputes that belong in arbitration under the No-Fault Law. While Plaintiffs attempt to improperly stamp an "IFPA" label on some of their claims asserted solely against medical providers, those claims fail to state viable IFPA claims and those pure PIP disputes are exclusively reserved for PIP arbitration.[4] Thus, the trial court's rulings to dismiss certain claims in favor of PIP arbitration under the No-Fault Law, while retaining jurisdiction over Plaintiffs' viable IFPA claims are entirely consistent with the principles set forth in Carteret.

Furthermore, the trial court's rulings are entirely consistent with the principles delineated in the other seminal New Jersey decisions, including:

- State Farm Mut. Auto. Ins. Co. v. Molino, 289 N.J. Super. 406, 410-11 (App. Div. 1996) ("Carriers should not be empowered to avoid arbitration simply by characterizing PIP disputes as questions of 'entitlement' or 'coverage' and then seeking judicial resolution of those issues.").

- Allstate v. Lopez, 311 N.J. Super. 600, 663-68 (Law Div. 1998) (retaining jurisdiction over viable IFPA claims relating to a "massive fraud ring" because not

[4] It is worth noting that, with Counts 4, 5, 7, 8, 10, 11, 13, and 14, Plaintiffs do not even attempt to improperly stamp an "IFPA" label on the pure PIP disputes. However, OAG fails to understand (or purposefully ignores) these facts.

only was there a commonality of facts, parties, and witnesses that ran through the underlying accidents, but, critically, there was a common question of insurance coverage regarding whether the policies were void with respect to all claimants, which, if denied, would bar all claims and avoid the need for arbitration).

- State Farm Ins. Co. v. Sabato, 337 N.J. Super. 393 (App. Div. 2001) (rejecting efforts to avoid arbitration by characterizing PIP disputes as issues of "fraud").

- Nationwide Mutual Fire Ins. Co. v. Fiouris, 395 N.J. Super. 156, 160 (App. Div. 2007) (concluding that, unlike disputes involving the propriety of the medical treatment rendered or the recovery of PIP benefits under valid insurance policies, disputes over the validity of an insurance policy are "subject to judicial resolution" under the IFPA).

- Endo Surgi Center, 391 N.J. Super. at 594-95 (permitting jury trial as to any PIP dispute with a "fraud" or "IFPA" label "would open the door to circumvention of the statutorily mandated alternative dispute resolution procedure provided by *N.J.S.A.* 39:6A-5.1.").

- Rivera v. Allstate Ins. Co., 2011 N.J. Super. Unpub. Lexis 1127, at *6-7 (App. Div. May 4, 2011) ("Since this is a dispute about payment of PIP benefits, even if Allstate raises fraud as a bar to payment of the claim, the matter must first be arbitrated.").[5]

- Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 134 (2015) (finding the defendants were entitled to a jury trial on viable IFPA claims asserted against them).

[5] This unpublished opinion in was attached to the PSR Defendants' Appendix at Da0125. Under R. 1:36-3, we are unaware of any contrary unpublished opinions.

- State Farm Indem. Co. v. National Liability & Fire Ins. Co., 439 N.J. Super. 532, 536-38 (App. Div. 2015) (recognizing "transactional efficiency" is the "legislative grail" of our State's no-fault auto insurance system and insurance carriers are not permitted to "avoid arbitration simply by characterizing PIP disputes as questions of coverage," including claims of fraud, to seek judicial resolution).

Additionally, the trial court's rulings are consistent with the public policies underlying the IFPA and No-Fault Law. Compare Molino, 289 N.J. Super. at 410-11 ("[A]ny 'dispute' concerning a 'payment' of PIP benefits … is subject to binding arbitration" and to the extent "dispute" creates any ambiguity, "we must construe it liberally to harmonize the arbitration provision with [the] firm policy favoring prompt and efficient resolution of PIP disputes without resort to the judicial process.") with Lajara, 222 N.J. at 143 ("The IFPA was enacted to 'confront aggressively the problem of insurance fraud.'"). The trial court's rulings fully appreciate, and seamlessly mesh, the policy favoring the prompt and efficient resolution of PIP disputes without resort to the judicial process under the No-Fault Law with the policy against insurance fraud and the private right of action authorized in the IFPA to aggressively confront such fraud.

OAG's arguments fail to recognize the critical distinctions between the facts, claims, and issues in Carteret and the facts, claims, and issues in this action. Or, OAG misinterprets or misunderstands this Court's ruling in Carteret. Either way, OAG's positions should be rejected and the trial court's rulings affirmed.

III. OAG'S ASSERTION OF ANY "SERIOUS HARM TO THE PUBLIC" THAT MAY RESULT FROM THE TRIAL COURT'S RULINGS IS A RED HERRING (*Amicus* Brief, pp. 14-19)

OAG also asserts that "serious harm to the public" will result if IFPA claims are limited to arbitration under the No-Fault Law. (*Amicus* Brief, pp. 14-19). OAG's assertion of any "serious harm to the public" that may result from the trial court's rulings is nothing more than a red herring, which should be soundly rejected.

As set forth above, the trial court's rulings to retain jurisdiction over viable IFPA claims, while dismissing pure PIP claims in favor of PIP arbitration fully appreciate, and seamlessly mesh, the policy favoring prompt and efficient resolution of PIP disputes without resort to the judicial process under the No-Fault Law with the policy against insurance fraud and private right of action authorized in the IFPA.

To those ends, the trial court's rulings ensure claimants and medical providers may achieve prompt and efficient resolution of pure PIP disputes, while insurance carriers and the government are, simultaneously, able to aggressively combat insurance fraud. Contrary to the positions taken by Plaintiffs, and regurgitated by OAG, the trial court's rulings ensure that both insurance carriers and the government retain their right to a jury trial on viable IFPA claims, as well as the remedies provided under the IFPA on such claims. Nothing resulting from the rulings would interfere with or limit "the prosecution of civil and criminal insurance fraud cases" or OAG's functions "in protecting the public from insurance fraud." (Id. p. 3).

Contrary to OAG's argument (which is upside down and incorrect), the public will be seriously harmed ***only if*** the trial court's rulings are overturned. Specifically, should insurance carriers be permitted to combine and mutate normal, everyday PIP disputes into improper actions under the IFPA, while simultaneously withholding the underlying benefits and staying the arbitrations as the litigation proceeds, the entire PIP system would be rendered meaningless. Carriers would be freely permitted to abrogate the PIP system, which has been around for well over forty (40) years, in their sole discretion. ***Unfortunately, this is not an exaggeration***. A review of the dismissed claims demonstrate that those claims allege specialized and technical medical issues, which the arbitrators are appropriately educated, equipped, and statutorily required to handle in arbitration. (Pa0019; Pa0967).

The motives of insurance carriers are clear:

(a) avoid arbitration, where an individualized review of the claims will occur and the veracity of the underlying PIP disputes will be appropriately vetted;

(b) aggregate hundreds, if not thousands, of individualized PIP disputes, identify some extraneous similarity between the disputes, and stamp an "IFPA" label on them;

(c) withhold the underlying PIP benefits and all arbitrations as the litigation proceeds to completely halt payments to the small business medical providers; and

(d) leverage a favorable settlement with such medical providers, who are simply unable to go toe-to-toe with the

> financial resources of the insurance carriers in a costly legal battle before the Superior Court.[6]

It is not a stretch for this Court to find that Plaintiffs' have already used improper "IFPA" labels on pure PIP disputes to manipulate the PIP arbitration scheme and to substantially harass, abuse, and oppress the PSR Defendants in bad faith.[7]

In turn, claimants would be substantially disincentivized from seeking necessary treatment and services to address their injuries, while medical providers would similarly be disincentivized from accepting these claimants. As a result, the public would be seriously harmed through the fear or inability to obtain necessary treatment and services to address their injuries, all while the insurance carriers are off the hook for the insurance benefits they are obligated to pay under the applicable insurance policies and the No-Fault Law. Therefore, contrary to OAG's assertion, only if the trial court's rulings are overturned will the public be seriously harmed.

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[6] In most instances, the carriers are large, well-capitalized conglomerates with several billion dollars in assets, while the providers are small, local businesses which rely on the regular stream of PIP benefits to maintain an ongoing operation. Here, Plaintiffs had statutory capital and assets of $18.0 billion at the end of 2023.

[7] To provide context, this action has been pending for over three (3) years. During that time, Plaintiffs have withheld over $600,000.00 in PIP benefits owed to the PSR Defendants based on the pending litigation and moved to stay all pending and forthcoming arbitrations between the parties. Moreover, Plaintiffs have asserted at least nine (9) separate complaints against the PSR Defendants, filed countless reconsideration motions with the trial court, brought or attempted to bring at least two (2) appeals before this Court relating to the trial court's rulings, issued over one thousand (1,000) discovery requests to the PSR Defendants, and subpoenaed the bank records of the PSR Defendants and even some of their family members.

CONCLUSION

Plaintiffs' appeal is both procedurally and substantively flawed. Even looking beyond the glaring deficiencies, OAG fails to understand (or purposefully ignores) the facts, claims, and issues presented on appeal in this action. Alternatively, OAG misinterprets the Carteret holding and/or misapplies that holding to the facts, claims, and issues on appeal in this action. The remarkably biased *amicus* brief filed by OAG, without even OAG's elementary understanding of the facts, claims, and issues actually pending on appeal, provides no assistance to this Court on the issues to be decided. The appearance of OAG under the guise of *amicus curiae* obstructs, rather than aids the just resolution of this appeal.

For the foregoing reasons, the PSR Defendants respectfully submit that the positions advanced by OAG in its *amicus* brief should be rejected, Plaintiffs' appeal should be denied, and the trial court's August 3, 2023 and June 28, 2024 rulings should be affirmed.

Respectfully submitted,

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Dated: January 31, 2025

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