WALTER USZENSKI, JACQUELINE HALSEY, and J.H., A MINOR, Plaintiffs-Appellants v. BRICK TOWNSHIP BOARD OF EDUCATION, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003834-23 T4 *Civil Action* ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, Dkt. No. Below: MON-L-001823-23 SAT BELOW: HON. OWEN C. MCCARTHY, P.J.CV.

BRIEF OF PLAINTIFFS-APPELLANTS, WALTER USZENSKI, JACQUELINE HALSEY AND J.H., A MINOR

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Re-Submission Date: December 3, 2024

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PRELIMINARY STATEMENT

In this CEPA case, Plaintiff Walter Uszenski, then-Superintendent of Schools for Defendant, Brick Board of Education (BBOE), objected to and refused to participate in the theft of services by a State Senator's sister who for years had a no-show/no-work job with the BBOE. Plaintiff Uszenski caused the demotion of the corrupt Director who allowed this theft—Donna Stump—who in turn, acting within the scope of her authority as a supervisory employee retaliated by falsely accusing Uszenski and his daughter, Defendant Jacqueline Halsey of a crime, *to wit*, stealing services from the school system for her disabled school-aged minor son, Plaintiff J.H. As a result of Supervisor Stumps lies to the Ocean County Prosecutor's Office (the OCPO), Uszenski was arrested and indicted, terminated from his position as Superintendent and Halsey's career as a public-school teacher was disrupted. Years later, under new leadership at the OCPO, charges against Halsey were dropped with prejudice and Uszenski was granted 3 months of PTI with no admission of guilt followed by compete expungement of his record.

The court below dismissed the case on summary judgment concluding erroneously that as a matter of law the BBOE as an entity could not be held liable for Stump's bad acts, and that the grand jury proceedings in this mater broke the chain of causation between Stump's alleged retaliatory lies to the

prosecutor and the indictment that, as a matter of law required, the BBOE to terminate Uszenski's employment.

In granting summary judgment, the trial court violated the holdings of Lehmann v. Toys 'R' Us, 132 N.J. 587, 619-620 (1993) and Abbamont v. Piscataway Twp. Bd. of Ed.,138 N.J. 405, 417-19 (1994) holding that a supervisory employee such as Stump—in this case using her supervisory status to allege misuse of school funds for a disabled child—binds the entity for purposes of liability. Moreover, the court ignored or minimized documentary and testimonial evidence—including the prosecutor's deposition and his detailed pre-grand jury investigative report—showing that but for Stump's false claims of fraud during the investigative phase, the matter never would have advanced to an arrest warrant or the convening of a grand jury. Thus, contrary to the conclusion of the court below, the Prosecutor and/or the grand jury were not independent intervening factors that severed the chain of causation for purposes of CEPA. Rather, long before this case ever reached a grand jury, Ms. Stump, through her pre-grand jury retaliatory lies to the Prosecutors guaranteed the indictment of Uszenski and his daughter.

PROCEDURAL HISTORY

On September 11, 2018, Plaintiffs, Walter Uszenski and his daughter, Jacqueline Halsey, individually and on behalf of her minor son, J.H., commenced

this action with a Complaint under the LAD, CEPA and derivative CEPA claims, NJCRA and common law counts against defendants, Brick Board of Education (BBOE), individual BBOE members as well as its employee, Donna Stump, her husband, James Stump, and the Ocean County Prosecutor's Office (OCPO), and former prosecutors Coronato, Paulhus and Detective Mahony. Pa51.

On April 10, 2019, after motions to dismiss, the Ocean County trial court dismissed with prejudice only the LAD and certain common law claims that are not relevant to this appeal. Pa1 at ¶¶ 1-2, 11, 13, 14, 16; 1/11/2019 Transcript ("1T").[1] However, as to the CEPA and derivative CEPA claims against the BBOE defendants, including Donna Stump, it dismissed those with**out** prejudice, Pa1 at ¶¶ 3, 6, and granted Plaintiffs leave to file an amended complaint. Pa1, at Pa5.

On July 11, 2019, Plaintiffs were granted leave to file a First Amended Complaint to add a CEPA derivative claim for the minor, J.H.. Pa160; Pa92. The OCPO defendants filed a motion to dismiss the First Amended Complaint. Plaintiffs opposed it and cross-moved to file a second amended complaint. On September 27, 2019, the court heard argument. On October 3, 2019, it dismissed the malicious prosecution, trade libel and NJCRA counts, thus dismissing the

[1]The three court transcripts relevant here are: "1T" for January 11, 2019 oral argument; "2T" for the December 8, 2023 argument on Defendant BBOE's summary judgment motion; and "3T" for the June 24, 2024 trial court's Decision on that motion.

OCPO defendants. Pa94.

On January 20, 2021, Plaintiffs moved to file a Third Amended Complaint to add additional facts recently discovered and decided to name only the BBOE entity as a defendant, and not the individual employees of the BBOE, including Donna Stump, as defendants. On February 10, 2021, the court granted that unopposed motion. Pa96. On February 16, 2021, Plaintiffs filed the 145-paragraph, Third Amended Complaint against BBOE, containing a CEPA or derivative CEPA count for each of the three Plaintiffs. Pa98.

On March 31, 2023, BBOE moved for summary judgment. Pa252-261, Pa262, Pa265, Pa282-736. Plaintiffs opposed the motion. See Response to Defendant's SOMF (Pa794); Counterstatement of Material Facts ("CSOMF")(Pa737); Uszenski Certification (Pa820); Certification with exhibits (Pa822-2107); and *sur* reply brief (Pa2143).

On December 8, 2023, the Monmouth County trial court heard argument on BBOE's summary judgment motion. See 12/8/23 Transcript ("2T"). On June 24, 2024, the trial court granted summary judgment and entered an Order that same day dismissing the Third-Amended Complaint against Defendant BBOE. Decision ("3T"); Pa7 (Order).

On August 6, 2024, Plaintiffs filed a Notice of Appeal from the June 24, 2024 Order (Pa7) as well as from portions of the earlier April 10, 2019 Order

(Pa1) that dismissed parts of the First Amended Complaint that were improperly relied upon by the trial court in granting BBOE summary judgment. Pa9; with Pa29 (Amended Appeal Notice).

STATEMENT OF FACTS

Plaintiff Walter Uszenski was employed by Defendant BBOE, as the Superintendent of Schools from July 1, 2012 to June 30, 2018. Pa98, ¶ 13; Pa295; Pa297.[2] Prior to his BBOE employment, Dr. Uszenski had over 37 years' experience as a teacher, vice-principal, principal and superintendent. Pa1901.

A. The Minor J.H. is Classified as a Special Needs at 18 Months Old

Plaintiff Jacqueline Halsey is the daughter of Uszenski and mother of the J.H. who was a special needs student at BBOE's schools. Pa98, ¶¶ 3-4. At that time, Plaintiff Halsey lived in Brick with her husband and three children.

On or about January 7, 2012, Halsey attended J.H.'s initial annual Individualized Education Plan (IEP)[3] meeting with BBOE for her son, J.H., who had been identified as a special needs child as early as 2011 by the State of New

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[2] The facts are from Plaintiffs' CSOMF (Pa737-793), and for brevity, citations are to the supporting evidence.

[3] An IEP is a plan or program developed to ensure that a child, like J.H., with a disability and attending an elementary or secondary educational institution receives specialized instruction and related services. Pa98, ¶ 19; Pa531 at No. 14; Pa645 at No. 12; Pa2004; Pa1735 (2/28/17 Opinion of Patricia B. Roe, J.S.C., at Pa1738-39).

Jersey, more than two years before the date of the events at issue in this case, and determined to be eligible for receiving services since he was 18 months old. At 18 months old, J.H. was diagnosed with Sensory Integration Disorder (SID) and Attention Deficit Hyperactivity Disorder (ADHD). Pa98, ¶ 20; Pa531 at No. 14; Pa645 at No. 12. J.H. was first classified at 18 months old, because it was "suggested…by his pediatrician" that "he get evaluated through early intervention. He started receiving those services at home and at Ocean Early [Preschool] when he was attending there... Then …at age three, he got evaluated through Brick public schools for the preschool handicap program and that was in 2012, in January…and they deemed him eligible for services." Pa667, Halsey Dep. at T23:16-24:1; Pa1895; Pa1897; Pa2007.

Thus, J.H. had received special education services as a preschool child "with a disability" as early as January 10, 2012 from the BBOE before the events at issue in this case and before Plaintiff Uszenski was hired as BBOE's Superintendent in July 2012. Pa531 at No. 14; Pa645 at No. 12; Pa1735 at Pa1739; Pa1895; Pa1897; Pa1971. J.H. first went to Ocean Early in 2011, when that school was recommended for him by the State, as he was receiving services through The State of New Jersey as a preschool child with a disability. Pa2004-06; Pa1971 at 6/7/11 note.

Ms. Halsey testified that the following school year (2012 to 2013) J.H. –

"went to the handicap preschool program" in Brick....for "three hours" and then BBOE "bussed him to Ocean Early ...and then we picked him up at the end of the day" and that when he went to Ocean Early at that time, she and her husband were paying for it. Pa667, at T24:2-25:10. However, by March 2013, J.H. began regressing and they had another IEP meeting as J.H. "was copying the inappropriate behaviors of the children in the three-hour special ed-only classroom," so the BBOE's Child Study Team (CST) "moved him to a two-hour program" which was a "mainstream program, with a mixture of regular ed-children and special-ed children" but "he started regressing even worse." The CST thought "it was inconsisten[cy] with his day" ....And, ...in May of that year [2013], [Ms. Halsey] took him to Meridian Behavioral Health ...to get other professional recommendations on a program that would fit his needs." Pa667 at T25:11-26:13; with Pa2010; Pa1887. J.H. continued to regress resulting in his IEP being properly amended in July 2013, as discussed below.

B. Dr. Uszenski Engaged in Whistleblowing Activities

Prior to Dr. Uszenski's employment with the BBOE, Donna Stump was the Director of the Department of Special Services (DSS) that was in charge of providing specialized educational services, including IEPs, to disabled or special needs school children. Pa98, ¶ 14; Pa531 at No. 14.

Dr. Uszenski objected to and reported to the Board what he reasonably

believed to be corruption involving the BBOE's finances, *e.g.*, an unexplained $750,000 deficit in BBOE's budget. After Dr. Uszenski objected, the Finance Committee for the BBOE asked Uszenski to call Director Donna Stump to a meeting with them to explain the deficit, which compelled BBOE to transfer $750,000.00 into the Special Ed budget to cover that shortfall. Pa98, ¶ 16; Pa531 at No. 14. In that meeting with the Finance Committee, Ms. Stump admitted that she caused the $750,000.00 deficit in the budget by failing to submit invoices for out-of-district expenses which had been unreported, unprocessed and placed under a desk blotter. Pa98, ¶ 17; Pa531 at Pa538; Pa1730; Pa1819, Cantillo Dep., at 2T17:10-18:1; Pa2080, L. Reid Dep. at T14:3-16:25.

As a result, Uszenski recommended that Ms. Stump be demoted from Director of DSS to her prior tenured position as a supervisor. Id. As a result of that incident along with other things that Uszenski believed were illegal and that he that objected to with respect to the DSS, Plaintiff Uszenski recommended, and the BBOE Finance Committee members agreed to, recommend to the Board as a whole to authorize an audit of Stump's DSS. Pa98, ¶ 18; Pa531 at Pa540; Pa311, Uszenski Dep. (Day 1) at 1T42:17-43:12.

On February 11, 2013, at Uszenski's suggestion, Human Resource (HR) Committee recommended to the BBOE that they hire Andrew Morgan as a consultant to audit the DSS's rules, regulations, procedures and programs.

Pa531 at No. 14; Pa2007 at Pa2009; Pa2078, Cantillo Dep. at 2T9:12-10:17.

On March 4, 2013, Mr. Morgan submitted an audit proposal. Pa98, ¶ 24; Pa531 at No. 14. Prior to Mr. Morgan being able to work as a consultant, BBOE's HR department conducted a criminal background check of him, through the NJ Department of Education (NJDOE), which initially sent a letter dated March 7, 2013 to the prior Superintendent, Mr. Hrycenko, that mistakenly said that Morgan was disqualified from working. Pa1724. However, just days later, on March 11, 2013, the NJDOE sent another letter to Mr. Hrycenko, instructing him to disregard its prior letter, as Morgan was cleared to work in New Jersey's schools. Pa1726. At that time, BBOE had some 9,000 to 10,000 students with well over 1,000 employees, and an annual budget of about $144 million. Pa2087, Cantillo Dep. at 2T44:23-44:18. Defendant's HR Department was responsible for getting the criminal background checks for employees. Pa1724; Pa1726; Pa2087, Cantillo at 2T44:16-22 and 2T45:19-1. The then-President of the BBOE, Ms. Cantillo, confirmed that Mr. Morgan was cleared to work at BBOE through a NJDOE check. Pa2088, Cantillo Dep. at 2T46:2-9.

On March 21, 2013, the Defendant BBOE approved a resolution hiring Mr. Morgan to do an audit of the DSS. Pa98 at ¶ 24; Pa531 at No. 14; Pa1733.

In addition to Dr. Uszenski's whistleblowing about the budget deficit caused by Ms. Stump unlawfully not disclosing $750,000 in invoices, Uszenski

also discovered that under Stump's direct supervision and with her knowledge and protection, Darlene Ciesla, sister of former New Jersey Senator Andrew Ciesla, was receiving a salary of $140,000 per year, for essentially a no-work job in BBOE's DSS. Stump knew Ms. Ciesla did not perform her required job as a supervisor, including reviewing and approving IEPs. Pa98 at ¶25; Pa531 at No. 14; Pa311, Uszenski Dep. at 1T104:18-105:25. Director Stump's job duties included, among other things, budgets, processing purchase requisitions and "administer[ing] the [CST] efficiently and effectively." Pa1807. Uszenski discovered that Ms. Stump had not evaluated Ms. Ciesla, despite it being her job as the Director to do so, and that Ms. Ciesla, as a supervisor in the DSS, was not preparing or reviewing any IEPs as required by her job, and that Ms. Stump was protecting Ms. Ciesla's no-work job. Pa311, Uszenski Dep. at 1T104:18-105:25; Pa1807.

Plaintiff Uszenski further objected to and reported that in violation of law and regulations, Ms. Stump permitted her staff to "cut and paste" IEPs from one student's IEP to another ones, resulting in many students not getting services to meet their specific needs and which was illegal under state and federal laws. Pa98, ¶26; Pa531, at No. 14; Pa311, Uszenski at 1T112:10-113:13, 1T114:5-13.

Dr. Uszenski had meetings with Director Stump and asked her about issues in the DSS that he believed were non-compliance with the law, including

cut/paste IEPs, failure to keep records for purchases for supplies and books that passed through BBOE for another school's use, not providing speech services required under federal law, and violations of student confidentiality laws. Pa311, Uszenski at 1T110:1-113:21. Dr. Uszenski's belief that a breach of confidentiality for students' IEPs was potentially illegal, was a reasonable belief under state and federal law. See New Jersey Pupil Records Act (NJPRA), N.J.S.A.18A:36-19, with N.J.A.C. 6A:32-7.1, et seq.; along with Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99; 34 CFR § 99.31(requiring parental consent to release students' records). Uszenski reasonably believed that what Stump was doing could be illegal and after finding out that there were these non-compliant issues, he directed Morgan and Stump to correct the issues so that BBOE would not get a non-compliant letter from the State, which they did later get. Pa311, Uszenski Dep. at 1T146:13-147:18.

Dr. Uszenski also objected to and reported to the Board members what he reasonably believed was unlawful and fraudulent activity by Ms. Stump, Ms. Ciesla, and others in the DSS. Pa531 at Pa540-41, 543. For example, he reported to Ms. Cantillo, and other Board members about the problems with the illegal IEPs. Pa311, Uszenski Dep. at 1T120:5-121:7.

Then-Board member Lawrence Reid confirmed that Dr. Uszenski reported

to the Board what he believed was malfeasance and non-compliance with the laws and that Dr. Uszenski, a reformer, was later retaliated against as a result:

> Q. You testified in front of the Grand Jury…that it was your belief that there **was retaliation against Dr. Uszenski.**
>
> **A. Yes.**
>
> ***
>
> Q. **And did you believe that that retaliation was by Donna Stump?**
>
> **A. I think she was part of it.**
>
> **Q. Was Darlene Ciesla [the Senator's sister with the no-work job]also part of it?**
>
> **A. I think the confluence of those two things, those two events was very much a part of when the Board of Education began retaliating against Dr. Uszenski.**
>
> Q. So if Dr. Uszenski had not complained about and reported to the Board Donna Stump and Darlene Ciesla for the reasons…you stated earlier is it your belief the retaliation never would have happened?
>
> A. **All I know is it seemed to be the precipitating event.**
>
> Q. **And the precipitating events were that Dr. Uszenski was trying to clean up what he thought was malfeasance and noncompliance with the laws in the Special Education Department and that he got punished as a result of that…Is that your understanding?**
>
> [objections omitted]
>
> A. **Yes. You know we knew there was a problem since the beginning of when I was on the board in the Special Ed Department, and so now when it came out and we had an audit done by Andy Morgan and he and Dr. Uszenski were trying to clean up this department, fix it, bring it into compliance, that's when the whole thing turned against Dr. Uszenski…**

[Pa1824, Dep. of L. Reid at T41:23 to 44:4; emphasis supplied.)]

BBOE President Cantillo also confirmed that Uszenski reported numerous problems at BBOE's DSS that he believed were non-compliant with the laws,

and that he wanted to "clean-up" the DSS including the illegal cut/paste IEPs, as well as other potentially unlawful activity, including Ms. Stump's hiding $750,000 in unpaid invoices. Pa2079, Cantillo Dep. at 2T11:13-17:22.

By March 2013, Dr. Uszenski recommended that Ms. Stump, then-Director of DSS, be demoted to her prior position as supervisor in that department for the upcoming school year (2014 to 2015). Pa1824, Reid Dep. at 16:12-25.

C. J.H.'s Amended IEP in the Spring/Summer 2013

On March 7, 2013, J.H.'s IEP was amended due to behavioral regression because J.H. required mainstreaming and exposure to peers and socialization that was not available at BBOE's special ed programs. Pa2010-29. Because of J.H.'s continuing behavioral issues, on May 1, 2013, Plaintiff Halsey (at her own expense) had a Biopsychosocial Assessment conducted on J.H. by Meridian Behavioral Health that confirmed peer socialization and aggressive outbursts concerns, and J.H. was referred to and deemed eligible for their services. Pa1887-94.

Around June 14, 2013, Mr. Morgan met with Ms. Stump, who at that point was still the Director of DSS, to assemble a meeting of the Child Study Team (CST) to address J.H.'s IEP. Pa531 at No. 14; Pa1915. On June 18, 2013, the BBOE's CST scheduled an appointment for J.H. for a neurological evaluation

with Dr. Pietrucha at CST's offices for July 16, 2013. Pa1915.

On July 16, 2013, Dr. Pietrucha evaluated J.H. and found that, "[J.H.] is exhibiting behaviors that are indicative of ADHD...with some co-morbid oppositional behavior." Dr. Pietrucha diagnosed J.H. as suffering from Oppositional Defiance Disorder (ODD), SID, and ADHD. Pa1813.

Around July 11, 2013, another parental meeting was held to amend J.H.'s annual IEP. Pa1912. At that July 11, 2013 meeting with BBOE's CST, including Dana Gonzalez, Jennifer Fabbo and Susan Russell, J.H.'s IEP was amended and approved by BBOE employees and J.H. became legally entitled to out-of-district placement (which simply means any school not a part of BBOE) and eligible for an extended school year, from July 2013 to June 2014 for "general education preschool" and transportation services. Pa1782 at Pa1785, Pa1797-98. In accordance with his amended IEP, approved by BBOE employees, J.H. attended Ocean Early Preschool for that summer, five-days a week, to mainstream him, and the services, including school bus transportation, were approved by BBOE's CST, Stump, BBOE's Business Administrator, James Edwards, and the Board itself. Pa1735, with Pa1803.

D. Uszenski's Demotion of Stump

On May 14, 2013, as a result of the fraud and corruption objected to and reported by Plaintiff Uszenski, he informed Ms. Stump that she would no longer

be the Director of DSS as of June 30, 2013, as her contract was not going to be renewed, and she would return to her prior tenured position as a supervisor in DSS. Pa531 at Pa541; Pa382. Dr. Uszenski testified why he believed that Stump and her Department had violated the laws with respect to IEPs including because: "[y]ou cannot release any information on a child at all, HIPAA laws, violating confidentiality, it's an IEP, it's an individualized educational plan and under the IEP law you cannot automatically just send out to anyone or show anyone...." Pa311, at 1T113:19-114:25.

The audit of the DSS done by Morgan and initiated by Uszenski, uncovered further malfeasance, violations of the law, and misfeasance by Ms. Stump and others in the DSS. Pa98 at ¶ 25; Pa531 at No. 14; Pa1773.

On June 18, 2013, Morgan, the contractor who did the audit, applied for the position of Interim Director of the DSS; and on June 27, 2013, Morgan's employment was ratified by the Defendant and he became the Interim Director of the DSS, effective July 1, 2013 to June 30, 2014. Pa531, at No. 14; Pa1728.

E. <u>Stump's Retaliation Against Uszenski Begins</u>

In July 2013, shortly after Ms. Stump was informed by Dr. Uszenski that she would be demoted to her prior supervisor's position at BBOE, she embarked on a malicious campaign to defame, undermine and discredit Dr. Uszenski, as well as Morgan, all in retaliation for Uszenski's whistleblowing activities

including her demotion and Morgan replacing her. Pa531 at No. 14; Pa1670-76; Pa1721-23; Pa1681-1720.

Criminal background information about an "Andrew Morgan" was provided to the BBOE's President, Ms. Cantillo, by Ms. Stump's husband James Stump, a former FBI agent, in a "dark parking lot" after an Ocean County Republican Club meeting attended by several BBOE members. Mr. Stump was "very agitated," handed Ms. Cantillo a "packet" of materials, and said, "do you know you hired a criminal." Pa531 at No. 14; Pa2083, Cantillo Dep. 2T29:23 to 31:12; Pa2084. Ms. Cantillo believed this took place in late Summer 2013. Pa1819, Cantillo Dep. at 2T34:5-14.

Ms. Stump, through her husband, also handed out copies of a fake, defamatory "Press Release" to others at other meetings. Pa2084-85, Cantillo Dep. 2T33:10-34:4; with Pa1670. Ms. Cantillo found the material distributed by Stump's attack on Uszenski "very disturbing," and even called the NJDOE herself, confirming that BBOE through NJDOE, had vetted Morgan and cleared him for work.

Yet, Ms. Cantillo and BBOE did nothing to protect Superintendent Uszenski from the harassment campaign by the demoted, now Supervisor

Stump. Pa1633, Cantillo GJ 4T at 148:3 to 155:9[4]; with Pa1726; Pa820-21 (Uszenski Cert.), at ¶¶ 2-4.

Around July 16, 2013, the six (6) page "anonymous" dossier including the fake "Press Release" was mailed to each member of Board at their BBOE mailboxes which falsely claimed that Plaintiff Uszenski knew about Morgan's 1989 arrest when he recommended the hiring of Morgan. Pa531 at No. 14; Pa1670. The fake "Press Release" was also mailed to the Ocean County Superintendent of Schools, which received it on July 16, 2013. Pa1671. BBOE President Cantillo, testified that the Stump materials were "put on different Board members windshield, mailboxes [for] different people, different residents in Brick. It was certainly getting out there...." Pa1633, Cantillo GJ 4T148:12-18.

The "Press Release" was authored by and distributed by BBOE's former Director, now Supervisor Stump, with the assistance of her husband, James Stump, a former FBI agent. Pa531, at No. 14; Pa1670; Pa2030, J. Stump Dep. at T53:16-57:25; Pa1633, GJ at 4T144, 145, 148; Pa583, D. Stump Dep., at

[4] There are five (5) volumes of the Third Grand Jury transcripts filed as exhibits as part of the summary judgment papers below, marked in Plaintiffs' Appendix as Pa829-1034 for the May 16, 2017 date (designated as "GJ 1T"); May 23, 2017 ("GJ 2T") at Pa1035-1338; May 30, 2017 ("GJ 3T") at Pa1339-1632; June 6, 2017 ("GJ 4T") at Pa1633-1641; and June 13, 2017 ("GJ 5T") at Pa1665-1669.

T112:7-113:12. Donna Stump admitted that she created the "Press Release" around June 2013, after she had been notified the month earlier by Dr. Uszenski that she was going to be demoted. Pa583, D. Stump Dep. at 114:4-15; 117:19-23.

Contrary to the Press Release, Uszenski had encountered Andrew Morgan for only a few days in 2003, when they crossed paths at a charter school, and Uszenski did not know when he recommended that BBOE hire Morgan as a consultant to do an audit in 2013, that Morgan had been charged with drug dealing back in 1989. Once Uszenski was told about the criminal background rumors that were circulated about Morgan, he asked the BBOE's attorney if he could suspend Morgan pending investigation, but was told to hold off on it, so that he, the Board's attorney, could investigate. Pa311, Uszenski Dep. at 1T44:13-45:13, 1T59:20-62:19. At that time, Morgan denied that he had a criminal record. Uszenski was told that the NJDOE had cleared Morgan to work. Pa311, Uszenski at 1T42:5-12. On October 16, 2013, Morgan even faxed a copy of his NJDOE clearance to work letter to BBOE's Head of HR, Mr. McFadden, whose job it was to vet employees. Pa2061. At the end of October 2013, Morgan admitted to BBOE's attorney and Uszenski that he had a prior criminal record but he had been cleared to work by the NJDOE years before through a special program. Dr. Uszenski wanted to fire Morgan, but BBOE's attorney

recommended to Uszenski and the BBOE to allow Morgan to resign for health reasons. Pa311, Uszenski at 1T65:21-67:8; Pa1964; Pa531 at No. 14. On November 23, 2013, Morgan resigned, effective as of December 31, 2013, and Susan Russell became the new Director of Special Services for BBOE. Pa531 at No.14.

F. The Retaliation Continues as Brick BBOE Declassifies J.H. in 2014

BBOE member Reid testified that once Ms. Stump began her public retaliatory campaign in July 2013, the Board began to "turn against" Dr. Uszenski. Pa1824, Reid Dep. at 41:23-44:4. By June 2014, the retaliation continued and was now directed against the minor Plaintiff, J.H., and his mother, Ms. Halsey – Dr. Uszenski's family.

In June 2014, J.H. was declassified for the 2014-2015 school year, following attendance at Ocean Early in the 2013-2014 school year to transition him into kindergarten the following year. Pa1735 at Pa1743; Pa531 at No. 14.

The de-classification had a detrimental impact on J.H. and he regressed. Pa1735 at Pa1761-62. This occurred under the supervision of Ms. Stump, who, acting within the scope of her employment, enlisted the assistance of her subordinates to later make false claims about Plaintiff J.H.'s legal IEP. Pa531 at No. 14; Pa645 at No. 12. BBOE also declassified J.H. without parental consent. Pa721; Pa667, Halsey Dep. at 41:10-43:7. Ms. Halsey was adamant

that she "never" agreed to declassify J.H. and never gave her consent in a phone call with Amy Ryan, another BBOE employee. Pa667, Halsey at 68:4-69:8. J.H. completed the 2014-2015 school year in a BBOE school without any special needs assistance based on the bogus June 2014 declassification. As a result, by July 2015, J.H. had regressed and was diagnosed as now suffering also from ODD and depressive symptoms requiring a 504 Plan. To further retaliate against Plaintiffs, no 504 Plan was developed for J.H. who returned to school in September 2015 with no special ed services. Pa723; Pa645 at No. 14; Pa1735 at Pa1761-62; Pa1917.

G. Dr. Uszenski Terminates a BBOE Bus Driver

In 2014, Dr. Uszenski continued with his reforms and whistleblowing at BBOE. In February 2014, Uszenski recommended termination of a dangerously incompetent school bus driver, Marcella Butterly, who had abandoned a special needs child on her bus instead of delivering the child to school. Pa531 at No. 14; Pa356, Uszenski at 2T 25:14-30:15. BBOE President Cantillo confirmed that Dr. Uszenski reported this to her. Pa2088, Cantillo at 2T46:10-47:21.

On December 10, 2014, Butterly, apparently in retaliation for Uszenski's actions, met with Brick Township Mayor John Ducey and its Administrator and falsely told them that she had forgotten the child on her bus because she was interrupted by another employee asking her for a "favor" to bus Dr. Uszenski's

grandson to a pre-school (Ocean Early). Pa468; Pa356, Uszenski at 2T25:14-30:15 and 2T45:6-25. Butterly learned that the minor Plaintiff J.H. was transported throughout the 2013/14 school year. Pa468. In truth, J.H., like all IEP students with out-of-district placements, was given BBOE school bus services. Pa583, D. Stump Dep. at 201:13-15. J.H. was among at least 17 other out-of-district students getting BBOE transportation services. Pa1885.

H. Stump and Other BBOE Employees Lie to the OCPO

In December 2014, Mayor Ducey contacted OCPO to report Butterly's allegations to him about Uszenski's grandson, J.H. Pa468. The OCPO's office investigated, tracking down the Ocean Early's administrator, Ms. Bliss, who confirmed that J.H. had an IEP from BBOE and that she had a copy of it, and that BBOE's CST had even observed J.H. on occasion while he was at Ocean Early. Pa468.

The OCPO investigation led by Detective Mahony went nowhere for months. Mahony did not for months seek an arrest warrant or present the matter to a grand jury. However, in late March 2015, the Defendant BBOE acting by and through its supervisory employee Donna Stump seized on the opportunity to further retaliate against Uszenski for his CEPA-protected activity. Pa531 at No. 14. Pa468; Pa531 at No. 12; Pa645 at No. 12.

On February 23, 2015, the OCPO's Detective Mahony contacted Donna

Stump, who he thought was still the Director of DSS, and she refused to speak about J.H., due to confidentiality laws, but her husband James Stump, a former FBI agent, got on the phone and told the investigator about his wife's demotion, concealed her malfeasance, and stated that his wife was demoted "when Andrew Morgan was hired to be the new Director of Special Services" and that Morgan "has a criminal past." Pa468.

Although Uszenski had no knowledge of Morgan's 1989 arrest when he recommended Morgan, and despite the fact that it was the responsibility of the BBOE's HR Department to vet and clear job candidates, the only "evidence" investigators ever found or presented regarding Uszenski's alleged knowledge of Morgan's arrest was the fake Press Release (Pa1670) authored and distributed by Donna Stump which falsely claimed that Uszenski knew about Morgan's arrest and that they had a "longstanding relationship." Pa468.

When Ms. Stump was later interviewed by the OCPO in March 2015, and acting within the scope of her employment, the demoted Stump enlisted the help of her CST subordinates to make false statements to the investigators, claiming that the placement of Uszenski's grandson J.H. in Ocean Early "was not educationally necessary and could not be supported by a legitimate IEP" even though they each approved it. Ms. Stump exerting her authority as a former Director and current Supervisor stated to the OCPO that the IEP her team signed

off on "is **fraudulent** and was only done because Andrew Morgan initiated the alteration [of the prior IEP] and exerted pressure on the CST [Child Study Team]." Pa468, at Pa486 (emphasis supplied).

Ms. Cantillo later admitted to Plaintiff that Donna Stump's husband told her, "I'm going to get those guys" (*i.e.*, Morgan and Uszenski). Pa311, Uszenski Dep. at 1T58:12-59:2.

The BBOE, by and through its employees, actively participated and assisted the OCPO in fomenting and advancing the baseless criminal charges against Plaintiffs by among other things, skewing the information they provided to the OCPO while, at the same time, failing to disclose the truth to the OCPO regarding J.H.'s special needs classification and legitimate receipt of special needs services. See, e.g., Pa311, Uszenski at 1T34:14-35:23; with Pa468; Pa1432, at GJ 3T at 147-150; Pa531 at No. 14; Pa645 at No. 12. The BBOE employees included Donna Stump, Susan Russell, Dana Gonzalez, Jennifer Fabo, and Rachel Gough, all of BBOE's DSS, along with BBOE Business Administrator Edwards and HR Head McFadden. Pa531, at No. 14. Had they told the truth to the OCPO, no criminal prosecution would have been possible and no grand jury would have been convened. Pa1735; Pa1765; Pa1782; Pa1813; Pa1887; Pa1895; Pa1899; Pa1912; Pa2004; Pa2010. BBOE, through its employees retaliated against the Plaintiffs by setting in motion the OCPO in

fomenting and pursuing the baseless criminal charges, which directly led to Uszenski's suspension and termination. Pa531 at No. 14; Pa645 at No. 12.

I. Uszenski and Halsey Are Arrested and Uszenski Suspended in May 2015

In May 2015, Plaintiffs Uszenski and Halsey were arrested and charged based on the false information provided by BBOE employees, led by Donna Stump. Pa531 at No. 14. Dr. Uszenski was arrested in BBOE's parking lot. Ms. Halsey was arrested at home, while in pajamas and recovering from abdominal surgery. Her other son, a three-year-old, witnessed her arrest. Ms. Halsey later was taken to the Brick police station where she was finger printed, processed, and later released.[5] Pa662, Halsey Dep at 116:17-117:24, 118:10-119:21, 123:6-124:3.

On May 7, 2015, BBOE voted to suspend Plaintiff Uszenski with pay. Pa384.

J. The Minor J.H.'s Regression, His OAL Case and Move to Pennsylvania

The retaliation continued against Plaintiffs. By July, 2015, the Halseys had to retain counsel to get J.H. the special educational services he needed, was

[5] As a result, Ms. Halsey's reputation and career were utterly destroyed. She was no longer able to work as a teacher for some five years. Pa645, at Nos. 8, 12, 30-31. Her family was harassed. Her neighbor even yelled to her then 7-year old daughter that her mother (Halsey) was "going to jail and … is only going to be able to eat bread and water!" Pa645 at No. 12; Pa667, Halsey Dep. at 141:12-142:13.

entitled to, and had been deprived of as a result of his declassification in June 2014. Pa645 at Pa655; Pa1944. In August, 2015, Ms. Halsey met with the BBOE's CST and, at the conclusion of the meeting, the CST reluctantly agreed to re-instate J.H.'s IEP, as J.H. had regressed. At that meeting, it was discovered that J.H.'s Principal had concealed from Ms. Halsey and her husband that J.H. had punched another child in the face. Despite BBOE's CST agreeing that J.H. still needed an IEP, only a handwritten, generic and bogus IEP was done which was not tailored to J.H.'s special needs, with no copies provided. Pa667, Halsey Dep., at 92:14-95:10 and 94:22-101:2.

Because of that delay, in September 2015, the Halseys filed an action in the Office of Administrative Law (OAL) to pursue getting J.H.'s IEP and related services reinstated. Pa1947. By January 2016, J.H. (then in first grade) had continued to regress. It took another month, until February 2016, for BBOE's CST to produce a formal IEP for J.H., but this IEP was still woefully inadequate and the Halseys continued to pursue J.H.'s IEP through the OAL. Pa667, Halsey Dep. at 91:9-101:2.

By August 2016, Ms. Halsey's reputation had been permanently damaged in the Brick area. Pa667, Halsey Dep. at 175:15-20. As a result, the family decided to re-locate from Brick, New Jersey to Pennsylvania, where J.H. was classified and given an appropriate IEP and services through Pennsylvania.

Pa667, Halsey at 141:12-142:13 and 98:9-99-5; Pa645 at No. 12. In November 2017, more than one year after they moved to Pennsylvania and, as a result of J.H. having been given a proper IEP in Pennsylvania where he now lived, J.H.'s parents withdrew without prejudice their OAL case against BBOE, as they no longer lived in Brick. Pa727; Pa729. As a result, Plaintiffs Halsey and J.H. exhausted their administrative remedies. Pa727; Pa729.

However, as a result of BBOE's declassification of J.H. and deprivation of the special educational services he needed, caused by continuing retaliatory actions of Stump and others on BBOE's CST, the minor Plaintiff regressed further. Pa645 at No. 14. J.H. was now diagnosed as suffering from Disruptive Mood Dysregulation Disorder, Emotional Depression and a reading disorder, in addition to ADHD and ODD. Pa1735; Pa1917; Pa1921; Pa1934; Pa667, Halsey dep at 199:5-201:9.

K. The September 2015 Indictments Are Dismissed by Judge Roe in 2017

On September 29, 2015, BBOE's employees, through the OCPO, presented their retaliatory falsehoods to a panel of grand jurors, which returned an indictment against Plaintiffs Uszenski and Halsey, as well as Morgan. Pa1735. That same day, BBOE voted to suspend Plaintiff Uszenski without pay based on the indictment which BBOE through its employees initiated in retaliation for Dr. Uszenski's protected activities. Pa386.

On May 24, 2016, a Superseding Indictment was returned. Pa531 at No. 14; Pa1735. As to Uszenski, it alleged that he and Mr. Morgan conspired to fraudulently solicit an audit of the BBOE's DSS and to remove Stump, the then existing Director, and supplant Morgan in her place, for the purpose of ultimately creating and approving a fraudulent IEP for J.H. for private daycare and transportation at the public expense. It further alleged that Morgan, Uszenski and Halsey conspired to create a fraudulent IEP for J.H., and that Uszenski, Halsey, Morgan, and his wife, Lorraine Morgan, each played a part in the payment of $149.00 for counseling for J.H. which was allegedly not needed. Pa531 at No. 14; Pa1735 at Pa1745.

There was no factual and legal basis for the criminal charges against Plaintiffs Uszenski and Halsey. Pa1735. The criminal prosecution was pursued by OCPO based upon false information and testimony by disgruntled BBOE employees, led by Stump, in retaliation for Dr. Uszenski's protected whistleblowing activity of reforming the illegalities in BBOE's DSS which caused Ms. Stump to be demoted, Ms. Ciesla to "retire" and Ms. Butterly to be terminated. Pa531 at No. 14.

In presenting the case to the grand juries, then Executive Assistant Prosecutor Paulhus relied upon Ms. Stump telling them that J.H.'s amended IEP was "fraudulent" and that Uszenski knew about Morgan's prior criminal record,

when he did not. Pa1735. The OCPO presented these bogus, retaliatory allegations to the grand jury because of what Stump and others who she supervised in the DSS told to OCPO, as Stump was still trying to get rid of Dr. Uszenski. There was no factual or legal basis to assert that Uszenski and Halsey had committed any illegal act whatsoever. Pa1735. On February 28, 2017, Judge Patricia B. Roe of the Superior Court of New Jersey, Ocean County, granted Dr. Uszenski and Ms. Halsey's motion to dismiss the Superseding Indictment. Pa1735. Judge Roe found that the State, through the OCPO, including Paulhus, not only withheld exculpatory evidence from the grand jury, but that there was no basis to pursue any criminal charges against Uszenski and Halsey, since:

> (a) J.H. was having behavioral difficulties requiring special services as early as 2011, more than two years prior to the incidents charged in the indictment;
>
> (b) In 2011, Dr. Pietrucha, a pediatric neurologist, evaluated J.H. and also recommended three daycares, including Ocean Early (where he was placed on the IEP) "as possibilities to be able to handle J.H.'s aggressive behaviors;"
>
> (c) J.H's history of behavioral issues and recommendations by experts for daycare placement as early as 2011;
>
> (d) BBOE's Finance Committee asked Dr. Uszenski to call then-Director Stump to a meeting with the committee to explain a deficit, which compelled the BBOE to transfer $750,000 into the Special Ed budget to cover that shortfall. In that meeting, Ms. Stump admitted that she caused the $750,000 budget deficit for BBOE, by failing to submit invoices for out of district expenses when she directed that they be placed them under her secretary's desk blotter. Judge Roe found that this incident was the deciding factor which

caused the Committee to direct an audit to see if any other problems existed in the SSD. And, that Ms. Stump was demoted as a result.

(e) Evidence regarding Mr. Morgan's audit work for BBOE and proofs showing his actual time on his audit and report, totaling 222 hours, with a note to cap them at 210, per his contract, including his submitted time sheets in five vouchers, signed by Morgan as well as Ms. Stump and Dr. Uszenski.

[Pa1735, at Pa1738-62].

Judge Roe held that there was no support for the State's case against Dr. Uszenski or his daughter:

> This legitimate and crucial need for the audit of special services, caused by someone other than defendants [Uszenski and Halsey], was never presented to the grand jury, notwithstanding this evidence came from a reliable, unbiased source through the State's own investigation. Clearly, this was exculpatory evidence that **negates the State's theory that the audit was merely a ruse by Dr. Uszenski to bring in Andrew Morgan in an effort to supplant Donna Stump. The audit was not a fraud perpetuated on the Board of Education. The fact that there was a legitimate need to audit special services in Brick, created by Donna Stump and requested by the Board of Education, undermines the State's entire theory of the case and request for indictment.**
>
> [Pa1735, at Pa1750, emphasis added.]

Judge Roe detailed other specific evidence relating the need for an IEP for J.H. who had behavioral problems since 2011, including that the few, in-home counseling services were appropriate and that BBOE's CST referred J.H. back to Dr. Pietrucha on July 11, 2013, because as one member, Donna Gonzalez, admitted: "[J.H.] is very oppositional." Dr. Pietrucha evaluated J.H.

again and confirmed "[J.H.] is exhibiting behaviors that are indicative of [ADHD]...with some co-morbid oppositional behavior" and that his IEP was amended as a result for an extended school year, with out-of-district placement, effective July 1, 2013, all of which contradicted the false statements by Stump and other BBOE employees to the OCPO that J.H.'s amended IEP was inappropriate. Pa1735, at 1756-59.

Judge Roe also found that Det. Mahony spoke with John Worthington of the DOE, who told him, "There is nothing improper about place[ing] a student in a private pre-k program... The [CST] has broad discretion to place a child - it could be for something as simple as socialization." Pa1735, at Pa1759. Judge Roe found that this statement from Mr. Worthington, coupled with the basis for J.H.'s classification at Ocean Early, rebutted the State's theory [advanced by Stump and the CST to get back at Uszenski] that the purpose for the placement was inappropriate. Pa1735, at Pa1759. Judge Roe was highly critical of the attempt to criminalize the events at issue finding that, "[p]arents and child study teams often disagree about what programs need to be placed in the IEP … it is misguided and wrong-minded to criminally prosecute parents or educators for advocating for special needs children." Pa1735 at Pa1762. Judge Roe also found that J.H. had regressed because of his declassification and "without these reasonable efforts and special services." Pa1735, at Pa1761.

L. BBOE Continues to Retaliate in the Subsequent Indictment

Despite the dismissal of the Superseding Indictment on February 28, 2017, BBOE did not cease their ongoing retaliation against Plaintiffs. BBOE did not investigate Stump or its CST employees, nor do anything to protect Dr. Uszenski, who was still an employee, even after Judge Roe's Opinion which was widely reported in the media. Pa280 at ¶¶ 1-4. BBOE did NOT reinstate Dr. Uszenski to his prior position, nor did it provide him with his back-pay from when he had been suspended without pay. Pa820, ¶5. This is despite Board members testifying that they understood that Uszenski would be paid his back wages once the criminal charges were dismissed, which they ultimately were. Pa1974, Conti Dep. at 95:12-25; Pa1977, Barton Dep. at 66:12-67:4.

Stump and other CST employees did not recant their prior false statements to the OCPO, nor did BBOE's Administrator Edwards and its HR Director McFadden tell the OCPO (nor tell the next grand jury) that it was not Walter Uszenski's job to vet Morgan or any other potential employee. Instead, they lied to it. BBOE did not tell OCPO to drop its pursuit of any further indictment against Plaintiffs. It took no action to protect Plaintiffs even after Judge Roe's decision.

Instead, the steam roller, once set in motion by Donna Stump, continued on and gathered more steam. When the OCPO led by then Prosecutor Coronato

and Paulhus re-conveyed a third grand jury beginning on May 16, 2017, they continued to use Stump's false, fake "Press Release" that Uszenski knew about Morgan's criminal record, when he did not, or that he had to vet Morgan, when it was HR's job to do that, and other false and misleading testimony from BBOE employees (often times coming in through hearsay from Det. Llauget who replaced Mahony) that J.H.'s amended IEP in late June 2013 was "fraudulent" **even though by now, in May 2017, J.H. was reclassified and on another IEP**. Pa1035 at GJ 2T174:21-24; Pa1231 at 2T282:4-8 and 2T281:2-22; Pa1721; Pa1670; Pa1681.

BBOE's President, Ms. Cantillo, admitted that J.H.'s amended IEP in July 2013 and placement at Ocean Early with transportation was appropriate since Brick had no suitable full time in-district placement for preschoolers to mainstream them. Pa1735; Pa2089, Cantillo at 2T52:3-22, 2T48:1-49:25. The BBOE also knew that Uszenski had no responsibility to do the criminal background check on Morgan as BBOE had a HR Department that conducted criminal background checks on its over 1,000 employees through the NJDOT. Pa2087, Cantillo at 2T44:16-45:3.

In June 20, 2017, since BBOE did nothing to protect Uszenski and his daughter from further, ongoing retaliation, Plaintiffs Uszenski and Halsey were re-indicted under the same factual and legal premise as had already been rejected

by Judge Roe. Pa531, at No. 14.

In re-indicting Plaintiffs in 2017, Detective Llauget testified from Det. Mahony's report and in his place, and read Stump's "Press Release" to the third grand jury as follows, in pertinent part:

> "Press Release. Did the Brick Board of Education hire a convicted felon to manage special education?...Is this the same Mr. Morgan who is a convicted felon and who was incarcerated for eight months for the selling of illegal substances? ... "**Superintendent of Schools, Dr. Walter Uszenski, has publicly stated that he mentored Mr. Morgan and had a longstanding relationship. Clearly he [Walter] was well aware of his [Morgan's] background and lack of valid credentials before recommending his services to the Board of Education.**"

[Pa1035, GJ at 2T174:21-24; Pa1231 at 2T282:4-8 and 2T281:2-21 and 2T282:15-283:17; with GJ exhibit at Pa1671].

Plaintiff Uszenski knew nothing of Morgan's 1989 arrest. Pa531 at No. 14. Ms. Stump fabricated the connection and lied about Uszenski's knowledge of Morgan's past and about his grandson J.H.'s allegedly "fraudulent" IEP, in retaliation because of Uszenski's protected activity outlined herein. Stump's actions led directly to Uszenski's termination from employment and Halsey's ineligibility to seek a public education job for some five years, and her son's declassification from needed services that caused him to regress.

Stump, a school administrator herself, knew that once Uszenski was arrested, he would not be allowed in the schools and would likely be suspended or terminated, which he was. Ms. Stump's actions, endorsed and condoned by

the Defendant BBOE, set in motion a chain of events that gravely harmed Plaintiff Uszenski, his daughter, his grandson, and their families. Pa737-793.

Defendant BBOE played a powerful accelerant role in the advancement of criminal proceedings against Uszenski and Halsey. Several testifying Board members openly admitted the retaliatory attack on Uszenski (and by association, Ms. Halsey and J.H.), after Plaintiff Uszenski had revealed "huge problems" in Donna Stump's department, but BBOE did nothing about it. Board Member Reid testified about Dr. Uszenski's objection to the no-work job held by Senator Ciesla's sister and pointed out that at that time, both Uszenski and Morgan became targets of "political partisan retaliation" by Ms. Stump. Pa1433, Reid GJ 3T147:2-150:1.

John Talty, another former BBOE Board member, testified about Uszenski's objections to Stump's hiding of $750,000 in invoices and other potentially illegal practices in the DSS. Pa1494, at Talty GJ 4T73:23-75:4; 4T77:7-25; 4T78:3-16; 4T89:24-90:6; 4T89:24-90:6; 4T91:2-94:12; 4T102:10-103:9. Mr. Talty described a conspiracy against Plaintiff Uszenski and Morgan because "Andy brought forward to the HR committee many issues [in Stump's DSS] that violated the law" and that "[Andrew Morgan] did a good job for Brick…I think it's shameful that politics became a part of this process." Pa1494, at Talty GJ 4T94:1-12. Mr. Talty's testimony also supported the retaliatory

motives by Ms. Stump, as her husband was very upset that his wife was demoted. Pa1494, at Talty GJ 4T102:10-102:23.

Because of these false charges, again, spurred on by Stump and other BBOE employees, on September 14, 2017, BBOE voted to terminate Plaintiff Uszenski's employment by not renewing his contract which was due to expire on June 30, 2018, if not renewed, at which time he ceased being a BBOE employee. Pa388. Despite all of the evidence of retaliation against Uszenski for engaging in protected activity, which was known to its Board members, as indicated above, BBOE terminated Dr. Uszenski. It was clear that the BBOE had "turned against" Dr. Uszenski. Pa531, at No. 14; Pa645, at No. 12.

M. <u>All Criminal Charges are Dismissed in 2019 and Expunged in 2020</u>

On June 10, 2019, the new OC Prosecutor, Bradley D. Billhimer, moved to dismiss all charges against Plaintiff Halsey and the court dismissed all charges against her. Pa531, at No. 14, with Pa2064-75. On June 10, 2019, Dr. Uszenski was granted entry into PTI program with <u>no</u> admission of guilt. Both Plaintiffs' arrest and indictment records were then completely expunged after receiving favorable terminations of the false criminal charges against them. Pa531 at No. 14; Pa2064-75.

LEGAL ARGUMENT
POINT I

THE COURT BELOW VIOLATED BASIC SUMMARY JUDGMENT RULES BY DECIDING DISPUTED ISSUES OF MATERIAL FACTS IN DEFENDANT'S FAVOR AND BY ERRONEOUSLY CONCLUDING THAT THERE WAS NO CAUSAL CONNECTION BETWEEN PLAINTIFF USZENSKI'S WHISTLEBLOWING AND THE ADVERSE EMPLOYMENT ACTIONS (Pa7; 3T18:11-26:6)

The trial court violated basic summary judgment rules by weighing evidence like a jury rather than discerning the existence of credible evidence supporting plaintiffs and determining whether genuine issues of material fact existed concerning such evidence. Moreover, in doing so, the court largely resolved disputes concerning the evidence in Defendant's favor again in violation of basic summary judgment rules requiring that such factual disputes be resolved in favor of the non-moving Plaintiffs. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013)(court must view all evidence in a light favorable to the non-moving parties, and should draw all reasonable inferences in their favor). Issues over motive, intent, credibility and causation are quintessential questions for the jury, not for a court). Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995).

To make out a *prima facie* CEPA claim, a plaintiff must show: (1) that he reasonably believed that his employer's conduct violated either a law, rule, regulation, or a clear mandate of public policy; (2) that he performed

whistleblowing activity described in N.J.S.A. 34:19-3a, c(1) or c(2); (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistleblowing and the adverse employment action. Mehlman v. Mobil Oil Co., 153 N.J. 163, 185-87 (1998); Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999).

The trial court correctly found that Plaintiff Uszenski (and by extension the other two Plaintiffs in their derivative CEPA claims) had met the first two elements of CEPA, namely, that (1) he reasonably believed that his employer's conduct—among other acts, providing a no-show job as a favor to a state senator's sister— violated either a law, rule or regulation or a clear mandate of public policy, and (2) that he "performed a whistleblowing activity described in N.J.S.A. 34:19-3[c]" by reporting and objecting to it, including finding that a former BBOE member Lawrence Reid testified that Uszenski "brought the conduct of Stump and Ciesla [misspelled "Seasli" in transcript] to the attention of the Board." Decision, 3T9:22 to 3T13:4. Although the trial court did not discuss at length the other whistleblowing activities that Uszenski engaged in, it reached the correct conclusion that there were material questions of fact for the jury as to the first two prongs of CEPA. See 3T8:19-13:17.

However, the trial court was woefully incorrect in not properly applying the law and reaching the same conclusion about the third and fourth prongs of

CEPA. The court found as to the third element, that while an adverse action was taken against Uszenski—he lost his job and was indicted—it was not taken by the defendant BBOE, but rather was taken by a disgruntled employee, Stump. In so ruling, the Court ignored that Stump took the action against Uszenski using her status as a supervisor and former director of the BBOE to persuade prosecutors that Plaintiff had engaged in fraud.

For the fourth element of CEPA, the trial court found that there was no "causal connection between the whistleblowing activity and the adverse action." 3T18:15-16, ignoring the fact that but for Stump's false statements to the Ocean County Prosecutor's Office (the "OCPO") made within the scope of her supervisory employment and/or authority with the BBOE the case against Uszenski never would have been submitted to a grand jury. The court ignored documentary and testimonial evidence showing admissions by the investigating prosecutor Mahony confirming that but for Stump' accusation of fraud, the OCPO never would have arrested and indicted Uszenski and therefore there would have been no a break in the chain of causation between Stump's retaliation and Uszenski and his daughter's arrest and Uszenski's termination.

Whether there is a causal connection is highly fact sensitive and should have been left for the jury to decide. Est. of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)(upholding jury's findings since "jurors may infer a causal connection

based on the surrounding circumstances" as "jury could have inferred...that in deciding to terminate plaintiff, Brown relied on a 'tainted' evaluation prepared by Briggs"); Maimone v. City of Atlantic City, 188 N.J. 221, 237-39 (2006)(whether there was a causal connection between the officer's whistleblowing and his transfer was jury question); Hernandez v. Montville Twp. Bd. of Ed., 354 N.J. Super. 467, 475-76 (App. Div. 2002), aff'd by, 179 N.J. 81 (2004)(upholding jury's compensatory verdict for plaintiff, who had always gotten good reviews before he complained, as there was "ample evidence" for "jury to conclude that defendant's proffered reason for his termination was pretextual and that the whistleblowing itself was a substantial factor in his termination."); Kolb v. Burns, 320 N.J. Super. at 479-483 (summary judgment reversed for defendants since it was for jury to decide whether defendants' proffered reasons for withholding teacher's salary increase were pretextual); Hester v. Parker, 2011 WL 1404886 (N.J. App. Div. Apr. 14, 2011)(summary judgment reversed since jury must decide whether CEPA plaintiff's termination was causally connected to his reports of racially discriminatory practices in his 2005 and in his 2007 civil complaint).

A. No Criminal Charges Were Possible Until Stump's Lie to the OCPO

No arrest warrant was sought and no arrest was made for months after Mayor Ducey went to the OCPO in December 2014 and told them about

Butterly's complaint about driving J.H. to Ocean Early. The critical turning point was on March 24, 2015 when Stump falsely and authoritatively told OCPO's Paulhus and Mahony that the IEP was "fraudulent." Pa468, at Pa486. Within weeks of that, the OCPO concluded there was probable cause rather than mere suspicion and on that basis they sought and obtained a warrant on May 6, 2015 against the Plaintiffs alleging an indictable offense and they arrested the Plaintiffs on May 7, 2015. Again, if Stump had not on March 24, 2015 retaliated by declaring the IEP "fraudulent," the OCPO would not have charged and arrested Plaintiffs so there would have been no indictment or re-indictment or grand jury proceeding. Detective Mahony admitted in his deposition that the OCPO would **not** have proceeded with charges against the Plaintiffs if they had not gotten Stump's statement that the IEP was "fraudulent," and that other CST members went along with her: "**I don't believe that we [the OCPO] would have proceeded on any criminal charges if that's all we had, no.**" Pa455, Mahony Dep., at 66:14 to 67:18. Despite counsel's attempt with leading questions to get Mahony to undo his truthful testimony in that regard (Pa455, at 68:16-70:2), he spoke the truth in his original answer to Plaintiffs' counsel's question. Pa455, at 66:14-67:18. On cross-examination, Mahony falsely testified that even without Stump's characterization of the IEP as "fraudulent" he would have indicted because he had supportive expert witness testimony. But

Mahoney's own detailed record of the pre-grand jury investigation shows no mention of such "expert testimony" during that time period. Pa468, at 495.

Competent, admissible evidence shows that the retaliatory Stump whipped up a hue and cry about a non-crime, Uszenski's daughter's legitimate effort to mainstream her undisputed disabled son, J.H., by an effort to mainstream him in a preschool that had been approved for him by the State as an appropriate placement. Ms. Stump did so as an agent of and with the authority and prestige as a BBOE Director and Supervisor and thus the BBOE is liable under CEPA for the harm she caused. If the consequences had not been so tragic, the "crimes" charged in this matter would be ridiculous on their face. When, if ever, has a party been charged criminally because of a mere difference of opinion concerning the placement of a clearly disabled child in a daycare center pursuant to an IEP signed by all members of a CST and approved by the out-going Director, Ms. Stump.

Here, the trial court wrongfully usurped the role of the jury by finding no causal connection, despite direct testimony from a Board member, Lawrence Reid, of retaliatory motive, namely that BBOE had turned against Dr. Uszenski after he demoted Stump and Ciesla had to resign, and Stump embarked on her smear campaign against Uszenski and Morgan. Pa1824, Reid Dep. at 41:23-44:4. The trial court ignored the evidence presented by Plaintiffs in their lengthy,

heavily-supported CSOMF about how Stump and others in CST lied to the OCPO about J.H.'s needed IEP, how BBOE's business administrator and some Board members also continued to defame Dr. Uszenski before the OCPO. The trial court instead focused on Mayor Ducey's initial report to the OCPO of December 29, 2014, but missed Plaintiffs' evidence that although it was the former bus driver's allegations that initiated the investigation by OCPO, that investigation went nowhere for months until, on March 24, 2015, Supervisor Stump decided to lie to OCPO's Det. Mahony by telling him that J.H.s amended IEP was "fraudulent." Pa468, at Pa486. Mahony and the OCPO did not seek an arrest warrant or initiate a grand jury investigation until that point.

Put another way, reading the evidence in a light favoring the Plaintiffs and drawing all reasonable inferences in their favor, there would have been no arrest and no grand jury at all if Stump had not accused Plaintiffs of a fraudulent IEP – the lynchpin of all charges against Uszenski and Ms. Halsey.

In his deposition, Det. Mahony, the first OCPO former defendant to be deposed, admitted the foregoing causation sequence was the case. Pa445, Mahony Dep., 66:14-67:18. On cross-examination by defense counsel, Mahony tried to claim that other alleged facts played in the decision to prosecute. He claimed under leading questions that the OCPO hired experts that influenced the decision to indict, but no such experts appear in Mahony's report prior to the

arrests. Pa468 at Pa495.

The trial judge treated the grand jury (and the OCPO) as an independent intervening cause, breaking the chain of causation under CEPA. 3T19:10-22:22. But, the evidence shows that there would have been no grand jury at all if Stump hadn't lied in the Prosecutors' interview, before the convening of the grand jury.

By focusing myopically on "who" has the legal authority to arrest or indict or what evidence to present to the grand jury, (Decision, 3T19:10-22:22), the trial court failed to view the facts most favorably to Plaintiffs, ignoring most of the facts presented by Plaintiffs and usurping the jury's role.

In an effort to support its finding of no causal connection, the trial court stressed that Plaintiffs were indicted by three different grand juries. But the first two indictments were dismissed by Judge Roe (Pa1735) because the OCPO suppressed exculpatory evidence. And again, no grand juries at all would have been convened in this matter if Stump, acting within the scope of her employment and/or authority, had not falsely accused Uszenski of pushing for a fraudulent IEP. So, whether there were three indictments or one is immaterial to the issue of causation.

To the extent Prosecutor Paulhus attempted to undermine the chain of causation in this case, he suffered serious credibility issues ignored or diminished by the trial court. For example, at deposition he Donna Stump's inflammatory

fake Press Release was not presented to the indicting grand jury. See Pa265, BBOE's SOMF, No. 64.

In truth, at the third Grand Jury, Paulhus swore Detective Llauget in (Pa1035, at Pa1191, GJ 2T174:21-24), directed her to read the "Press Release" verbatim to the jury (Pa1035 at GJ 2T279:21-281:5), marked the "Press Release" as Exhibits 114 and 115 (Pa1670), and submitted testimony that Stump wrote it. Pa1191, GJ 2T 282:4-8. A reasonable jury could conclude that the former EAP Paulhus, who suppressed exculpatory evidence in Grand Juries one and two, and pretended under oath he did not recall "seeing" the inflammatory "Press Release" (Pa265, at No.64), has no credibility when he used it extensively before the Third Grand Jury as indicated above, and when he testified that Plaintiffs' arrest and indictments were supported by more than Stump's lie as repeated by her fearful, entrapped staff. A jury in this matter will likely conclude that Stump's lies and those of the CST team which she supervised (including Stump's contention in the Press Release that Uszenski had knowingly placed a drug dealer among the children of the school district) were a determinative factor in the final grand juries' decision to indict, and were all links in a chain of connectivity stemming back to when Stump embarked on her smear campaign because of Uszenski's whistleblowing and ending with his termination as a result of the baseless criminal charges that were eventually dismissed. That said, there would have

been no grand jury at all had Stump never claimed the IEP was "fraudulent."

B. The Trial Court's Reliance on Temporal Proximity Was Erroneous

Donna Stump set all of the subsequent arrests and indictments in motion when she began her defamatory smear campaign against Uszenski and Morgan in July 2013, as it continued unabated and led directly to Plaintiffs' arrests and later indictments in May and September 2015. It continued in the interim period even before Mayor Ducey went to the OCPO in December 2014 about what the BBOE bus driver had told him, with J.H.'s declassification in June 2014. Board members admitted that Uszenski was retaliated against, and that the Board had "turned against" him. Pa1824, Reid Dep. at T41:23-44:4.

In fact, BBOE member John Barton admitted that he also reported Dr. Uszenski to the OCPO in the Fall of 2014, before Mayor Ducey did, over unfounded rumors.[6] The retaliation continued after Uszenski's May 2015 arrest,

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[6] Barton admitted that he went to the OCPO with what can best be called malicious, speculative gossip in the Fall of 2014, met with Det. Mahony and told him, "the special ed department seemed to have lost $750,000" and while he was "talking to parents, a PTA officer …had mentioned that they just had a [school] playground"… "redone, like within an instant, within a heartbeat's moment" and Mahony told Barton that Mahony would keep a record of it on file. Pa1977, Barton Dep. at 80:5-82:7 and 82:18-83:11. Barton also told Mahony that he thought that Uszenski may have a conflict because he had a family member attending the schools and Mahony said he would keep a record of it. Pa1977, Barton at 83:23-85:5. Mahony testified that he did not believe that he ever met Barton as he alleged. Pa445, Mahony Dep. at 26:9-34:20. Barton's admission that he, too, reported speculative, false gossip about Uszenski to OCPO, **supports the testimony from other BBOE members** (including Reid), that the

when Uszenski was suspended with pay and later without pay by BBOE in September 2015, and in February 2017, when BBOE failed to reinstate Uszenski's pay after Judge Roe's decision, and in September 2017 when BBOE refused to renew Uszenski's contract (terminating him in July 2018), and when BBOE refused to do anything to negate their employees' falsehoods about Plaintiffs resulting in the Third Indictment against Plaintiffs. Even to this date, BBOE had not paid Uszenski his back pay despite BBOE members testifying at deposition that they understood that he would be paid it if the criminal charges were dismissed, which they were in 2019.

The trial court failed to recognize the continuing nature of the retaliation which began with Donna Stump's defamatory, smear campaign and that temporal proximity, while it may be a factor, is **not "the only circumstance that justifies an inference of causal connection**." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. at 550. As explained in Romano, **"[w]e doubt that a sophisticated employer ... would immediately retaliate**." Ibid.

This court has recognized that retaliation can take years. In Nardello v. Township of Voorhees, 2009 WL 1940390 *12-13 (N.J. App. Div. July 8, 2009)(Nardello II), this Court discussed the "sophisticated employer" concept in

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BBOE members began to "**turn against**" Uszenski as a result of Ms. Stump smear campaign that began in July 2013. Pa1824, Reid Dep. at 41:23-44:4.

the context of temporal proximity discussed in Romano, supra, and explained that defendants who want to retaliate often bide their time in retaliating against a whistleblower, and that despite **a three-year lapse "the factfinder could have drawn different inferences from the same facts, in that 'a knowledgeable employer might mask its reason for discharging an employee by delaying its action for a protracted period after a dispute.'"** Nardello II, at *12-13

In T.D. v. Borough of Tinton Falls, 2015 WL 7199733 (N.J. App. Div. Nov. 17, 2015), the Appellate Division reversed summary judgment for the employer in a CEPA case where plaintiff police officer alleged he was transferred from the K-9 unit in January 2010 and denied a promotion in December 2010 in retaliation for what he had said and done in March and September 2009. Id., at *2. In finding that there were material questions of fact as to causation, the Appellate Division reasoned:

> "A CEPA plaintiff can prove causation by presenting either direct evidence of retaliation or circumstantial evidence that justifies an inference of retaliation." Zaffuto v. Wal–Mart Stores, Inc., 130 Fed. Appx. 566, 569 (3d Cir.2005). **These determinations are fact sensitive and are determined by the ultimate factfinder**. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir.2000).
>
> The record reflects both direct and circumstantial evidence satisfying this prong. Plaintiff has shown the asserted, but unrebutted, adverse employment actions, **along with antagonism and animus toward plaintiff, which demonstrate "more likely than not" the employer was motivated by a retaliatory intent**. Donofry v. Autotote Sys., Inc., 350 N.J.Super. 276, 293 (App.Div.2001) .... See also Kelly v. Bally's Grand, Inc., 285 N.J.

> Super. 422, 431 (App.Div.1995) (holding a plaintiff can discredit an employer's response and create an inference of retaliatory conduct by pointing to "weaknesses, implausibilities, inconsistencies,...).
>
> T.D., at *8-9 (internal and parallel cites omitted; emphasis added).

Similarly, in Asen v. Cooper Hosp./Univ. Med. Center, 1996 WL 347451, *2-4 (D.N.J. June 7, 1996), the district court denied summary judgment to defendant on the CEPA count, despite a 2-year gap between her complaints and her layoff, finding that **"the timing of plaintiff's termination alone is not dispositive of the issue."** Id., at *7.

Where, as here, when there was an ongoing, continuing retaliatory campaign by BBOE, in the unbroken chain discussed herein, the trial court's reasoning on temporal proximity falls apart.

C. The Trial Court Erred in its Reliance on OCPO's Dismissal

The trial court also improperly relied upon the prior dismissal of the OCPO (see 3T22:23-23:11) – when OCPO was never sued under CEPA, but on common law claims that have no bearing on the CEPA claim against BBOE. Pa94-95. The trial court was also critical of Plaintiffs' reliance on the exculpatory evidence outlined in Judge Roe's Decision dismissing the superseding indictments against Uszenski and Halsey (which we also presented independent proof of) and instead relied upon another judge's decision not to dismiss the Third Indictment. Decision, 3T24:3-19. However, the trial court missed the point – that one Judge

found factual support for the need for J.H.'s amended IEP and of Stump's retaliatory motives – demonstrates that disputed issues of material facts are abundant in this matter – and should be decided by a jury, not the trial court.

Also, contrary to the judge's view, Plaintiffs did not have to prove any "civil conspiracy" between the OCPO and the BBOE under CEPA as alluded to by the trial court. 3T25:1-26:6. The trial court's discussion of it clearly shows its misunderstanding of the facts, and of CEPA. The trial court failed to see that it matters not who made the decision to seek arrests or indictments or even who went to the OCPO's first, but rather that the BBOE's employees, most notably Ms. Stump, made false, defamatory statements to the OCPO that OCPO undoubtedly relied upon in their investigation that caused and led to the arrests and indictments of Plaintiffs Uszenski and Halsey and the ensuing adverse employment actions.

POINT II

THE BBOE IS VICARIOUSLY LIABLE FOR STUMP's ACTIONS (Pa7; 3T16:5-18:10)

The trial court premised its conclusion that the BBOE engaged in no adverse employment action (the third prong of CEPA), on its finding that Donna Stump's alleged retaliatory actions were not within the scope of her supervisory authority and therefore did not give rise to entity liability. The court's analysis is based on a cramped, inaccurate reading of the relevant authority.

The trial court failed to appreciate that whether an employee is or is not acting within or outside of her employment is fact sensitive and typically should be left for a jury to decide. See, e.g., Abbamont at 417-19 (1994)(applying Lehmann's liberal vicarious liability to CEPA cases). See also, D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 124-127 (2007)(even fact issues on whether plaintiff was an "employee" or independent contractor under CEPA are for jury).

In Abbamont, 138 N.J. at 417-19, the defendants argued that Piscataway BOE ("PBOE") was not liable for the retaliatory actions of its supervisory employees because CEPA requires proof of intent and it was argued that the Plaintiff had not proven the bad intent of the actual Board of the PBOE, proofs we have here because of Reid's testimony. The Court rejected this argument, accepting that the PBOE was liable for the retaliatory conduct regardless of Board members' specific personal intent:

> ... [A]ccording to the trend of modern authority, the liability of an employer for the acts of his employee depends not upon whether the injurious act of the employee was willful and intentional or was unintentional, but upon whether the employee, when he did the wrong, was acting in the prosecution of the employer's business and within the scope of his authority, or had stepped aside from that business and done an individual wrong.
>
> [53 *Am.Jur.2d* Master & Servant § 438 (1970).]
>
> *See Lehmann, supra,* 132 *N.J.* at 619; W. Prosser, et al., *Cases and Materials on Torts* 685 (7th ed. 1982) ("*Respondeat superior* is not limited to negligent torts. An employer may be held liable for the intentional torts of his servant when they are reasonably connected

> with the employment and so within its 'scope.'"). Therefore, CEPA, even though it covers intentional conduct, does not preclude the application of traditional agency principles.
>
> ***
>
> As this Court noted in *Lehmann*, an employer whose supervisory employee is acting within the scope of employment will be liable for that supervisor's improper conduct. 132 *N.J.* at 619. Accordingly, we sustain the Appellate Division determination that the actions of McGarigle and Edelchik, specifically their recommendation that plaintiff not be rehired with tenure, were within the scope of their employment. 269 *N.J.Super.* at 27–28.

[Abbamont, at 419–21, parallel cites omitted, emphasis added]

Ms. Stump was acting within the scope of her employment when she created and distributed her fake, defamatory Press Release to all of the BBOE members by mailing them to their BBOE work mailboxes, by mailing it to another entity, the Ocean County Superintendent of Schools (Pa1670), by leaving it on car windshields and distributing copies to people at BBOE board meetings – a work place. Pa759-761, at ¶¶ 56-61, with Pa1670; Pa2084, Cantillo Dep., at 2T33:10-34:4; Pa1633, Cantillo, GJ 4T148:12-18. Just because the fake Press Release was according to Stump (whose credibility has been repeatedly called into question) allegedly created on her personal computer is non-dispositive. Decision, 3T16:15-16. The fake Press Release clearly related directly to her work because through it she was trying to get back at her new supervisor, Mr. Morgan, and Superintendent Uszenski who had demoted her, by defaming Uszenski in the hopes of getting him terminated. There is no credible testimony

that she distributed it on her "own personal time" as found by the trial court. 3T16:16-17. Ms. Stump's credibility is for the jury, not for the trial court to decide.

Ms. Stump was not an hourly worker, but a Supervisor and former Director. The trial court completely ignored that the fake Press Release was mailed to BBOE board members at Stump's and their place of work, distributed at her work which included BBOE meetings and even mailed to Ocean County Super. of Schools – in the hopes of getting Uszenski and/or Morgan fired. Ms. Stump admitted that she was "mad" at Dr. Uszenski for demoting her – and she engaged in these clearly retaliatory acts of defaming him:

> Q. Is there any reason why then you put Dr. Uszenski in here [fake Press Release] then?
>
> A. He was the superintendent.
>
> Q. **Okay. You were mad at him because he had just given you a bad promotion -- I'm sorry – a bad performance review and your contract hadn't been renewed and he had blown the whistle on some things that were going on in your department; isn't that true?**
>
> **A. Yes.**
>
> [Pa583, D. Stump Dep., at 140:25-141:9, emphasis added]

Her retaliatory actions and motivations do not negate that she was acting within the scope of her employment, as she distributed the fake Press **Release at work, intended it to impact her employment and that of Dr. Uszenski –**

namely, the BBOE's workplace.

The trial court also focused on only one event, that the "fliers" – i.e., the fake Press Release – was "distributed following a political event outside of work outside of work hours" (3T17:22-23) but misses **all of the other ways** that Stump distributed the fake Press Release by mailing it to each BBOE member to their work mailboxes at BBOE, and also distributed at her place of work after BBOE meetings. Even when it was distributed in a parking lot following a Republican Club meeting that Stump's husband and Ms. Cantillo both attended, he handed it to Ms. Cantillo, not in her role as a participant in the Republican meeting that had just concluded, but rather in her capacity as the President of the BBOE. The fake Press Release was not distributed at the Republican meeting itself, it did not have anything to do with the Republican Party, it was simply a place where Mr. Stump and Ms. Cantillo both had attended. It clearly related to Ms. Stump's employment who had just been demoted from Director to now Supervisor by Uszenski who had replaced her with Morgan, as an interim director.

The trial court also erred when it wrote that it "is concerned about the chilling effect potentially limitless liability holding public entities liable for the conduct of their employees and their personal lives while in engaging in political activity." Decision, 3T18:1-4. Stump's "Press Release" was not about Ms. Stump's "personal life" but her professional one – as a demoted, supervisor at

BBOE. She was not engaging in protected "political activity." Stump's "Release" falsely implied that Uszenski knowingly hired a convicted drug dealer and placed him in a position involving the care of children. Stump did not have any First Amendment or free speech rights to defame Dr. Uszenski, nor lie to the OCPO about J.H's IEP being "fraudulent" when it was not, as those are not protected speech. State v. Hill, 256 N.J. 266, 281-82 (2024)("Some types of speech… **fall outside** the protections of the First Amendment altogether. Those historically unprotected categories of speech include …**defamation, …and speech integral to criminal conduct"**).[7]

The trial court also wrongfully concluded that Ms. Stump was not acting within the scope of her employment when she was interviewed by the OCPO by concluding that it "was done on her own time and had no connection with her role as a supervisor of special education." 3T16:19-22. However, OCPO was interviewing Stump only because of her BBOE employment as a Supervisor and former Director of BBOE's DSS. She brought that status and authority to her claim that the IEP was "fraudulent."

Ms. Stump, like the other CST members, were all acting within the scope of their employment because **they only knew about J.H. and his IEP in**

[7] Non-protected speech integral to criminal conduct includes obstruction of justice and giving false testimony.

connection with their employment. Stump even initially declined to speak with OCPO about J.H. until the OCPO got permission for BBOE to release J.H.'s confidential records that allowed Stump and others in the CST to discuss J.H.'s confidential educational records with OCPO. Pa468 at Pa472, Pa485-486.

Thus, any concern that the trial court had for Stump's alleged "political activity" is misplaced because she was not engaging in protected First Amendment speech when she defamed Uszenski and his daughter by contending they had caused the issuance of a "fraudulent, IEP. Defamation is not constitutionally protected. Brennan v. Norton, 350 F.3d 399, 412 (3d Cir. 2003).

Clearly, under Abbamont, supra, the BBOE is vicariously liable for the false and retaliatory statements their Supervisor Stump made, blaming Uszenski for a "fraudulent" IEP for his grandson, because she did so acting within the scope of her employment as a supervisor. The only reason OCPO contacted her was because of her employment as a Director, now demoted to a Supervisor in DSS, and she brought to the OCPO the imprimatur of her authority and expertise as a Supervisor. The OCPO called her because they believed her still to be the Director. Pa468. Det. Mahony even captioned his summary with her official title: "Interview of Donna Stump—Supervisor of Special Services, Brick Schools." Pa468. Given her supervisory stature, Mahony reported what was in effect Stump's opinion that "the placement of J.H. was not educationally necessary, and

could not be supported by a legitimate IEP." She went on at length about BBOE policies for out-of-district placement and concluded that "the IEP that allowed J.H. to attend Ocean Early at tax payer expense is fraudulent..." completely ignoring, as brought out by Judge Roe in her Opinion dismissing the first indictments in this matter, that mainstreaming a disabled child by placing him in a non-disabled school environment is a clinically accepted approach to treatment. Pa1735.

Because Stump acted within the scope of her employment when she falsely and for purposes of retaliation stated that the IEP was fraudulent, the BBOE should be deemed to have vicariously retaliated against the Plaintiffs via Supervisor Stump. Likewise, Stump acted within the scope of her authority as a supervisor when she and her husband handed her fake "Press Release" to all the Board members on it and its attachments, a document read verbatim to the Grand Jury that falsely accused Dr. Uszenski of being "well aware of his [Andrew Morgan's criminal] background." Pa1670. Under Abbamont and Lehmann, Defendant BBOE retaliated because their supervisor, as well as other CST employees and other employees retaliated and ganged up on Uszenski when they buttressed Stump that J.H.'s IEP was "fraudulent" and that Uszenski's job was to vet Morgan's background, neither of which was true.

Moreover, given Reid's testimony about the BBOE shifting to a retaliatory

stance after Ciesla's scam was exposed and Stump was demoted, the BBOE is **directly liable** for Stump's and other employees' retaliation because it failed to protect Superintendent Uszenski from a vicious and wide-spread public smear campaign by not disciplining Stump after her public distribution of the defamatory Press Release in 2013. Had they done so, she may well have ceased generating her subsequent lies concerning a "fraudulent" IEP, and others in the CST would not have likely supported her in her lies to the OCPO.

A. Even if Stump or Others Acted Outside the Scope, BBOE is Liable

The trial court failed to recognize that under Lehmann, supra, even if Stump's actions were not deemed "within the scope," the Board is liable for Stump's (and the other BBOE's employees such as McFadden, Edwards and other supervisory members of the CST like Susan Russell, who became Director, and Dana Gonzalez, the School Psychologist) retaliatory actions. Lehmann makes clear that an employer is liable for its supervisor's misdeeds when acting **outside the scope of her authority** as follows, citing the Restatement of Agency:

> Section 219 of the *Restatement (Second) of Agency* outlines the liability of a master for the torts of a servant.
>
> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, **unless:**
>
> **(a) the master intended the conduct or the consequences, or**
>
> **(b) the master was negligent or reckless, or**
>
> **(c) the conduct violated a non-delegable duty of the master, or**
>
> **(d) the servant purported to act or to speak on behalf of the**

> **principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.**
>
> Applying those principles, we declare that under § 219(1) an employer whose supervisory employee is acting within the scope of his or her employment will be liable for the supervisor's conduct in creating a hostile work environment. **Moreover, even in the more common situation in which the supervisor is acting outside the scope of his or her employment, the employer will be liable in most cases for the supervisor's behavior under the exceptions set forth in § 219(2). For example, if an employer delegates the authority to control the work environment to a supervisor and that supervisor abuses that delegated authority, then vicarious liability under § 219(2)(d) will follow**. (citations omitted).
>
> [Lehmann, 132 N.J. at 619–20; emphasis added].

Here, when speaking to the OCPO, Supervisor Stump (as well as other CST members who piled on the falsehood that J.H.'s amended IEP was "fraudulent") "purported to act or to speak on behalf of the principal *[i.e.*, the BBOE] and" in speaking with authority and expertise Stump "relied upon apparent authority or [s]he was aided in accomplishing the tort by the existence of the agency relation." Thus, under Section 219 (2)(d), the Defendant BBOE is vicariously liable for Stump's retaliation, and the other BBOE employees who also lied about J.H.'s IEP or that Dr. Uszenski, as a Superintendent, had any duty to conduct any background check or clear Morgan for work, when BBOE had an HR Department that did that, and actually cleared him to work through the NJDOE. That is, the BBOE itself is deemed to have retaliated against Uszenski.

Moreover, by failing to stop Stump early on when she launched a public

campaign defaming Uszenski, the BBOE became vicariously liable because it was "negligent or reckless" under 219(2)(b) of the *Restatement*. The BBOE certainly had a duty to investigate who was launching the campaign against Dr. Uszenski, which they knew involved Stump's husband, and by extension, their employee, Donna Stump, but they did nothing to protect Dr. Uszenski. The failure to remove a harasser – such as Donna Stump -- from the workplace gives rise to employer liability for a hostile work environment. Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999). The failure of BBOE in this instance led to the false criminal charges against an innocent man and his daughter.

The BBOE gave Stump sufficient supervisory power to create an environment among her subordinates and others that forced them to support her story about alleged "coercion" by Morgan to sign the IEP. Once Stump convincingly lied to the OCPO about the IEP being "fraudulent," all of the IEP signatories, including Donna Gonzalez and Susan Russell, were trapped into claiming to the OCPO, following Stump's lead, that they were "coerced" into signing it. If they had not claimed coercion, then they risked being indicted as well for signing off on a "fraudulent" document. So frightening was this trap created by Stump that at least one signatory to the IEP, Ms. Gonzalez, a supervisory member of the Child Study Team who would later sign off on the non-renewal of J.H.'s IEP, had her lawyer negotiate an immunity agreement with

the OCPO before she testified. The moment before she testified the Prosecutor reminded her of her deal: "And an agreement was made between you and your attorney that in exchange for your cooperation and truthful testimony that no charges would be filed against you. A. Correct. Q. Is that accurate? A. Yes." Pa1000, GJ (Gonzalez) at 1T171:5-11. Trapped by Stump, Ms. Gonzalez, a supervisory employee of BBOE, then dutifully testifies that Ocean Early was not an appropriate placement for J.H. and was "not legitimate." Pa1000, GJ (Gonzalez) at 1T171:16-18.

B. The Court Erroneously Relied Upon a Dismissal Without Prejudice

The trial court held "this Court is unaware of how the Brick [BOE] could be held vicariously liable for an employee who was previously dismissed from this litigation at its inception." 3T18:7-10.

CEPA does not at all require that to sue an employer, a plaintiff must also sue responsible individuals. Thus, the judge's comment had no basis in law. Importantly, the trial court ignored that the prior April 2, 2019 Order (Pa1, ¶¶ 3,6) was with**out** prejudice as to the CEPA counts, was based on the original complaint, not the Third Amended Complaint, and had **no effect** whatsoever on BBOE's summary judgment motion. It is fundamental that a "with**out** prejudice" order cannot bar any subsequent action against Stump, nor her employer, BBOE. See Czepas v. Schenk, 362 N.J.Super. 216, 228 (App.Div.), certif. denied, 178 N.J.

374 (2003)("A dismissal without prejudice means that there has been no adjudication on the merits and that a subsequent complaint alleging the same cause of action will not be barred by reason of its prior dismissal.").

The trial court was wrong on the law as to vicarious liability, had misplaced "concerns" over Stump's non-existence free speech rights to defame and give false statements to the OCPO, and even ignored basic law on the meaning of a "without prejudice" Order. In and of themselves, these are grounds for reversal.

POINT III

THE TRIAL COURT ERRED BY IMPROPERLY DECIDING THERE WAS NO ADVERSE EMPLOYMENT ACTION AND IMPROPERLY DECIDED DISPUTED QUESTIONS OF MATERIAL FACT (Pa7; 3T13:18-16:4)

Also, with respect to the third prong of CEPA, the trial court erroneously decided other questions of fact, adopting Defendant's self-serving arguments, including that, "[it] fails to find any evidence of retaliatory action by the [BBOE] against the plaintiff. Rather the record confirms Uszenski was hired ...and the [BBOE] approved the contract for a four year term on August 1, 2012 through June 30, 2016." Decision, 3T14:9-15. The trial court then found there was no retaliation since the BBOE later approved an extension of Uszenski's contract from 7/1/13 to 6/30/18. However, the extension Resolution was on June 25, 2013 (Pa306), **before** Stump began her smear campaign against Uszenski which began

in mid-July 2013 – see date stamp of July 16, 2013 on the fake Press Release (Pa1670) – and **before** Stump falsely told the OCPO on June 29, 2015 that J.H.'s IEP was "fraudulent." (Pa468 at Pa508).

In so holding, the trial court ignored **direct** evidence of retaliation by the BBOE, as testified to by Reid, and supported by John Talty, another board member as detailed above, that the Board "**turned against**" Uszenski and "retaliated" against him as a result of Ms. Stump's smear campaign. Pa1824, Dep. of L. Reid, at T41:23-44:4

Reid was careful to say the Defendant "Board of Education" as an entity "retaliated." This testimony alone creates a genuine issue of material fact and thus Defendant's motion should have been denied on that basis. See Smith v Millville Rescue Squad, 225 N.J. 373, 394 (2016)(in LAD case, court found that "[d]irect evidence of discrimination [here retaliation] may include evidence 'of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory [retaliatory] attitude.'").

Clearly, Dr. Uszenski suffered retaliation in violation of the plain language of CEPA. "'[R]etaliatory action' is defined by CEPA to mean '**the discharge, suspension** or demotion of an employee, or *other adverse employment action* taken against an employee *in the terms and conditions of employment.*'"

Maimone, 188 N.J. at 235, quoting, N.J.S.A. 34:19–2(e) (emphasis added).

It matters not whether the BBOE had to suspend Uszenski once he was charged with a crime, by its very nature, his suspension – which could have been with pay during its duration but was not – and his later termination -- were undoubtedly "adverse employment actions" under the **plain language** of CEPA. Again, BBOE, through Stump and other employees, **actually caused** the false charges to be filed against Uszenski and his daughter. But for Supervisor Stump and other BBOE CST employees retaliating by telling falsehoods to OCPO about Uszenski and the allegedly "fraudulent" amended IEP for his grandson, no criminal charges would have been possible and no termination of employment would have been required by statute.

The Board members' testified that they understood that Uszenski would be paid his back wages if the charges were dismissed, which they were, yet BBOE never did so. It speaks volumes about the ongoing retaliation and that the Board had "turned against" Uszenski. In short, his suspension, with and then without pay and later termination, were all unquestionably adverse employment actions.

POINT IV

THE DERIVATIVE CEPA CLAIMS DISMISSAL MUST ALSO BE REVERSED (Pa7; 3T, 26:7-14)

Lastly, as to the derivative CEPA claims of Ms. Halsey and the minor, J.H., under Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 633 (1995), the trial court dismissed them solely on the improper basis that Dr. Uszenski's CEPA claim was dismissed. Since summary judgment should be reversed as to Uszenski, so should summary judgment on the other Plaintiffs' derivative CEPA claims be reversed and their claims reinstated.

CONCLUSION

Plaintiffs request that the summary judgment Order (Pa7) be vacated and this matter remanded back for a trial on Plaintiff Uszenski's CEPA and Plaintiffs Halsey and J.H.'s derivative CEPA claims against Defendant BBOE.

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Attorneys for Plaintiffs-Appellants

/s/ Neil Mullin
Neil Mullin, Esq.

Dated: December 3, 2024

WALTER USZENSKI, JACQUELINE HALSEY and J.H., a minor, Plaintiffs-Appellants, v. BRICK TOWNSHIP BOARD OF EDUCATION, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION **DOCKET NO.: A-003834-23 T4** CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MONMOUTH COUNTY DOCKET NO.: **MON-L-1823-23** SAT BELOW: HON. OWEN C. MCCARTHY, P.J.Cv.

BRIEF OF DEFENDANT-RESPONDENT, DONNA STUMP

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PRELIMINARY STATEMENT

Plaintiffs-Appellants, Walter Uszenski, Jacqueline Halsey and the minor child, J.H., have distorted and misrepresented the facts of this case and the holdings of the Trial Court by the Honorable Craig L. Wellerson, P.J.Cv. and the Honorable Owen C. McCarthy, P.J. Cv. The Trial Court's dismissal of Plaintiffs' Complaint without prejudice in favor of Defendant-Respondent, Donna Stump in 2019 and subsequent dismissal of Plaintiffs' Third Amended Complaint against the Defendant, Brick Board of Education, were both based upon well-reasoned oral opinions and sound legal principles. Plaintiff Uszenski alleges he was retaliated against for blowing the whistle regarding alleged violations occurring within the special education department of the Brick Township School District, concerning Ms. Stump, in violation of the New Jersey Conscientious Protection Act ("CEPA"). (Pa51-91). Plaintiff Uszenski additionally alleges that as a result of his whistle blowing activity, Ms. Stump falsely accused Plaintiff Uszenski and Plaintiff Halsey of obtaining an inappropriate out-of-district placement, which resulted in the Ocean County Prosecutor's Office initiating an investigation and obtaining subsequent indictments against the Plaintiffs. (Pa51-91). Plaintiffs allege Ms. Stump's actions resulted in Plaintiff Uszenski's ultimate termination from his position as Superintendent of the Brick Board of Education. (Pa51-91).

Ms. Stump filed a Motion to Dismiss arguing Plaintiffs are unable to establish their claims as a matter of law. (Pa148-159). Ms. Stump submitted a legal brief in support of the motion that outlined the legal framework for each cause of action, and how based on the facts pled, viewed in the light most favorable to the Plaintiffs, Plaintiffs simply could not sustain claims for which relief could be granted as Ms. Stump had no authority to influence Plaintiff Uszeski's termination nor cause the Ocean County Prosecutor's Office to bring criminal charges against Plaintiffs Uszenski and Halsey. Plaintiffs opposed the motion, arguing relevant information linking Ms. Stump to these incidents may be revealed during discovery.

At oral argument, Judge Wellerson heard extensive argument from Ms. Stump and Plaintiffs, as well as Defendant Board of Education and Defendant James Stump, as both Co-Defendants also filed dismissal motions, and concluded that Plaintiffs failed to meet their burden and dismissed all claims against Ms. Stump. (Pa1-6). With respect to the claims for discrimination in violation of the New Jersey Law Against Discrimination ("LAD") on behalf of J.H., violations of the Conscientious Employee Protection Act ("CEPA"), violations of the New Jersey Civil Rights Act ("NJCRA"), malicious prosecution, abuse of process and trade libel, Judge Wellerson specifically dismissed the claims without prejudice as to Ms. Stump to allow Plaintiffs to add Ms. Stump as a Defendant at a later point should discovery

demonstrate she was “more than just an innocent bystander". (1T 26:15 to 26:21). Plaintiffs never moved to add Ms. Stump back as a Defendant.

All facts, viewed in the light most favorable to Plaintiffs, do not give rise to any claims for which relief can be granted. Plaintiffs’ claims fail as a matter of law for the reasons established in the record below. Accordingly, the Trial Court’s decision to dismiss Ms. Stump as a Defendant should be affirmed.

PROCEDURAL HISTORY

On September 11, 2018, Plaintiffs, Walter Uszenski and his daughter, Jacqueline Halsey, individually and on behalf of her minor son, J.H., filed a Complaint alleging: (1) LAD discrimination on behalf of J.H.; (2) LAD retaliation on behalf of J.H.; (3) CEPA retaliation on behalf of Plaintiff Uszenski; (4) CEPA derivative retaliation on behalf of Plaintiff Halsey; (5) NJCRA violations on behalf of Plaintiffs Uszenski and Halsey; (6) malicious prosecution on behalf of Plaintiffs Uszenski and Halsey; (7) Abuse of Process on behalf of Plaintiffs Uszenski and Halsey; (8) Tortious Interference with Economic Gain on behalf of Plaintiff Uszenski; and, (9) Trade Libel on behalf of Plaintiffs Uszenski and Halsey. (Pa51-91).

On November 28, 2018, Ms. Stump filed a Motion to Dismiss in lieu of an Answer to Plaintiffs’ Complaint seeking dismissal of all claims. (Pa148-159). On December 13, 2018, Plaintiffs filed a Cross-Motion to Amend the Complaint in

opposition to Ms. Stump's Motion to Dismiss, as well as the Motions to Dismiss filed by the Defendant Board of Education and Defendant James Stump. (Pa160-162). Oral argument on all Defendants' dismissal motions was held on January 11, 2019 before the Honorable Craig L. Wellerson, P.J.Cv. (Pa1-6). Judge Wellerson granted Ms. Stump's Motion to Dismiss, without prejudice, by Order dated April 2, 2019 and Oral Opinion dated January 11, 2019. (Pa1-6). Plaintiffs amended their Complaint three times but never sought to add Ms. Stump back as a Defendant. (Pa98-14).

On March 31, 2023, the Defendant Board of Education filed a Motion for Summary Judgment. (Pa252-261). On May 16, 2023, Plaintiffs filed Opposition to the Motion for Summary Judgment. (Pa794). Oral argument on Defendant Board of Education's Motion for Summary Judgment was held on December 8, 2023 before the Honorable Owen C. McCarthy, P.J.Cv. (See generally 2T). Judge McCarthy granted Defendant Board of Education's Motion for Summary Judgment by Order and Written Opinion dated June 24, 2024. (Pa7-8).

Plaintiffs filed the within Notice of Appeal on August 6, 2024, appealing the Trial Court's April 2, 2019 and June 24, 2024 Orders. (Pa9-28). Plaintiffs filed an Amended Notice of Appeal on August 15, 2024. (Pa29-50).

COUNTERSTATEMENT OF FACTS

Ms. Stump began her employment with the Brick Board of Education in 1984 as a teacher of the handicapped. (Pa588). She was promoted to Supervisor within the Special Education department in 2001. (Pa588). Ms. Stump became the Director of Special Education in 2012. (Pa588). At the time Ms. Stump became the Director of Special Education, Walter Hrycenko was the Superintendent. (Pa588). When she was hired as the Director of Special Education, Ms. Stump advised Mr. Hrycenko that finance was not her specialty and she had never previously managed a budget. (Pa606). Ms. Stump was reassured that Mr. Hrycenko and Business Administrator Jim Edwards would help and offer her support in this area. (Pa606). Former Board member, John Talty, confirmed that the Board members were reassured that Ms. Stump would receive support with budgeting from Mr. Hrycenko and Mr. Edwards. (Pa1570). Plaintiff Uszenski was hired as the Superintendent of the Brick Board of Education on July 1, 2012. (Pa98).

In 2013, within Ms. Stump's first year as Director of Special Education, it was realized that there was a $750,000 shortfall within the special education budget due to unprocessed invoices which predated Ms. Stump's appointment as Director. (Pa600). Ms. Stump's secretary had compiled the invoices and Ms. Stump failed to submit the invoices to the Business Administrator for processing and payment. (Pa600). Ms. Stump was brought before the Education Finance Committee to discuss

the $750,000 deficit and admitted fault for the untimely submission of the invoices. (Pa602). The invoices were all determined to be for legitimate expenses. (Pa1275). Mr. Talty testified he and the other Board members wanted to speak with Ms. Stump because they believed she was being thrown under the bus. (Pa1571). After hearing from Ms. Stump, Board members insisted that Ms. Stump be removed from her position as Director, with one Board members specifically calling for Ms. Stump's termination. (Pa2081). Plaintiff Uszenski advised the Board that because Ms. Stump was tenured, she could not be terminated, but rather be demoted back to her position as Supervisor. (Pa2081). Accordingly, at the suggestion of the Board, Plaintiff Uszenski removed Ms. Stump as the Director of Special Education and demoted her back to Supervisor. (Pa1840). All Board members were in agreement that Ms. Stump should be removed as the Director. (Pa1840).

As a result of ongoing issues existing within the special education department prior to Plaintiff Uszenski's hiring, Mr. Reid requested that something be done to correct the department deficiencies. (Pa1838; Pa2080). Collectively, the participants of the Education Finance Committee determined that an audit of the special education department should be conducted. (Pa1471-1472). On February 11, 2013, Plaintiff Uszenski recommended to the Board that Andrew Morgan be hired as a consultant and to perform an audit of the special education department. (Pa1474). The District's Human Resources department submitted Mr. Morgan's information

to the New Jersey Department of Education ("DOE") for the standard background check to be conducted. (Pa1725). A letter dated March 7, 2013 was issued to the District from the DOE indicating that Mr. Morgan was disqualified from working for the District. (Pa1725). A second letter dated March 11, 2023 was issued from the District from the DOE indicating that the March 7, 2013 letter could be disregarded as Mr. Morgan is qualified to work for the District. (Pa1727).

In June 2013, after engaging in the alleged whistle blowing activity regarding the special education department, the Board gave Plaintiff Uszenski a new employment contract for a longer term, five years. (T3 14:25 to 15:4). Plaintiff Uszenski was only approximately one year into his employment contract when the Board extended his contract because the Board felt he was doing a good job. (Pa1840). For the year 2013, Plaintiff Uszenski was given an outstanding review by the Board President, Sharon Cantillo and was assessed to be exceeding the expectations of the Board. (T3 15:6 to 15:9).

On June 18, 2013, Mr. Morgan submitted his job application for the open position of Director of Special Services, which was ratified by the Board on June 27, 2013. (Pa1742). He became the Interim Director of Special Services effective July 1, 2013. (Pa1742). On his job application, Mr. Morgan checked "no" in response to the question of whether he had ever failed to be rehired or whether he had ever been terminated from employment, when in fact, he had been terminated or forced to

resign from several districts, as confirmed by Judge Roe during the underlying criminal proceedings. (Pa1742). Mr. Morgan additionally checked "no" in response to the question as to whether he was ever arrested or charged with a criminal offense, when he had pled guilty to a criminal offense of a controlled substance, third degree in the State of New York in 1990. (Pa1742). After undergoing rehabilitation efforts, the New Jersey DOE granted Mr. Morgan a teaching certificate in 1997. (Pa1742). However, the DOE had no authority to expunge or seal Mr. Morgan's prior conviction, and same was never expunged nor sealed. (Pa1742).

Shortly after Mr. Morgan was hired, District employees performed a Google search of his name which revealed an article detailing Mr. Morgan's 1990 arrest and conviction. (Pa610). Plaintiff Uszenski vouched for Mr. Morgan as it was known throughout the District that Plaintiff Uszenski and Mr. Morgan were friends. (Pa611). In June 2013, following her demotion, Ms. Stump drafted the Press Release that detailed the criminal past of Mr. Morgan and questioned whether or not Plaintiff Uszenski was aware of this information when he recommended Mr. Morgan be hired in a position that puts him around children. (Pa614). Ms. Stump testified she drafted the document as a way of venting with no intent to ever distribute the document, nor did she ever distribute the document. (Pa613-614). Numerous Board members, and former Business Administrator Edward McFadden, each testified that when the rumors about Mr. Morgan's criminal past began to circulate, they questioned

whether the Andrew Morgan referenced in the online article was the same Andrew Morgan that the Board hired. (Pa1398; Pa1450-1458; Pa1489-1490; Pa1501). Mr. Conti directly asked Plaintiff Uszenski about the allegations and was told the Andrew Morgan referenced in the article is a "Black man" not the Mr. Morgan hired by the District, which was echoed by multiple Board members. (Pa1458). Mr. Conti testified it was the Superintendent's responsibility to confirm an employee's background before hire. (Pa1454).

In the summer of 2013, Ms. Stump's husband, James Stump, hired an attorney to conduct a background check of Mr. Morgan, which revealed Mr. Morgan's criminal conviction. (Pa2040). Without her knowledge, Mr. Stump mailed Ms. Stump's Press Release to the Board members and personally gave the results of his background check to the Board President. (Pa2039-2045).

Criminal Investigation

Plaintiff Halsey's son, J.H., attended Ocean Early Childhood Center ("Ocean Early") from July 1, 2013 through June 2014, pursuant to a District Individualized Education Program ("IEP") which granted J.H. an out-of-district placement. (Pa61). Accordingly, J.H.'s tuition for attending Ocean Early was paid for by the Board. Pursuant to his IEP, J.H. was received transportation to and from Ocean Early each day at the expense of the Board. (Pa1735). In December 2014, a District bus driver, Marcella Butterly, contacted Brick Mayor, John Ducey, to complain about her

termination from the Brick Board of Education for leaving a student on the bus. (Pa431). Ms. Butterly relayed to Mayor Ducey that when the event occurred, she was covering a route for another bus driver and the route required her to pick up J.H. from Ocean Early. (Pa431-432). Mayor Ducey had concerns about the transportation services for J.H.'s placement and upon the belief that same may be an illegal use of township or school services, contacted the Ocean County Prosecutor's Office ("OCPO"). (Pa435). After receiving this information, the OCPO opened up an investigation into the issue. (Pa469).

As part of its investigation, the OCPO contacted the Director of Ocean Early, Lori Bliss, who told the detective that Ocean Early did not offer J.H. special education services and it is not a special education facility. (Pa471). The OCPO contacted Ms. Stump about J.H. on February 23, 2015, however, Ms. Stump indicated she did not feel comfortable speaking with the detective and shared no information. (Pa472). Under threat of subpoena, Ms. Stump met with the OCPO on March 24, 2015. (Pa623). During her interview, Ms. Stump indicated she did not believe J.H.'s placement at Ocean Early was appropriate and felt pressured to agree to same by Mr. Morgan. (Pa485-486). Child Study Team members, Vincent Balestieri, Jennifer Fabbo, Amy Ryan and Theresa Goodfellow, Special Education Supervisor, Susan Russell, and J.H.'s Case Manager, Dana Gonzalez, all told the OCPO they did not believe J.H.'s placement at Ocean Early was appropriate and

they felt pressured to approve same by Mr. Morgan. (Pa486-491). In May 2015, Plaintiffs Uszenski and Halsey were arrested and charged following the OCPO's investigation. The OCPO did not consult with Ms. Stump, or any member of the Board, prior to seeking an indictment against the Plaintiffs. (3T 19:17-19). Ms. Stump did not testify during any of the three Grand Jury proceedings. (2T 37:18-21).

As it relates to the detailed factual history leading to the Board of Education's decision to ultimately terminate Plaintiff Uszenski, Ms. Stump relies on the Statement of Facts submitted by the Defendant, Board of Education.

In evaluating Ms. Stump's Motion to Dismiss on January 11, 2019, Judge Wellerson concluded that Ms. Stump was not responsible for the decision to terminate Plaintiff Uszenski and he could not find any evidence that Ms. Stump did anything to assist the Board in making that decision. (1T 24:8 to 25:15). Similarly, in Judge McCarthy's June 24, 2024 decision, he concluded that the "decision to seek indictments against the Plaintiffs was made exclusively by the Ocean County Prosecutor's Office". (3T 19:17-19). Judge McCarthy opined the investigation only began because Mayor Ducey filed a report, not Ms. Stump or anyone from the District. (3T 19:19-21). He specifically opined, "[t]here's no evidence that any Brick Board of Education member or employee went to the Ocean County Prosecutor's Office and complained about the plaintiff busing of the grandchild". (3T 20:3-6).

Of significance, Judge McCarthy determined that the OCPO relied on a host of evidence that supported the decision to charge Plaintiffs, not solely that from Ms. Stump. (3T 20:18-22). "Prosecutor Coronado testified that even if Stump and members of the child study team had told him the IEP or J.H. was appropriate". (3T 20:23-25). Additionally, the OCPO also testified there were "grounds and a basis to find the IPE for J.H. was inappropriate other then the testimony of Donna Stump". (3T 21:4-7). Judge McCarthy further concluded that Ms. Stump's Press release was not the but for reason for the Plaintiffs' indictment either. (3T 22:4-5). Accordingly, Ms. Stump was properly dismissed from the litigation in 2019 and this decision was supported in the June 24, 2024 opinion.

STANDARD OF REVIEW

It is well-established that a reviewing court is neither bound by, nor required to defer to, the legal conclusions of a trial or intermediate appellate court. See State v. Gandhi, 201 N.J. 161, 176 (2010) (citing Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). For that reason, questions of law are reviewed de novo. See State v. Rockford, 213 N.J. 424, 440 (2013); State v. J.D., 211 N.J. 344, 354 (2012).

Additionally, "an appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e)". Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 290, (App. Div. 2017). Plaintiff appeals from the grant of Ms. Stump's Motion to Dismiss for failure to state a claim and the issue before the Court is whether the trial court properly applied the law in granting Ms. Stump's request for dismissal. Accordingly, Ms. Stump respectfully submits that the appropriate standard of review in this case is a de novo review of the trial court's application of the law to the undisputed facts of this case.

LEGAL ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN FINDING THAT THERE WAS NO ADVERSE ACT NOR CAUSAL CONNECTION BETWEEN PLAINTIFF USZENSKI'S ALLEGED WHISTLEBLOWING ACTIVITY AND ADVERSE EMPLOYMENT ACTION AS IT RELATES TO DONNA STUMP. (Pa1-6; 1T 5:1 to 38:20).

Plaintiffs argues the Trial Court improperly granted Ms. Stump's Motion to Dismiss based on the position that Ms. Stump's comments to the OCPO are the sole cause of Plaintiff Uszenski's termination from employment with the Brick Board of Education. As determined by the Trial Court, Plaintiffs failed to establish a prima facie case of CEPA retaliation as to Ms. Stump and, thus, her dismissal as a Defendant was appropriate. Judge Wellerson specifically granted Ms. Stump's dismissal without prejudice so Plaintiffs would have the ability to bring her back in

as a Defendant if the discovery supported same. (Pa1-6). Ms. Stump was never brought back into the litigation as a Defendant. As the Trial Court's decision to dismiss Ms. Stump was based on a thorough evaluation of the facts, and Judge Wellerson's decision was further supported by Judge McCarthy's June 24, 2024 decision, Ms. Stump's dismissal should not be disturbed.

To establish a prima facie claim of retaliation under CEPA, a plaintiff must demonstrate that:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
>
> (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19–3(c);
>
> (3) an adverse employment action was taken against him or her; and
>
> (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

Once a plaintiff has established a prima facie case under CEPA, the burden then shifts to the defendant to advance a legitimate, non-retaliatory reason for the alleged adverse employment action. See Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990). If the defendant is able to do so, the plaintiff must then establish by a preponderance of the evidence that a discriminatory

intent motivated the defendant's action. Id. at 445; see also Klein v. Univ. of Med. & Dentistry of New Jersey, 377 N.J. Super. 28, 39 (App. Div. 2005) ("If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual.").

A. Donna Stump had no legal authority to terminate Plaintiff Uszenski.

The Trial Court correctly determined that no adverse action was taken against Plaintiff Uszenski by Ms. Stump. (Pa1-6). A public board of education has the sole right to employ or not employ any public school employee, including a superintendent. N.J.S.A. 18A: 11-11; N.J.S.A. 18A:27-41. As both the Director of Special Services and a Supervisor of Special Services, Ms. Stump was a subordinate of Plaintiff Uszenski and had no legal authority to make decisions related to his employment. Further, it is not disputed that Ms. Stump never served on the Brick Board of Education, and as the Board has the sole right to make employment decisions as it relates to the Superintendent, Ms. Stump had no decision-making authority.

Plaintiffs acknowledge it was the Board of Education who made the decision to place him on leave and ultimately terminate his employment, not Ms. Stump. Plaintiffs also acknowledge it was the OCPO, an independent government entity, who made the decision to pursue criminal charges against Plaintiffs, not Ms. Stump. Plaintiffs' sole argument is that because Ms. Stump was disgruntled because of her

demotion, she made false statements to the OCPO, and but for Ms. Stump's false statements, the OCPO would never have pursued charges against the Plaintiffs. At oral argument on Ms. Stump's motion, Judge Wellerson properly concluded that the Board of Education "are the ones that are ultimately responsible for making the decision, not Donna Stump", specifically finding that Ms. Stump does not have the power to terminate Plaintiff Uszenski. (1T 24:8 to 24:13). To be liable for CEPA retaliation, Judge Wellerson opined that there "has to be retaliation from people who have the authority to, for lack of a better term, inflict the pain". (1T 25:7 to 25:9). Judge Wellerson ultimately concluded that there were no facts supporting that Ms. Stump did anything to assist the Board in its decision to terminate Plaintiff Uszenski. (1T 25:14 to 25:15). Accordingly, Judge Wellerson properly dismissed Ms. Stump without prejudice.

It is undisputed that after being contacted with complaints from former bus driver Marcella Butterly, Mayor Ducey was the one to first contact the OCPO in December 2014. (Pa431). It was only after Mayor Ducey contacted the OCPO did the OCPO open their investigation of Plaintiff Uszenski. The OCPO did not contact Ms. Stump until February 23, 2015, at which time Ms. Stump indicated she did not feel comfortable speaking with the detective and shared no information. (Pa472). It was not until the OCPO indicated they would subpoena Ms. Stump did she finally met with the OCPO on March 24, 2015. (Pa623). It is undisputed that Ms. Stump

never initiated contact with the OCPO and never spoke with any detective until **after** the OCPO's investigation was already ongoing.

As set forth in the record, the OCPO interviewed numerous individuals, from various entities, all who offered testimony similar to that of Ms. Stump. In his June 24, 2024 opinion, Judge McCarthy analyzed and dissected the facts of this case at length. Judge McCarthy opined:

> Rather their decision to seek indictments against the plaintiffs was made exclusively by the Ocean County Prosecutor's Office. The investigation of plaintiffs began filing a report made by former Mayor John Ducey to the Ocean County Prosecutor's Office, Former Mayor Ducey has denied contacting the Brick Board of Education, any attorney, member, supervisor, or employee of the Brick Board of Education in advising them of the nature of the conversation with the bus driver that she was picking up Uszenski's grandchild in Beachwood and driving the child to Forked River. There's no evidence that any Brick Board of Education member or employee went to the Ocean County Prosecutor's Office and complained about the plaintiff busing of the grandchild. (3T 19:17 to 20:6).

Initiation of the OCPO's investigation into Plaintiff Uszenski had nothing to do with Ms. Stump, but rather was initiated based on the complaints raised by Mayor Ducey. Further demonstrating the OCPO's independence in making the decision to bring charges against Plaintiffs, "Ocean County Prosecutor's Office Detective Ryan Mahoney testified that none of the Board of Ed. Members or employees that he spoke with suggested charges should be brought against plaintiffs". (3T 20:7 to 20:10). This statement clearly encompasses Ms. Stump and demonstrates that despite having

no authority to bring criminal charges against Plaintiff Uszenski, she never even suggested same to the OCPO.

Ultimately, the criminal investigation and subsequent indictments had nothing to do with Ms. Stump as the presentation made before the grand jury and the decision to criminally charge was made by a separate public entity – the OCPO. (3T 20:11 to 20:15). While Plaintiffs argue that had Ms. Stump not made the alleged false statements to the OCPO, the OCPO would never have moved forward with criminal charges, this positon is unsupported by the factual record. During her interview with the OCPO, Ms. Stump indicated she did not believe J.H.'s placement at Ocean Early was appropriate and she felt pressured to agree to same by Mr. Morgan. (Pa485-486). In addition to Ms. Stump, numerous other employees of the District also told the OCPO they did not believe J.H.'s placement at Ocean Early was appropriate and they felt pressured to approve same by Mr. Morgan. (Pa486-491). Of significance, the Director of Ocean Early, Lori Bliss, who has no association with Ms. Stump or the Board, told the OCPO that Ocean Early did not offer J.H. special education services and it is not a special education facility. (Pa471). It is clear that the OCPO had ample evidence from a wide variety of sources to support pursuing its investigation and initiating criminal charges.

Further, "County Prosecutor Coronado, Assistant Prosecutor Paulhus, and lead investigator Detective Mahoney each testified that there was a host of

information evidence that supported the Prosecutor's Office to charge plaintiffs, not just Donna Stump". (3T 20:18 to 20:22). Not only did three employees from the OCPO all confirm that they did not solely rely on Ms. Stump's testimony in its investigation, but Prosecutor Coronado additionally testified that the OCPO would have moved forward with its case even if Ms. Stump and the members of J.H.'s child study team testified that J.H.'s IEP was appropriate. (3T 20:23 to 20:25). Accordingly, Plaintiffs' theory against Ms. Stump has no basis because even if she had not made the alleged false statement that J.H.'s IEP was inappropriate and instead testified to the contrary, the OCPO still would have pursued criminal charges against Plaintiffs. "The Ocean County Prosecutor's Office would have still sought the indictment as it was not the sole theory under which Uszenski was charged". (3T 21:1 to 21:3).

The Ocean County Prosecutor's Office retained the services of two independent experts to review J.H.'s IEP that had no connection to the Board of Education. (3T 21:8 to 21:10). Detective Paulhus testified it was his decision to seek the initial indictment, to determine who was going to be charged and determine the specific charges that would be brought. (3T 21:11 to 21:14). "Clearly the Ocean County Prosecutor's Office is the only public entity that can charge the plaintiffs criminally, not the Brick Board of Education or their employee Stump". (3T 21:22 to 21:25). In his opinion, Judge McCarthy further concluded that "Stump's press

release was not the but for the reason of indictment either". (3T 22:4 to 22:5). As to the OCPO's independence and validity to the investigation, Judge McCarthy opined:

> The Court cannot ignore the fact plaintiffs were indicted on three separate occasions by three separate grand jury's. Each decision to present the case was made exclusively by the Ocean County Prosecutor's Office. It was the decision of the Ocean County Prosecutor's Office and their decision alone to investigate, arrest, and prosecute the plaintiffs, not the Brick Board of Education. (3T 22:15-22).

As concluded by both Judge Wellerson and Judge McCarthy, Ms. Stump had no authority to make decisions regarding Plaintiff Uszenski's employment nor did she have any authority to bring criminal charges against the Plaintiffs. The record is clear that the OCPO spoke with dozens of witnesses, retained experts and made its own, independent decision to pursue criminal charges against the Plaintiffs. Additionally, Ms. Stump had no influence or decision-making authority as it relates to the Board's decision to terminate Plaintiff Uszenski as a result of the criminal charges. Accordingly, the Trial Court properly determined that as a matter of law, Plaintiffs cannot establish a prima facie case of CEPA retaliation as to Donna Stump.

B. <u>There is a lack of temporal proximity between Plaintiff Uszenski's alleged whistleblowing activity alleged adverse acts.</u>

In addition to Ms. Stump having no involvement in the alleged adverse actions, there is a lack of temporal proximity between Plaintiff Uszenski's alleged whistleblowing activity and his indictment and termination. Plaintiff Uszenski engaged in his whistleblowing activity as early as October 2012 and made the

decision to demote Ms. Stump in May 2013. (3T 14:16 to 14:24). In June 2013, after engaging in his whistleblowing activity, the Board entered into a new employment contract with Plaintiff Uszenski for a longer term because he was deemed to be exceeding the expectations of the Board and they were happy with his performance thus far. (3T 14:25 to 15: 9). It is clear that immediately following the whistleblowing activity, the Board actually rewarded Plaintiff Uszenski with a longer contract. The OCPO did not even initiate its investigation until December 2014 and Plaintiff was not suspended until May 2015. The significant gap of multiple years, and a complete lack of any adverse actions taken against Plaintiff Uszenski casts extreme doubt that there is any causal connection between the alleged whistleblowing activity and alleged adverse employment actions.

Plaintiffs argue the Trial Court's reliance on temporal proximity was erroneous, however, Plaintiff's argument is not supported by the record. Plaintiffs argue that Ms. Stump set all of the subsequent arrests and indictments in motion when she began her defamatory smear campaign against Plaintiff Uszenski and Andrew Morgan in July 2013, which Plaintiffs argue directly led to Plaintiffs' arrests. As set forth above, Ms. Stump did not contact the OCPO, so it logically does not follow that her actions resulted in the subsequent arrests when the OCPO would never have even initiated an investigation had Mayor Ducey not raised concerns regarding J.H. Additionally, as stated above, Ms. Stump had no influence or

involvement in the OCPO's decision to pursue criminal charges and the OCPO specifically confirmed that charges still would have been pursued even without the testimony of Ms. Stump. The Trial Court correctly assessed the facts and its reference to the lack of temporal proximity was highly relevant.

Plaintiffs' arguments are further misguided because the Trial Court did not solely rely on the lack of temporal proximity in making its decision, but specifically outlined Ms. Stump's lack of decision-making authority and the OCPO's independence as an entity in bringing the criminal charges. Accordingly, the Trial Court's inclusion of the lack of temporal proximity was not erroneous.

CONCLUSION

For the foregoing reasons, the decision of the Trial Court to dismiss Plaintiffs' Complaint against Defendant, Donna Stump, should be affirmed.

Respectfully submitted,

/s/ Patrick F. Carrigg
Patrick F. Carrigg, Esq.

Dated: January 15, 2025

WALTER USZENSKI, JACQUELINE HALSEY, AND J.H., a minor

Plaintiffs-Appellants,
-VS-

BRICK TOWNSHIP BOARD OF EDUCATION,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003834-23 T4

Civil Action

Sat Below:
Hon. Owen C. McCarthy, P.J.Cv.

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY
DOCKET NO.: MON-L-1823-23

DEFENDANT-RESPONDENT, BRICK TOWNSHIP BOARD OF EDUCATION'S BRIEF IN SUPPORT OF ITS OPPOSITION TO PLAINTIFFS' APPEAL

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PRELIMINARY STATEMENT

This appeal comes before the court after summary judgment was properly granted dismissing Plaintiffs/Appellants, Walter Uszenski, Jacqueline Halsey, and J.H.'s, (collectively "Plaintiffs") claims in their entirety against Defendants/Respondents, Brick Township Board of Education (hereinafter "Defendant" or "Brick BOE"). More specifically, the Honorable Owen C. McCarthy, J.S.C., granted Defendants' motion to for summary judgment, applying the requisite legal standard, and undisputed facts, finding that Plaintiffs had failed to establish a claim under the Conscientious Employee Protection Act ("CEPA").

Plaintiffs claim they were retaliated against by the Brick BOE by conspiring with and causing the Ocean County Prosecutor's Office (hereinafter "OCPO"), to investigate, arrest and indict Plaintiffs Uszenski and Halsey, for Plaintiff Uszenski's alleged whistleblowing activity, reporting what he believed to be illegal activity of Donna Stump, the then Director of Special Services.

The Trial Court correctly found the record contained no evidence of an adverse action by the Brick BOE against Plaintiffs. Moreover, the Court found the Brick BOE was not vicariously liable for the alleged retaliatory acts of Ms. Stump, and that Plaintiffs were unable to establish a causal connection between

Plaintiff Uszenski's whistleblowing activity and any adverse action. Notably, the Trial Court found and the timeline established after Plaintiff Uszenski's alleged whistleblowing activity, the Brick BOE granted him a new contract for a longer term, and thus more money and gave Uszenski glowing reviews. Moreover, the Trial Court was correct in finding the decision to investigate, charge, arrest, and indict Plaintiffs Uszenski and Halsey rested solely with the OCPO. As the undisputed record established and aptly found by the Trial Court, the OCPO would have still sought to indict both Plaintiffs Uszenski and Halsey, even if Ms. Stump and members of Plaintiff J.H.'s child study team ("CST") told the OCPO that Plaintiff J.H.'s Individualized Education Program ("IEP") was appropriate. The Brick BOE did not take any adverse action against Uszenski until after his arrest by the OCPO, which pursuant to New Jersey Statute, disqualified him from employment as the superintendent, requiring them to suspend him.

Plaintiffs' allegations in this appeal, as were those at the trial level, are mere speculation and argument, unsupported by any record evidence established throughout discovery. The undisputed testimony established there was no agreement/conspiracy between the Brick BOE and the OCPO, nor did the Brick BOE incite or spur on the OCPO's decision to investigate, arrest, and indict

Plaintiffs. The decision rested solely with OCPO, without any input or influence by the Brick BOE.

As will be outlined below, the Trial Court was correct in granting Defendant's Motion for Summary Judgment, as Plaintiff could not, based upon the undisputed record establish a prima facie case under CEPA as the: (1) Brick BOE did not take any adverse act against Plaintiffs, only taking action required of it by statute, after the OCPO – a separate entity – charged and arrested Plaintiffs; and (2) there is no evidence of a causal connection between Plaintiffs' alleged protected activity and the adverse employment actions.

PROCEDURAL HISTORY

On September 11, 2019, Plaintiffs, filed their lawsuit in the Monmouth County Superior Court, Docket No. MON-L-3292-18 against Defendants, Brick BOE, John Barton, Sue Suter, Michael Conti, Karyn Cusanelli, Frank Pannucci, Sharon Cantillo, Dr. Vito Gagliardi, Sr., Business Administrator James Edwards, Board Attorney John C. Sahradnick, Marcell Butterly, Donna Stump, James Stump, Brick Township, Brick Township Mayor John Ducey, Brick Township Administrator Joanne Bergen, the Ocean County Prosecutors Office, Prosecutor Joseph D. Coronato, Executive Assistant Prosecutor Michal A. Paulhus, and Detective Ryan Mahoney. Plaintiffs alleged nine claims within

their Complaint:

(1)Count One – LAD Discrimination – Plaintiff J.H.
(2)Count Two – LAD Retaliation – Plaintiff J.H.
(3)Count Three – Violation of CEPA – Plaintiff Uszenski
(4)Count Four – Violation of CEPA, Derivative Retaliation – Plaintiff Halsey
(5)Count Five – Violation of NJ Civil Rights Act – Plaintiffs Uszenski and Halsey
(6)Count Six – Common Law Malicious Prosecution – Plaintiffs Uszenski and Halsey
(7)Count Seven – Law Abuse of Process – Plaintiffs Uszenski and Halsey
(8)Count Eight – Tortious Interference with Economic Gain – Plaintiff Uszenski
(9)Count Nine – Trade Libel – Plaintiffs Uszenski and Halsey

(Pa51-Pa90).

On April 2, 2019, the Honorable Craig L. Wellerson, P.J.Cv. dismissed: Count One of Plaintiffs' Complaint with prejudice; Count Two of Plaintiffs' Complaint without prejudice as to Donna Stump and with prejudice as to James Stump; Count Three of Plaintiffs' Complaint without prejudice as to Donna Stump and with prejudice as to James Stump; Count Four of Plaintiffs' Complaint without prejudice as to Donna Stump and with prejudice as to James Stump; Count Five of Plaintiffs' Complaint without prejudice as to Donna Stump and the Brick BOE, and with prejudice as to James Stump; Count Six of Plaintiffs' Complaint without prejudice as to Donna Stump and the Brick BOE, and with prejudice as to James Stump; Count Seven without prejudice as to

Donna Stump and the Brick BOE, and with prejudice as to James Stump; Count Eight of Plaintiffs' Complaint with prejudice as to Donna and James Stump and the Brick BOE; Count Nine of Plaintiffs' Complaint without prejudice as to Donna Stump and the Brick BOE, and with prejudice as to James Stump. (Pa1-Pa6).

On July 11, 2019, Plaintiffs were granted leave to file a First Amended Complaint. (Pa92-Pa93). On September 29, 2019, the Ocean County Trial Court dismissed Plaintiffs' First Amended Complaint with prejudice as to the OCPO, Prosecutor Coronato, Executive Assistant Prosecutor Paulhus, and Detective Mahoney. (Pa94-95). On February 10, 2020, the Ocean County Trial Court permitted Plaintiffs to file a Third Amended Complaint. (Pa96-Pa97). Plaintiffs' Third Amended Complaint asserted claims only against the Brick BOE:

(1) Count One – Violation of CEPA – Plaintiff Uszenski
(2) Count Two– Violation of CEPA – Derivative Retaliation – Plaintiff Halsey
(3) Count Three – Violation of CEPA – Derivative Retaliation – Plaintiff J.H.

(Pa98-Pa140).

On March 31, 2023, the Brick BOE moved for summary judgment to dismiss Plaintiffs' Third Amended Complaint. (Pa262-Pa263). On May 23, 2023, the matter was transferred from the Ocean County Superior Court to

Monmouth County Superior Court as newly appointed Ocean County Judge Ducey was a witness. (Pa141). On December 8, 2023, oral argument was heard. On June 24, 2024, the Honorable Owen C. McCarthy, P.J.Cv., granted Defendant's Motion for Summary Judgment and dismissed Plaintiffs' Third Amended Complaint with prejudice. (Pa7-Pa8).[1]

On August 6, 2024, Plaintiffs filed a Notice of Appeal of the June 24, 2024, Decision granting Brick BOE's Motion for Summary Judgment and the April 10, 2019 Order, dismissing Counts Three, Four, Six, and Seven without prejudice as to Donna Stump, and dismissing Counts Six and Seven without prejudice as to the Brick BOE. (Pa9).

STATEMENT OF FACTS

In and around June of 2012, Plaintiff, Walter Uszenski was employed as the superintendent of schools by the Brick BOE. (Pa100-01 at ¶ 13). Plaintiff, Jacqueline Halsey, is the daughter of Plaintiff Uszenski and mother of Plaintiff J.H. (Pa99 at ¶ 3). Plaintiff J.H., was a student who previously attended the Brick Township schools. (Pa99 at ¶ 4).

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[1] At no time after the Complaint was dismissed without prejudice against Donna Stump but prior to the granting of Summary Judgment did Plaintiffs move to amend or reinstate the claims against her or any other party dismissed without prejudice.

On June 21, 2012, the Brick BOE entered into a contract with Plaintiff Uszenski to be the superintendent for a term from August 1, 2012, through June 30, 2016. (Pa287-294; Pa295-296). From August 2012 through early 2013, Plaintiff Uszenski had several meetings with Donna Stump, the then Director of Special Education, concerning the special education department and its alleged non-compliance. (Pa338-339, Uszenski September 12, 2022, Deposition at T104:20-T106:9). Plaintiff Uszenski testified that Ms. Stump was forthcoming with information relating to the non-compliance of the department. (Pa339 at T107:9-15). Plaintiff Uszenski testified that Ms. Stump told him about Darlene Ciesla, her relation to former state senator Ciesla, and how she was allegedly not doing her job. (Pa338 at T105:4-25). In and around May 2013, Ms. Ciesla retired from the Brick BOE. (Pa719-720).

In October of 2012, during a finance meeting, an issue with the special education department's budget was raised by Jim Edwards, identifying a $750,000.00 deficit. (Pa343 at T123:16-T124:9). As a result, Uszenski asked Ms. Stump to attend a finance committee meeting to explain the deficit and unpaid invoices. (Pa343 at T125:6-19). Subsequent to the meeting, Uszenski recommended to the Brick BOE that Ms. Stump not be renewed as director and demoted to supervisor, which the BOE agreed to do. (Pa345 at T130:1-7). Some

Board members felt Ms. Stump's conduct was grounds for termination. (Pa345 at T130:8-23). On May 15, 2013, Plaintiff Uszenski advised Ms. Stump that she was not to be renewed as Director of Special Services and instead returned to the position of supervisor. (Pa382-383).

On June 21, 2013, after the demotion of Stump, despite already having a contract, the Brick BOE entered into a new contract with Plaintiff Uszenski, to be the superintendent for a longer term and more monies than the original contract, from July 1, 2013 through June 30, 2018. (Pa297-305; Pa306-307). A year later, on July 31, 2014, Plaintiff Uszenski was evaluated by the Brick BOE for the 2013-2014 school year. (Pa308-310). Pursuant to the evaluation performed by members of the Brick BOE, Plaintiff Uszenski received marks of exceeding expectations. (Pa308-310).

On or about May 6, 2015, the OCPO sought and obtained arrest warrants for Plaintiffs Uszenski and Halsey. (Pa391-399; Pa400-402). On May 8, 2015, after Plaintiffs had been arrested and charged, the State of New Jersey Department of Education advised the Brick BOE in writing that there was a pending charge against Plaintiff Uszenski for a "disqualifying crime or offense", and directed the Brick BOE to take the appropriate action. (Pa733-734). On May 8, 2015, Plaintiff Uszenski was advised that the Brick BOE held an emergency

where the Board approved his suspension with pay, pending the disposition of the criminal charges, pursuant to N.J.S.A. 18A:6-8.3, and the direction of the New Jersey Department of Education. (Pa384-385). At no time prior to Plaintiff Uszenski being charged and arrested in May of 2015, by the OCPO, did the BOE take any negative action regarding his employment. Plaintiff was never suspended or had his pay docked, in fact he received two positive evaluations and a new more lucrative and longer contract. (Pa359 at T6:16-25).

Only **after** the Ocean County Grand Jury returned the indictment of criminal charges on September 29, 2015, did the Brick BOE hold another emergency meeting on September 30, 2015, where the Board approved Uszenski's suspension without pay, pending the disposition of the criminal charges. (Pa386-387). It was not until two years later, September 18, 2017, did Brick BOE give Plaintiff Uszenski a formal written notice of unilateral termination of his employment pursuant to the terms and conditions of his contract, because the criminal charges remained pending. (Pa388-389).

The Origins of the OCPO investigation, indictment and arrest of Plaintiffs Uszenski and Halsey:

In or around December of 2014, then Mayor of Brick Township, John Ducey, met with Marcella Butterly, a former bus driver. (Pa430, John Ducey

Deposition, at T17:9-24). At the meeting, Ms. Butterly advised Mayor Ducey that she was upset because she had been suspended and that she was asked to pick up the grandchild of the superintendent in Beachwood and drive him to Forked River. (Pa431-Pa432 at T20:13-16 and T21:7-T23:21). After the meeting, Mayor Ducey did not contact the Brick BOE attorney or any Board members concerning the information Ms. Butterly relayed. (Pa434 at T32:10-22). Mayor Ducey discussed the information with the township attorney and then scheduled a meeting with the OCPO. (Pa434-435 at T33:24-T34:5). Mayor Ducey did not share the information with anyone else other than the OCPO. (Pa437 at T42:16-25). At no time did Mayor Ducey have any conversations with Donna or James Stump about her employment or demotion by the Brick BOE, nor did he ever talk to her about Andrew Morgan. (Pa429 at T13:18-T14:21 and Pa443 at T69:7-10).

The OCPO's investigation of Plaintiffs Uszenski and Halsey began when OCPO's Prosecutor, Joseph Coronato, received a call from the mayor's office regarding the conversation and complaint the mayor received from Ms. Butterly. (Pa409, Joseph Coronato Deposition, at T18:5-T19:7). After meeting with Mayor Ducey, Prosecutor Coronato handed the investigation to Mike Paulhus and Laura Pierro. (Pa409 at T20:3-21).

With no assistance, influence or input by the Brick BOE, the OCPO, specifically, Assistant Prosecutor Paulhus ("A.P. Paulhus") made the decision to seek the indictment of Plaintiffs in 2015. (Pa411 at T27:16-23). A.P. Paulhus made the determination on who and what to charge. (Pa462 at T62:2-18). None of the Brick BOE members or employees suggested or told Detective Mahoney that charges should be brought against Plaintiffs Uszenski and Halsey. (Pa461 at T59:12-T61:7). Detective Mahoney testified that there was a host of information, testimony, documents, emails, and evidence that supported their decision to charge Plaintiffs, not just Ms. Stump's statement. (Pa463 at T69:2-25). Further, Detective Mahoney testified that the indictment was "true billed three times" meaning the indictment went to the Grand Jury on three separate occasions, testimony was given all three times and each Grand Jury found there was probable cause to indict Plaintiffs Uszenski and Halsey. (Pa466 at T81:7-14).

Detective Ryan Mahoney prepared a report in connection with the criminal case against Plaintiffs. (Pa450 at T17:12-21 and Pa468-515). Detective Mahoney interviewed numerous individuals and obtained records from several sources, prior to seeking an indictment. (Pa468-515). Pursuant to the OCPO investigative report, prior to seeking arrest warrants, the OCPO interviewed

seventeen (17) different individuals and subpoenaed and reviewed records from over a half dozen different entities. (Pa468-515).

A.P. Paulhus presented the criminal charges to the Grand Jury in 2015 and 2017. (Pa519 at T8:18-T9:6). The decision to originally present and re-present the case to the Grand Jury laid solely with the OCPO. (Pa520 at T11:21-T13:4). A.P. Paulhus testified he made the decision to seek a second indictment after the 2015 indictment was dismissed by Judge Roe. (Pa413 at T35:4-13). The OCPO did not meet with the Brick BOE concerning reindicting the Plaintiffs, nor did the Brick BOE have any involvement in the decision. (Pa413 at T35:14-T36:5 and Pa520 at T11:21-T13:4).

A.P. Paulhus testified there were grounds to find that the IEP for JH was inappropriate other than the testimony of Ms. Stump and the CST. (Pa521 at T14:12-T15:8). The OCPO retained an expert, Dr. Bruder, who provided a detailed report and opined and advised the OCPO that Plaintiff J.H.'s placement was not appropriate. (Pa521 at T15:9-14). A.P. Paulhus testified that while Dr. Bruder did not testify in front of the Grand Jury, the substance of his report was presented. (Pa521 at T16:1-8). The OCPO also retained another expert, Dr. McCartney, who wrote a report concerning the actions and/or inactions Plaintiff Uszenski failed to take regarding Mr. Morgan's hire. (Pa524-525 at T29:13-

T30:4). Dr. McCartney stated in his report that it was incumbent upon the superintendent to do a thorough and complete background check and investigation prior to hiring Andrew Morgan. (Pa524-525 at T29:13-T30:4).

Prosecutor Coronato also testified that even if Ms. Stump and members of the CST had told him that the IEP and the bus transportation for Plaintiff J.H. was appropriate, the OCPO still would have sought to indict Uszenski, as same was not the sole theory for the charges. (Pa420 at T62:4-18).

After the first indictment was dismissed by the Court, to address any of the Judge Roe's concerns, the 2017 indictment presented by the OCPO took place over 5 days, with over a dozen witnesses and 139 exhibits. (Pa529 at T46:1-T47:10). The grand jury again, for the second time returned an indictment.

Uszenski's Allegations of Retaliation:

Plaintiff Uszenski testified that the false information that Ms. Stump gave the OCPO in the "press release" was that he knew Andrew Morgan and his criminal background, and had she not given that information to the OCPO he would not have been arrested. (Pa325 at T50:4-19; Pa542 at No. 14). While a grand jury exhibit, neither A.P. Paulhus nor Detective Mahony recall seeing the "press release" document. (Pa577-582; Pa456 at T41:3-21; Pa525 at T32:2-23).

Moreover, the OCPO did not rely upon the "press release" or Ms. Stump's interview to bring the charges against Plaintiffs, but as the undisputed record established, and aptly found by the Trial Court, had a host of other evidence, including numerous interviews, documents and two (2) experts the OCPO retained to provide support for their charges. (Pa272 at ¶52-58). It was this that the grand jury relied upon in returning the indictments against Plaintiffs. There is simply no evidence that Ms. Stump or the Brick BOE, "spurred on", was the "accelerant" or "set in motion" the investigation or charges against Plaintiffs by the OCPO, as Plaintiffs mistakenly allege.

Plaintiff Uszenski represented that he only "crossed paths in the workplace for about three days in 2007" with Mr. Morgan and did not socialize out of work. (Pa542 at No. 14). Uszenski contradicted his sworn interrogatories and admittedly testified at his deposition that prior to Mr. Morgan being hired by the Brick BOE, since 2007, he and Mr. Morgan had kept in touch with Uszenski agreeing to be Mr. Morgan's unofficial mentor. (Pa332 at T78:4-19). During this time, Mr. Morgan would contact him periodically, sometimes once or twice a week to discuss education and curriculum. (Pa332 at T78:4-19; Pa542). Plaintiff Uszenski testified that while Mr. Morgan was employed by the Brick BOE he told not only the Brick BOE HR committee that Plaintiff Uszenski

was his mentor but everyone else, including administrators. (Pa334 at T88:1-19). Uszenski never denied it, nor did he stop Mr. Morgan from telling people he was his mentor. (Pa334 at T88:1-19).

Uszenski also alleged that had the Brick BOE, specifically Ms. Stump told the truth to the OCPO regarding Plaintiff J.H., that no criminal prosecution could have been possible. (Pa545 at No. 14). As stated above and the undisputed record established, A.P. Paulhus testified that even without the testimony of Ms. Stump and the CST, there were other grounds to find that the IEP for JH was inappropriate, including an expert hired by the OCPO. (Pa272 at ¶54-58). Similarly, Prosecutor Coronato testified that even if Ms. Stump and members of the CST had told him that the IEP and bus transportation for Plaintiff J.H. was appropriate, that the OCPO would still have sought to indictment Plaintiffs as it was not the sole theory under which Plaintiff Uszenski was charged. (Pa270 at ¶40).

Halsey and J.H.'s allegations of retaliation:

Similar to Uszenski, Halsey alleges that she had false, baseless criminal charges filed against her at the instigation of the Brick BOE, who "spurred on" by Ms. Stump, conspired with the OCPO to bring same. (Pa653-655 at No. 12; Pa135 at ¶128). As established above, the OCPO without any discussions or

input from the Brick BOE or any of its employees, made the decision to investigate, indict, and arrest Plaintiffs. (Pa272 at ¶ 53-58).

J.H. resided in the Brick School District and received special education services. (Pa102 at ¶21). On June 12, 2014, Plaintiff Halsey had an eligibility meeting as it related to the special education services for Plaintiff J.H. (Pa676, Halsey Deposition Transcript, at T34:13-20). Present at that meeting were Plaintiff Halsey, special education teacher Jenna Worman, CST member and case manager Dana Gonzalez, and school representative Amy Ryan. (Pa721-722). At that meeting, Plaintiff Halsey testified that she was advised that Plaintiff J.H. was being declassified and that Amy Ryan advised her that a 504 plan would be put in place. (Pa677-678 at T41:20-T42:2). The record is completely bare of any evidence that Ms. Stump had any input, involvement or influence over the decision.

Subsequent to the June 12, 2014, meeting, Plaintiff Halsey did not send any written objection, email, letters, or other to the CST objecting to the declassification. (Pa679 at T48:5-16). Moreover, in an email dated June 16, 2014, from Amy Ryan to the principal of Osbornville Elementary School where Plaintiff J.H. would be attending kindergarten, Ms. Ryan advised after speaking with Plaintiff Halsey, confirmed that Plaintiff Halsey would be declassifying

Plaintiff J.H. and seeking a 504 plan. (Pa725-726). Prior to the June 12, 2014 meeting, where Plaintiff J.H. was declassified, Plaintiff Halsey never had any communications with either Ms. Stump or Ms. Ciesla and had never even heard either of their names. (Pa677 at T40:14-24).

Plaintiff Halsey stated that after J.H. was declassified, he had counseling sessions in the fall of 2014, with Ms. Goff, and states that after discussing same with Ms. Goff, they both agreed that Plaintiff J.H. was doing well at home and did not require any further sessions. (Pa107-108 at ¶44-47).

A year after J.H.'s declassification, on June 22, 2015, Plaintiff Halsey wrote correspondence to Ms. Susan Russell, who was the director of special services. (Pa723-724). In that correspondence Plaintiff Halsey summarized her recollection of the June 12, 2014, meeting in which Plaintiff J.H. was declassified. (Pa723-724). **As written in her own words**, Plaintiff Halsey states she agreed to Plaintiff J.H.'s classification. (Pa723-724). Moreover, Plaintiff Halsey admitted she had met Plaintiff J.H.'s kindergarten teacher, as was agreed to discuss his accommodations. (Pa723-724). She also stated in the letter that the discussed accommodations were put in place and implimented. (Pa723-724). Nowhere in the correspondence does Plaintiff Halsey state that the accommodations were not put in place or that they were insufficient. (Pa723-

724). A full year after the June 2014 declassification meeting, Plaintiff Halsey drafted the June 2015 correspondence, and nowhere does she object or raise issue with J.H.'s declassification or demand he be re-classified and provided with an IEP. (Pa723-724).

On September 11, 2015, after her arrest, Plaintiff Halsey filed a request for due process to have Plaintiff J.H. reclassified. (Pa727-728). Prior to any finding or determination by the New Jersey Office of Administrative Law, the due process petition was voluntarily withdrawn by Plaintiff Halsey and her husband. (Pa729-732 and Pa114 at ¶75).

Donna Stump:

Donna Stump became the Director of Special Services on February 1, 2012. (Pa588, Donna Stump Deposition Transcript, at T16:9-16). Prior to February of 2012, she was a supervisor and was returned to supervisor on July 1, 2013. (Pa588 at T16:9-16). Donna Stump was in the position of Director for less than a year and a half. When she became the Director in February 2012, the assignments of caseloads had already been set by the prior Director. (Pa591 at T26:7-18). The alleged $750,000.00 shortfall in the special education budget was for nursing services provided to a child with severe health issues. (Pa600 at T63:25-T64:9). The money for the alleged shortfall was in the total budget, it

just was not in the nursing budget, requiring same to be transferred. (Pa601 at T68:15-25).

Ms. Stump was advised by Plaintiff Uszenski that the Brick BOE did not support her position as the Director. (Pa604 at T79:3-14). Ms. Stump did not blame Plaintiff Uszenski for not having Brick BOE support and not being renewed for the position of director. (Pa607 at T91:15-25). In fact, she did not blame anyone. (Pa607 at T91:15-25).

Ms. Stump admitted that she wrote the "press release" on her own without assistance from anyone, on her personal computer at her house, sometime in June of 2013. (Pa612-613 at T113:8-T114:22; Pa576-582). Ms. Stump did not do any type of search, social media or background check on Mr. Morgan. (Pa609 at T98:1-4). Ms. Stump testified she was not trying to get Plaintiff Uszenski in trouble when she wrote the "press release", nor was there any vengeance involved even if her contract had not been renewed. (Pa619 at T140:1-T141:15). Ms. Stump did not have any conversation with Mayor Ducey or Administrator Joanne Bergin about Mr. Morgan, Plaintiff Uszenski, or the "press release". (Pa621-622 at T149:21-T150:5). She also testified that she never told Ms. Gonzalez, Ms. Fabbo, or other members of the CST, that Mr. Morgan had a

criminal background, nor did she share with them any article. (Pa633 at T192:7-20).

Ms. Stump did not know who Marcella Butterly was nor did she ever speak to her. (Pa622 at T151:6-23). The first time that Ms. Stump was contacted by the OCPO was around February 23, 2015, when Detective Mahoney called her. (Pa622 at 152:2-19). Ms. Stump never met Plaintiff Halsey, had any conversations with, or any communications of any kind with her. (Pa624 at T161:5-13). Ms. Stump never met Plaintiff J.H. (Pa624 at T161:3-4). Ms. Stump never had any discussions with Plaintiff Uszenski about Plaintiff J.H. (Pa624 at T161:14-19). Ms. Stump did not evaluate students for Brick BOE. (Pa625 at T164:4-T165:2). Ms. Stump never had any involvement at all with Plaintiff J.H. up until a meeting with Mr. Morgan in 2013. (Pa627 at T171:22-T172:1). That meeting was the only one she was involved in at all regarding Plaintiff J.H., and she was not there for the whole meeting, but was in and out. (Pa626 at T166:21-22). She also did not have any conversations about Plaintiff J.H. or his attending Ocean Early. (Pa626 at T166:21-22; Pa630 at T184:6-12).

Ms. Stump never attended any of Plaintiff J.H.'s annual IEP meetings. (Pa628 at T176:7-12). Ms. Stump never went to any Brick BOE members and said she thought Plaintiff J.H.'s IEP was fraudulent. (Pa631 at T186:4-7). Ms.

Stump never spoke to anyone at Ocean Early about Plaintiff J.H. (Pa630 at T185:14-18). Ms. Stump could not override a CST's meeting and decision on placement of a student, it was the job of the CST to review the records and make a decision on placement and special services eligibility. (Pa631 at T188:11-20). Ms. Stump testified that while Plaintiff J.H. did meet the qualifications for a preschool IEP, she did not think he qualified for an out of district placement at a school that was not a special education school, when Brick had a program in district that was taught by special education teachers. (Pa633 at T195:2-16).

Other than tangentially attending the one meeting involving Plaintiff J.H.'s summer placement in 2013, Ms. Stump removed herself from his case as she was no longer the director, and he was not assigned to her or the school she was responsible for. (Pa633 at T197:5-19). Until the day of the 2013 meeting, Ms. Stump did not know that Plaintiff J.H. was Plaintiff Uszenski's grandchild. (Pa636 at T208:17-22).

Ms. Stump merely answered the questions that were posed to her by the OCPO, she did not initiate the conversation. (Pa635 at T204:7-18). Other than a phone call from Detective Mahoney and the formal statement that was taken on June 29, 2015, she did not meet with or speak with anyone at the OCPO. (Pa638 at T215:20-T216:3). Ms. Stump was not called, nor did she give testimony in

front of any Grand Jury related to Plaintiffs. (Pa639 at T220:12-20). Ms. Stump testified that she never voiced any objection to anyone in the Finance Department about the services that were paid for Plaintiff J.H., nor did she ever file any internal complaint against Plaintiff Uszenski. (Pa642 at T230:4-19).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN FINDING THERE WAS NO ADVERSE ACT NOR CAUSAL CONNECTION BETWEEN PLAINTIFF'S ALLEGED WHISTLEBLOWING ACTIVITY AND ADVERSE EMPLOYMENT ACTION (3T13:18-T18:10 AND 3T18:14-T26:6).

To establish a *prima facie* case for a violation of CEPA, a plaintiff must demonstrate that: (1) he reasonably believed that his employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) that he performed a whistleblowing activity; (3) that an adverse employment action was taken against him; and (4) that there was a causal connection between his whistleblowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003), (citing Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999)).

If a plaintiff establishes a *prima facie* case, then the defendants must come

forward and advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee. Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28, 38-39 (App. Div. 2005) (citing Zappasodi v. State Dept. of Corrections, 355 N.J. Super. 83, 89 (App. Div. 2000)). If such reasons are proffered, the plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual. Id. at 39 (citing Bowles v. City of Camden, 993 F.Supp. 255, 262 (D.N.J. 1998)).

"To prove causation, a plaintiff must show that 'the retaliatory discrimination was more likely than not a determinative factor in the [adverse employment] decision.'" Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659, 673 (D.N.J. 2013) (citing Donofry v. Autotote Sys., Inc., 350 N.J.Super. 276, 293 (App.Div.2001)). "Temporal proximity, standing alone, is insufficient to establish causation." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002)r.

A. Plaintiffs failed to Establish the Requisite Causal Connection.

Plaintiffs rely on the same baseless arguments in their appeal that they raised in their opposition to Defendant's Motion for Summary Judgment. The Trial Court correctly found that:

> Foremost, County Prosecutor Coronado [sic], Assistant Prosecutor Paulhus, and lead Investigatory Detective Mahoney each testified

> that there was a host of information evidence that supported the Prosecutor's Office to charge plaintiffs, not just Donna Stump. Prosecutor Coronado [sic] testified that even if Stump and members of the child study team had told him the IEP for J.H. was appropriate. The Ocean County Prosecutor's Office would have still sought the indictment as it was not the sole theory under which Uszenski was charged. (3T20:18-T21:3).

It is undisputed that Plaintiffs were arrested as a result of the complaint made by Mayor Ducey to the OCPO. Plaintiffs ignore the facts that were revealed in discovery and instead continue to argue that Ms. Stump's alleged false statement to the OCPO on March 24, 2015, "spurred on", set in motion or was the determinative factor in bringing charges against Plaintiffs. Pursuant to the OCPO's December 2014 Investigation Report, between the beginning of the investigation in December 2014 and the final decision to apply for an arrest warrant in May 2015, the OCPO interviewed **over a dozen individuals** from several different entities and reviewed countless documents in response to subpoenas that were issued. The undisputed record does not support Plaintiffs' farfetched claims.

Plaintiffs' theory is completely contradicted by the record, specifically, the testimony of the members of the OCPO. Plaintiffs rely upon and cite to a single sentence within Detective Mahoney's deposition transcript in their blatant attempt to misconstrue the record and support their theory that the OCPO based

their actions solely on Donna Stump's testimony. However, had Plaintiffs provided the Court with the complete deposition record, the following sentences confirm that Detective Mahoney was only referring to a hypothetical scenario in which he was "constrained to the facts" that Ms. Stump did not state that the IEP was fraudulent. Detective Mahoney testified:

> Q. Okay. So if Donna Stump -- and I'll represent to you that she had used the word "fraudulent" in connection with the IEP for J.H. If she hadn't told you that and other child study team members told you that they didn't agree with the IEP even though they signed off on it for J.H., would you have had any basis whatsoever to seek an arrest for Dr. Uszenski or Jacqueline Halsey? [. . .]
> A. **Constrained to the facts** as you just put forth? Again, those facts are that Donna Stump told me it was fraudulent, yet the members of the child study team said they didn't agree with it but they signed off on it, constrained to those facts.
> Q. Yes.
> A. **Constrained to those facts**, I don't believe we would have proceeded on any criminal charges **if that's all we had**, no.

(Pa463 at T66:18-T67:18). (emphasis added).

Detective Mahoney confirmed that constrained only to the facts presented by the question, i.e. that Ms. Stump did not state that the IEP was fraudulent, there would be no basis for the criminal charges. However, as testified by Detective Mahoney and the several other OCPO witnesses, Ms. Stump's statement was **not** the only evidence or support the basis for the charges, instead there was a host of other information such as testimony, documents, emails,

experts, and other evidence, that supported the OCPO's decision to bring charges. Specifically, Detective Mahoney stated:

> Q. Sorry, Detective. I just want to follow up on that last question you were asked where you were constrained to those facts and those facts alone. **When you answered that question, were you constraining it to those facts; meaning that there was not any other evidence that you had, documents or otherwise, that you gathered or other statements that you had from other witnesses?** Is that how you're answering that question?
> A. **If we just had Donna Stump, one person, telling us and the child study team saying they didn't agree with it and they didn't sign off on it, that alone, yes, constrained to those facts;** but we have e-mails indicating that, you know, Andrew Morgan was putting them in through a purchase order, which is out of the normal. We had the -- a teacher at Ocean Early who was saying that this kid was just in general education. Nothing was done. He was, you know, receiving archery. He got bused. We knew that there was only five other kids or six other kids in the entire district that received out-of-district placement, and those kids were severely handicapped. We talked to experts that said that, you know, Brick had -- they had services in -- services in school for J.H. that any other kid would have gotten and should have gotten, that this was extremely out of the normal course of business. All those facts collectively, that's why we made the decision to charge. It was not just taken on Donna Stump's word or the child study team's word. We supported it with documentation to the best we could, and I believe we built a good case.

(Pa463-Pa464 at T68:16-T70:2). (emphasis added).

Plaintiffs further argue that while Detective Mahoney testified the OCPO relied on experts, the grand jury investigation report fails to mention expert testimony. However, A.P. Paulhus also confirmed that the OCPO retained

experts, specifically Dr. Bruder from the University of Connecticut, who performed an analysis and report confirming that Plaintiff J.H.'s placement was inappropriate. (Pa521 at T15:9-13). A.P. Paulhus testified that while Dr. Bruder was not presented to the grand jury, the substance of her report was. (Pa521 at T16:1-8). Additionally, the OCPO hired a separate expert Dr. McCartney, who authored a report concerning Plaintiff Uszenski's failure to do a background check on Mr. Morgan prior to being hired and performing an investigation after the allegations of Mr. Morgan came to light. (Pa524-525 at T29:13-T30:4). Moreover, the OCPO's decision for not including expert testimony within an investigation report has no bearing on whether there was a causal connection under CEPA, as stated by several members of the OCPO there were several categories of evidence relied on by the OCPO to bring charges against the Plaintiffs. Prosecutor Coronato also testified:

> Q. ("If Donna Stump and members of the child study team had told you that the IEP for J.H. was appropriate for that out-of-district placement and that all kids that have out-of-district placement get bus transportation in Brick, would you have sought an indictment against Dr. Uszenski and his daughter over J.H.'s IEP?") [. . .]
> A. Well, I didn't make the decision to indict Mr. Uszenski and [sic] two is that that wasn't the sole theory or why I think he was -- why he was charged, so the answer is yes.

(Pa420 at T62:4-18).

Similarly, A.P. Paulhus confirmed the statements that both Prosecutor Coronato and Detective Mahoney testified to:

> Q. Okay. If Donna Stump and others in the child study team had not told you -- and by "you" I mean you in your capacity at the Ocean County Prosecutor's Office -- that the placement for J.H. was fraudulent or inappropriate or they disagreed with it, would you have had any basis to seek an indictment of Dr. Uszenski and his daughter, Jacqueline Halsey? [. . .]
> A. Yes.
> Q. So are you telling me that if they had told you the placement was appropriate for out-of-district that he still -- you still would have sought an indictment against Dr. Uszenski – [. . .]
> Q. -- and Jacqueline Halsey? [. . .]
> A. No. **You had asked me if there was a basis other than those individuals for a finding that the IEP was inappropriate, and there is.**

(Pa521 at T14:12-T15:8). (emphasis added).

Plaintiffs simply ignore the fact that there is absolutely no evidence, testimony or documents that established or even hint at any type of arrangement, agreement or conspiracy that they allege existed between the OCPO, the Brick BOE or Ms. Stump, that caused the OCPO to investigate and present to several grand juries the charges it brought. It was the grand juries that found probable cause existed(more than once), based upon the evidence the OCPO presented, not the Brick BOE. As established above, the undisputed record also does not support the bald claim that Stump's singular interview by the OCPO was the

"accelerant" or "set in motion" their investigation and eventual decision to pursue charges.

Moreover, the Trial Court did not usurp the role of the jury by finding no causal connection, even with Lawrence Reid's testimony as argued by Plaintiffs. Mr. Reid's testimony does not create a genuine issue of material fact, as Mr. Reid admitted he had no factual basis for his opinion, it was simply his belief. The record established Mr. Reid had no support for his belief:

> Q. Did any other board members' attitudes towards Dr. Uszenski change other than -- while you were there other than Suter, Pannucci, Conti?
> A. Not that I'm aware of, no.

(Pa1844 at T76:17-20).

> Q. What, if anything, are you aware of that Mr. Pannucci did to get back at claimant? I'm sorry. To get back at Dr. Uszenski.
> A. To get back at him?
> Q. Yes.
> A. **Nothing that I can recall.**
> Q. Okay. How did his attitude, if any, change and when did it change?
> A. **I don't recall.**
> Q. Okay. How about Mr. Conti? What, if anything, are you aware of that he did to get back at Mr. Uszenski?
> A. **I don't recall.**
> Q. How, if at all, did his attitude change towards Mr. Uszenski after the resignation of Ms. Ciesla and the demotion of Ms. Stump?
> A. **I don't recall.**
> Q. And with regards to -- is it -- it's Mr. Barton, correct?
> A. Yes.
> Q. Okay. What, if anything, are you aware of that Mr. Barton did to get back at Mr. Uszenski as a result of the demotion of Ms. Stump

and/or the resignation of -- I'm sorry -- the retirement of Ms. Ciesla?
A. **Barton wasn't on the board then**. He was not on the board.
Q. But you included him in the individuals that you named that their attitudes --
A. That's subsequent, subsequent to the whole thing. I mean, I believe it was in the middle of 2015 that he was indicted, so that was the indication that there had been a whole lot of things going on that were attacking Dr. Uszenski.
Q. And that's what I'm asking. What are the whole lot of things that --
A. Well, whatever -- whatever was going on behind the scenes.
Q. Did --
A. I wasn't on the board then.
Q. Okay.
A. So there had to be some coordination between the board and whoever was bringing these charges, et cetera, so it was the people on the board then. You have to ask them.
Q. That's what I'm getting at. You made the accusation. I'm just trying to figure out what, if any, information --
A. It was my general --
Q. -- or evidence or --
A. **It was my general feeling** those people didn't like Uszenski, and it started back when Ciesla got fired. No. She resigned. She resigned and Donna Stump got demoted, and that's when all this stuff started happening against Dr. Uszenski, against Andrew Morgan, and, in my opinion, Andrew Morgan did a -- did a great job in what he was asked to do, which was to straighten out the Special Ed Department.
Q. Okay. You said all these things started happening against Uszenski back then. What are you -- what are you referring to specifically?
A. That -- that was the precipitating event. That's the way I described it. That's when it all changed, okay? And again, you know, **that's my opinion.**
Q. Okay.
A. **That's my opinion**.

(Pa1846-Pa1847 at T83:10-T86:10). (emphasis added).

> Q. Okay. And you said on several occasions you don't know what happened; somebody from the Board of Ed must have said something to bring all these charges. Do you know who said what or --
> A. No. You would have to -- you would have to do the investigation. **I don't know**.
> Q. Okay. So that's just your feeling?
> A. **That's my feeling, yes.**
> Q. Since you weren't on the board, you don't know of any information, documents, or other that was provided to the Prosecutor's Office that led them to draft the first indictment?
> A. No.

(Pa1847 at T88:16-T89:6). (emphasis added).

Moreover, Plaintiffs ignore the fact that Mr. Reid was no longer on the Brick BOE when the OCPO opened its investigation, indicted and arrested Uszenski, and the decision was made to suspend him. Similarly, Plaintiffs' reference to John Barton is also a red herring, as Mr. Barton was not a member of the Brick BOE in the fall of 2014, when he recalled having spoken to the OCPO, therefor he was not acting as or on behalf of the Brick BOE. He did not become a Brick BOE member until after the OCPO had already started its investigation.

Additionally, Plaintiffs' attempt to devalue the testimony of A.P. Paulhus because he testified that he did not recall the press release, does not make it any less credible or undisputed. A.P. Paulhus is no longer employed by the OCPO, has no allegiance to it, nor does he have any reason to exaggerate his testimony.

Further, Plaintiffs misrepresent his testimony, as he testified that he may have seen the press release, but did not recall. (Pa525 at T32:17-23). Moreover, as stated within the Trial Court's decision it was not only A.P. Paulhus who confirmed the OCPO had a host information besides Ms. Stump's statement that led to it seeking charges and arrests against Plaintiffs, but Prosecutor Coronato and Detective Mahoney as well.

Plaintiffs' argument that a jury would likely conclude that Ms. Stump and the CST members' statements were a determinative factor for the final grand jury's decision is similarly baseless and without merit. To the contrary, Ms. Stump was not called, nor did she give testimony in front of any Grand Jury. (Pa639 at T220:12-20). Notably, the 2017 indictment presented a dozen witnesses and 139 exhibits over the course of five days. Ms. Stump was not one of the witnesses, and while the press release was a document that was marked and presented, it was merely one out of 139 exhibits.

As found by the Trial Court, supported by the undisputed record, there was a host of information that supported the OCPO's decision to seek charges and indictments against Plaintiffs Uszenski and Halsey. The members of the OCPO testified undisputably, even without Ms. Stump's the CST's statements, they still had enough information to seek charges. None of the documents or

testimony in this matter support Plaintiffs' theories or causal relationship arguments, as such the Trial Court was correct in finding that Plaintiffs were unable to demonstrate a causal connection between Plaintiff Uszenski's alleged whistleblowing activity and the adverse employment action.

B. The Trial Court Did Not Rely Solely On Temporal Proximity To Find No Causal Connection.

Plaintiffs argue that the Trial Court improperly relied on temporal proximity to determine there was no causal connection between the alleged whistleblowing activity and the adverse employment action. To the contrary, the Trial Court issued a detailed opinion setting forth Plaintiffs failure to establish a causal connection, including but not limited to: the decision to seek indictments against Plaintiffs Uszenski and Halsey was solely that of the OCPO; the criminal investigation presented to the grand jury was made only by the OCPO; there was a host of information, testimony and documents that supported the charges and arrests against Plaintiffs; and even if Ms. Stump told the OCPO that Plaintiff J.H.'s IEP was appropriate, the OCPO would still have charged Plaintiffs. Moreover, there is simply no evidence to support the allegation that Ms. Stump "set in motion" Plaintiffs' arrest and indictment when she allegedly began her "smear campaign" 2 years earlier.

The Trial Court was correct in finding a two (2) year gap between Plaintiffs' alleged whistleblowing activity and any adverse employment action taken by the Brick BOE. The nonbinding and unreported cases cited to and relied upon by Plaintiffs to show temporal proximity, Nardello v. Township of Voorhees, 2009 WL 1940390 (N.J. Super. Ct. App. Div. July 8, 2009); T.D. v. Borough of Tinton Falls, 2015 WL 7199733 (N.J. Super. Ct. App. Div. Nov. 17, 2015); and Asen v. Cooper Hosp./Univ. Med. Center, 1996 WL 347451 (D.N.J. June 7, 1996), are not analogous and are all distinguishable, as none of them, as in the present matter have several intervening acts, which include rewarding and commending Plaintiff Uszenski.

The timeline outlined by the Trial Court established that during the over two (2) years gap between Plaintiff Uszenski's alleged whistleblowing activity in January of 2013, and suspension in May of 2015, the Brick BOE rewarded Plaintiff Uszenski with a new contract, more money and raving performance evaluations. Plaintiffs misguidedly argue that the Trial Court failed to recognize the continued retaliatory actions that began with Ms. Stump's press release. Uszinski's whistleblowing activity occurred on January of 2013, when he allegedly raised the issue of the missing funds in the special education budget. Several months after the alleged whistleblowing activity, on June 21, 2013, the

Brick BOE rewarded Plaintiff Uszenski with a new contract for a longer-term and more monies, from July 1, 2013, to June 30, 2018. (Pa306-307). A year later – after the press release was written and issued in the parking lot – on July 31, 2014, Plaintiff Uszenski was provided with a glowing performance evaluation review by the Brick BOE for the 2013-2014 school year. (Pa309-310). The only thing the Brick BOE did was reward and support Uszenski after his whistleblowing activities.

Plaintiffs attempt to create a narrative that the Brick BOE started its "retaliation" prior to Mayor Ducey going to the OCPO in December 2014 is false. Plaintiffs state that John Barton admitted to reporting Plaintiff Uszenski to the OCPO in the fall of 2014. Mr. Barton was not a member of the Board when he went to the OCPO concerning the missing $750,000.00. (Pa1998 at T81:17-20; Pa1999 at T85:11-14). Additionally, in direct contradiction to Plaintiffs' arguments, Mr. Barton testified he did not contact the OCPO to report Plaintiff Uszenski, but to report an issue concerning the loss of the $750,000.00. (Pa1998 at T80:5-17). Mr. Barton's source of information concerning the $750,000.00 was not from a Brick BOE member, but a PTA member. (Pa1998 at T80:14-T81:7). Plaintiffs characterize such deposition testimony as "malicious, speculative gossip[;]" however, such mischaracterization is baseless

and not supported by Mr. Barton's testimony which is wholly unconnected from the Brick BOE.

Moreover, there was no continuing retaliation after Plaintiff Uszenski's arrest as any action taken by the Brick BOE was pursuant to its obligations under the New Jersey Department of Education ("NJDOE"). Charged with a crime or offense that disqualified Plaintiff Uszenski from school employment pursuant to statute, the Brick BOE was legally obligated to act. The NJDOE notified the Brick BOE on May 8, 2015, to take appropriate action concerning Plaintiff Uszenski. (Pa734). On the same day, the Brick BOE notified Plaintiff Uszenski the Board approved of his suspension with pay pursuant to N.J.S.A. 18A:6-8.3. (Pa385). Moreover, after the first indictment was dismissed, there was no discussion or meeting between the OCPO and the Brick BOE concerning reindicting the Plaintiffs. (Pa413 at T35:14-T36:5). It was solely the decision of the OCPO, specifically, A.P. Paulhus, to seek a second indictment. (Pa413 at T35:4-13). The Brick BOE did not take action as to Plaintiff Uszenski's employment after Judge Roe's decision dismissing the indictment, as there remained open criminal charges pending, and in May of 2017, Plaintiffs were re-indicted. Moreover, in 2019 Plaintiff Uszenski's charges were not dismissed but he entered the Pre-Trial Intervention Program as part of a plea deal. Plaintiff

Uszenski's arrest by the OCPO disqualified him from employment as the superintendent, as such he was no longer able to perform his job, and by statute the Brick BOE was required to suspend him pending resolution of the charges, which did not occur until after Plaintiff Uszenski's contract expired.

As such, there was no continuing or ongoing retaliation after Plaintiff Uszenski's arrest as the Brick BOE was directed to take action against Plaintiff Uszenski pursuant to statute.

C. The Trial Court Relied on Several Documents and Information to Find that Plaintiffs Failed to Establish a Causal Connection.

In its failed attempt to argue the Trial Court had a misunderstanding of CEPA and the facts, Plaintiffs "cherry pick" certain sentences from the June 24, 2024, decision. Specifically, Plaintiffs assert the Trial Court relied on the OCPO's dismissal, was critical of Judge Roe's Decision, and stated that the Plaintiffs had to show a civil conspiracy between the OCPO and the Brick BOE, however, the Trial Court did not rely on any of Plaintiffs' assertions when it provided its extensive analysis concerning the fourth factor under CEPA.

The Trial Court only speaks about "civil conspiracy" as a result of plaintiffs' suggestion there was a conspiracy between the Brick BOE and the OCPO, not as an element or requirement of CEPA. The record was void of any communication or agreement, let alone conspiracy between the OCPO and Brick

BOE, further evidence that there was no causal connection. The Trial Court provided an extensive and detailed analysis concerning Plaintiffs failure to establish a causal connection. (3T19:10-T26:6).

Moreover, the Trial Court did not rely on the indictments to determine that Plaintiffs failed to establish CEPA's factors, but cites to it stating that as a result of the indictments the Brick BOE was required to take appropriate disciplinary action against Plaintiff Uszenski at the direction of the NJDOE. (3T24:7-19). Additionally, Plaintiffs argue that Judge Roe's decision demonstrates that there is an issue of fact; however, Judge Roe's opinion does not establish facts and within the opinion, Judge Roe lays blame on the OCPO for failing to present evidence, not the Brick BOE or its members. There is no dispute that the evidence, documents and witnesses that were presented to each of the grand juries was determined only by the OCPO.

As such the June 24, 2024, Decision should be affirmed, as the Trial Court properly found Plaintiffs could not establish the requisite causal connection between the alleged whistleblowing activity and the alleged adverse employment action as required by CEPA.

POINT II

THE BRICK BOE DID NOT TAKE AN ADVERSE EMPLOYMENT ACTION AGAINST PLAINTIFFS, THEREFORE, THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED (3T13:18-T18:10).

The Trial Court correctly found Plaintiffs' CEPA claim failed as the Brick BOE did not take any retaliatory or adverse action against the Plaintiffs until required to after his arrest by the OCPO. In fact, discovery revealed the exact opposite, that after Uszenski's alleged protected acts, he had the full support of the Brick BOE, being given a contract extension and glowing reviews from the Board, finding that he was exceeding their expectations.

Retaliatory acts under CEPA are confined to "completed…personnel actions that have an effect on either compensation or job rank." Beasley v. Passaic City, 377 N.J.Super 585, 606 (App. Div. 2005). The only adverse action that would qualify or meet CEPA's standard is the suspension of Plaintiff first with and then without pay, May 7th and September 30, 2015, respectively. There was simply no act taken by the Brick BOE between his hire and his arrest that can constitute an adverse employment action.

Uszenski admittedly testified at his deposition, that at no point in time prior to the OCPO's arrest of him did the Brick BOE take any negative action with regards

to his employment, he was never suspended or had his pay docked and he received two **positive** evaluations. The timeline below demonstrates there was no adverse action taken against Uszenski, nor is there any causal connection between his alleged whistleblowing activity and his suspension.

- Uszenski hired as superintendent and the Brick BOE approves a contract for a four (4) year term August 1, 2012 through June 30, 2016.

- Uszenski alleges to have engaged in whistleblower activity in the form of: raising issues of a $750,000.00, special education deficit in October of 2012; issues of non-compliance within the special education department in August 2012 through early 2013; and the Darlene Ciesla's failure to perform her job and eventual resignation in May of 2013.

- May of 2013, Donna Stump is removed as Director and Darlene Ciesla retires.

- June 2013, after the alleged whistleblowing activity, the Brick BOE enters into a new, more lucrative contract for Uszenski to be the superintendent for a longer term, five (5) years, then the original contract, from July 1, 2013, through June 30, 2018.

- July of 2014, Uszenski was evaluated by the Brick BOE, president Sharon J. Cantillo, for the year 2013-2014, and given an outstanding review and noted to be exceeding the expectation of the Brick BOE.

There was no adverse employment action taken against Uszenski by the Brick BOE. Once arrested by the OCPO, the Board was legally obligated to act on Plaintiff's employment status after he was charged and indicted. Having been charged with a crime or offense that disqualified Uszenski from school employment

pursuant to statute, the State of New Jersey Department of Education wrote to the Brick BOE notifying them of the need to take appropriate action based upon the disqualifying event. Uszenski's arrest by the OCPO disqualified him from employment as the superintendent, as such he was no longer able to perform his job, and by statute the Brick BOE had to suspend him pending the resolution, which did not occur until the after the expiration of his contract. Specifically, on May 8, 2015, the New Jersey Department of Education notified the Brick BOE that Plaintiff Uszenski was charged and that the Brick BOE was "to take appropriate action." (Pa734). On the same day, the Brick BOE notified Plaintiff Uszenski that the Board approved of his suspension with pay pursuant to N.J.S.A. 18A:6-8.3. (Pa385).

An event disqualifying Uszenski from employment does not and cannot constitute an adverse employment action taken against him by the Brick BOE. There was no adverse employment action taken against Uszenski by the Brick BOE that was not required by statute, as such there can be no adverse employment action.

Moreover, as demonstrated by the above timeline, there is no causal connection between the whistleblowing activities and the alleged adverse employment action. There is at least a two (2) year gap between the whistleblowing activity and Uszenski's suspension, from January 2013 to May of 2015. As such

there is absolutely no temporal proximity between the two. "Temporal proximity, standing alone, is insufficient to establish causation." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002).

Moreover, there are several intervening acts, all of which establish that there is absolutely no causal relationship between the protected acts and the alleged retaliation. Instead of being retaliated against, suspended, demoted or other, after Uszenski allegedly blew the whistle on the special education department in early 2013, the Brick BOE rewarded Uszenski with more money and a longer contract. Uszenski was also subject to an "employee review", and found by the Brick BOE to not only be fulfilling, but exceeding their expectations. Discovery has revealed no evidence the Brick BOE took any action against Uszenski that was related to his whistleblowing activities. Uszenski's suspension and termination were required by statute, and solely as a result of the OCPO's arrest and indictment of him.

Plaintiffs argue that the Trial Court relied on the extension of Plaintiff Uszenski's contract from July 1, 2013, to July 30, 2018, to find that there was no retaliatory action. Further, Plaintiffs argue that such contract extension occurred prior to the issuance of the press release. However, the Trial Court also relied on the performance evaluation that the Brick BOE provided to Plaintiff Uszenski, a year after the press release was issued in which the Brick BOE wrote

that Plaintiff Uszenski exceeded expectations. (Pa308-310 and 3T15:4-9).

Plaintiffs' argument also fails based upon the undisputed facts and testimony, that the Brick BOE, as testified to by Uszenski himself, did not support Donna Stump and was demanding her demotion, if not termination after Uszenski reported the alleged criminal acts. The Brick BOE was not in any way supportive of Stump, but instead the Brick BOE's actions demonstrate their support of Uszenski. As a result of Uszenski's "protected acts", Stump was demoted and Ciesla retired in May of 2013, after which Plaintiff was rewarded, not retaliated against by the Brick BOE in the form of a max contract in years and monetary value, in July of 2013, and glowing review in 2014. This was after the "press release" and Morgan's resignation. These facts and timeline are undisputed.

Additionally, Plaintiffs argue that the Trial Court ignored the testimony of Mr. Reid; however, as outlined above Mr. Reid was unable to provide any facts to support his personal belief that the Brick BOE was retaliating against Plaintiff Uszenski. Moreover, Mr. Reid was no longer a BOE member when the decision was made to suspend Uszenski. Mr. Reid's personal beliefs, unsupported by facts, do **not** create a genuine issue of material fact.

Moreover, Plaintiffs' argument that there is ongoing retaliation because Plaintiff Uszenski was not paid back his wages is simply false and demonstrates

just how far Plaintiffs will misrepresent the facts. After the first indictment was dismissed in February 2017, the Brick BOE did not take any action to reinstate Plaintiff Uszenski as there remained open criminal charges and Plaintiff Uszenski was reindicted in May of 2017. Moreover, in 2019 Plaintiff Uszenski's charges were **not dismissed**, as Plaintiffs misrepresent, instead Uszenski took a plea deal to enter into the Pre-Trial Intervention Program. Plaintiff Uszenski's arrest by the OCPO disqualified him from employment as the superintendent, as such he was no longer able to perform his job, and pursuant to statute, the Brick BOE had to suspend him pending resolution of the charges, which did not occur until after Plaintiff Uszenski's contract expired.

Based upon the foregoing, the June 24, 2024, Decision should be affirmed, as no adverse action was taken against Plaintiff Uszenski as he was suspended and later terminated as a result of the charges and arrest that were brought solely by the OCPO.

POINT III

THE BRICK BOE IS NOT VICARIOUSLY LIABLE FOR MS. STUMP'S ACTIONS AS THEY OCCURED OUTSIDE THE SCOPE OF HER EMPLOYMENT (3T16:5-T18:10).

The Trial Court was correct in rejecting Plaintiffs' argument that the Brick BOE was vicariously liable for Ms. Stump's actions. The Trial Court noted that Ms. Stump's alleged retaliatory actions were conducted outside the scope of her employment and had no nexus to her supervisory role and assistance with the CST regarding the accommodations and education of students within the Brick BOE.

Plaintiffs' reliance on the case of Abbamont v. Piscataway Tp. Bd. Of Educ., 138 N.J. 405 (1994), to support its position that the Brick BOE is vicariously or otherwise liable for any act of Ms. Stump is inaccurate and contrary to the New Jersey Supreme Court's findings. Plaintiff Abbamont was a non-tenured public school industrial arts teacher, and the supervisory employees who retaliated against him were McGarigle, principal of Abbamont's school and Edelchik, the superintendent.

The Court in Abbamont, determined that under CEPA, it would apply agency principles and that under the doctrine of *respondeat superior,* an

employer is liable to a third party for the torts of one of its employees if that employee is acting within the scope of his or her employment. An employee is acting within the scope of employment if the action is "'of the kind [that the servant] is employed to perform; it occurs substantially within the authorized time and space limits; [and] it is actuated, at least in part, by a purpose to serve the master.'" See id. at 416, citing Di Cosala, 91 N.J. at 169 (citing Restatement (Second) of Agency § 228 (1957) (alteration in original)); see 1 J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability and Litigation § 7.01, at 186 (rev. ed. 1993); W. Page Keeton et al., Prosser and Keeton on Torts § 70, at 505 (5th ed. 1984). Further, the standard "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." Di Cosala v. Kay, 91 N.J. 159, 169 (1982). The foreseeability of the employee's act is a crucial inquiry. See Mason v. Sportsman's Pub, 305 N.J. Super. 482, 499 (App.Div.1997).

In Abbamont, the Court found that McGarigle and Edelchik were high-level employees, Plaintiff's supervisors, who were responsible for conditions in the shop, for evaluating plaintiff's job performance, and for making tenure recommendations, finding specifically that their recommendation that plaintiff

not be rehired with tenure was within the scope of their employment. See id. at 422.

In the case at hand, unlike McGarigle and Edelchik, Ms. Stump did not supervise or have any authority to direct or control Plaintiff Uszenski's employment. Plaintiff Uszenski, as the superintendent reported directly and only to the Brick BOE. Plaintiffs argue that because the press release related to Ms. Stump's work, Ms. Stump's alleged retaliatory actions were committed within her scope of employment. However, Ms. Stump was not acting within the scope of her employment when she committed the alleged retaliatory actions of writing the press release. To the contrary, the alleged retaliatory act falls well outside the scope of employment for a supervisor of a special education department, whose job it was to supervise, assess and assist the CST in the services they were providing. Moreover, the alleged retaliatory act did not occur during or within the authorized time and space limits, as Ms. Stump testified that the press release was drafted at her home on her personal computer, without any assistance from anyone at the Brick BOE. Plaintiffs' argument that Mr. Stump handed the press release to Ms. Cantillo in her capacity as President of the BOE and therefore it was within the scope of her employment is false. The press release was provided to Ms. Cantillo by Mr. Stump, not Ms. Stump after a

political event that had no relation to the Brick BOE. Plaintiffs also misrepresent the facts in alleging that Ms. Stump distributed the press release at her work, in mail boxes or at the Brick BOE meetings. There is absolutely no support for this statement in the record, in fact same is denied by Ms. Stump.

Additionally, Ms. Stump was not working within the scope of employment when she interviewed with the OCPO as it was done outside of her employment. The OCPO directly contacted Ms. Stump to initiate the interview. While the OCPO had to gain permission from the Brick BOE to allow Ms. Stump and other CST members to talk about confidential records, such does not establish that Ms. Stump was acting in the scope of employment. Moreover, if in fact Ms. Stump purposefully lied to the OCPO and perjured herself, as alleged by Plaintiffs, that is clearly not with the scope of her employment.

Writing the press release and responding to the OCPO was not to the benefit of the Brick BOE, nor motivated by Ms. Stump's desire to serve it. The Brick BOE did not derive any benefit from the press release, in fact same only criticized the Brick BOE, more so than Plaintiff Uszenski. The press release stated:

> **Did the Brick Board of Education Hire a Convicted Felon to Manage Special Education?**
>
> At the regular board of education meeting held on March 21, 2013

> the board of education hired Morgan Associates to conduct a Special Education August Service. For this report the board agreed to pay $17,499. To date no report has been presented to the public.
>
> At the regular board of education meeting held on June 27, 2013 the board hired Andrew Morgan of Morgan Associates to be the Interim Manager of Special Services. He is to receive $98,000 for a part time position.
>
> Is this the same Mr. Morgan who is a convicted felon and who was incarcerated for 8 months for the selling of illegal substances? If so, he is a known felon who has committed voter fraud every time he has voted. He has also filed for personal bankruptcy. Further investigation shows that he has shown that he has no known certifications and does not hold a New Jersey Driver's license. Attached is the proof of the above statements.
>
> Superintendent of Schools, Dr. Walter Uszenski, has publicly stated that he mentored Mr. Morgan and that they have a long standing relationship. Clearly, he was well aware of his background and lack of valid credentials before recommended his services to the board of education.

(Pa1671).

Plaintiff Uszenski admittedly testified that Mr. Morgan told not only the Brick BOE HR committee that Plaintiff Uszenski was his mentor but everyone else, including administrators. (Pa334 at T88:1-19). Plaintiff Uszenski never denied such statements, nor did he stop Mr. Morgan from telling people. (Pa334 at T88:1-19).

Plaintiffs argue that the Trial Court only focused on the distribution of fliers after the political event when looking at whether Ms. Stump's actions were

committed within the scope of her employment. In support, Plaintiffs cited testimony by Ms. Cantillo concerning the distribution of the press release to Board members on their windshields and mailboxes, but again same is false, as Ms. Cantillo's testimony was regarding a New York Times article, not the press release. As stated by Ms. Cantillo:

> [B]ut from what I understand there were -- the **news article** was put on different Board member's windshields, mailboxes and different people, different residents in Brick.

(Pa1642 at 4T148:13-16) (emphasis added).

The New York Times Article was only related to Mr. Morgan and his prior arrest, it had nothing to do with Uszinski. Additionally, Plaintiffs argument that the press release was mailed to members of the Brick BOE is not supported by the documents cited by Plaintiffs. Specifically, Ms. Cantillo stated that the press release was neither mailed, handed, nor placed on her windshield. (Pa2084 at T33:2-5). Even if the Trial Court focused on Mr. Stump distributing the press release at a public Board meeting, the action was still not within the scope of Ms. Stump's employment. Mr. Stump distributing a press release to a Board member concerning the Brick BOE hiring a convicted felon is not an action that Ms. Stump was hired to perform nor is she distributing the press release in the interest of the Brick BOE.

Additionally, Plaintiffs argument that Ms. Stump sent the press release in the hopes of getting Plaintiff Uszenski fired is unsupported by the record. Ms. Stump testified that she did not blame Plaintiff Uszenski for the Board not supporting her and not being renewed for the director position. (Pa607 at T91:15-T92:2). Moreover, Ms. Stump testified that she was not trying to get Plaintiff Uszenski in trouble when she wrote the press release, nor was there any vengeance involved in writing the press release. (Pa619 at T140:1-T141:15). Even if it were her intent, same clearly did not have any effect on the Brick BOE, as Uszinski got a new contract and glowing reviews after it.

As such, Ms. Stump's actions were well outside of the scope of her employment. Ms. Stump's position as a supervisor in special education is not connected in any way to her writing the "press release" or speaking with the OCPO, nor is same even foreseeable. Neither are the kind and type of act that she was employed to perform.

A. The Brick BOE Is Not Liable For Ms. Stump's Actions Under Lehmann.

The Brick BOE are not liable for Ms. Stump's acts "outside the scope of her employment", based upon Lehmann v. Toys R. Us, Inc., 132 N.J. 587 (1993), as Ms. Stump was not Plaintiff Uszenski's supervisor, nor do any of the exceptions under the Restatement of Agency apply.

Plaintiffs argue the Brick BOE is liable for Ms. Stump interview with the OCPO, claiming she was speaking on behalf of the Brick BOE or that Ms. Stump was aided in accomplishing the alleged tort by the agency relationship. Additionally, Plaintiffs maintain that the Brick BOE is vicariously liable for the actions of the CST members to cancel Plaintiff J.H.'s IEP. There is no evidence that there was any coercion or alignment between Ms. Stump, Ms. Gonzalez, Ms. Russell or other members of the CST for Plaintiff J.H.'s IEP, merely Plaintiffs' false accusations.

Moreover, there is no evidence in the record that when the OCPO interviewed Ms. Stump and members of the CST, the that they were speaking on behalf of the Brick BOE. The evidence shows that the OCPO reached out separately to these individuals themselves to conduct the interview. Additionally, the record is devoid of any evidence showing that Ms. Stump created an environment to force the CST to support the idea that Mr. Morgan forced the CST to sign Plaintiff J.H.'s IEP.

There is no testimony or evidence in the record that Ms. Stump had any involvement in Plaintiff J.H.'s declassification, nor influenced any decision made by the CST who did. (Pa625 at T164:25-T165:2; Pa631 at T188:11-20). The only meeting concerning Plaintiff J.H. that Ms. Stump took part in was the

meeting in 2013 with Mr. Morgan that was unrelated to classification. (Pa630 at T184:8-12). Notably, Plaintiff J.H.'s 2014 declassification was approved by Plaintiff Halsey, Plaintiff J.H.'s mother, as admitted to in the letter she wrote. (Pa724).

Plaintiffs falsely misrepresent that Ms. Stump influenced Ms. Gonzalez and Ms. Russell to retaliate against Plaintiff Uszenski and remove Plaintiff J.H.'s IEP in 2014. There is no document or testimony that supports this. As stated by Ms. Stump, she was not part of evaluating students for Brick BOE and she could not override the decisions made by the CST. (Pa625 at T164:25-T165:2; Pa631 at T188:11-20). Moreover, nowhere is Ms. Stump's name written or mentioned in the 2014 Eligibility Consent/Acknowledgement Record Form. (Pa722).

Moreover, Plaintiffs' argument that the Brick BOE were "negligent or reckless" under the Restatement of Agency by failing to stop Ms. Stump's alleged defamatory campaign is without support. As argued above, the press release by Ms. Stump criticized the Brick BOE for hiring Mr. Morgan, not Plaintiff Uszenski. Additionally, Ms. Stump was not Plaintiff Uszenski's supervisor; therefore, there can be no vicarious liability claim against the Brick BOE. Further, even if the Brick BOE were vicariously liable for Ms. Stump's

actions, such actions by Ms. Stump did not lead to the charges against Plaintiffs. As testified by several members of the OCPO even if Ms. Stump stated that the IEP was appropriate, the OCPO still had enough information to arrest and press charges against Plaintiffs.

The June 24, 2024, Decision should be affirmed as the Trial Court was correct in finding that the Brick BOE was not vicariously liable for Ms. Stump's alleged actions as they were committed outside the scope of her employment.

B. The Trial Court Did Not Rely Upon Ms. Stump's Dismissal Without Prejudice To Determine That The Brick BOE Was Not Vicariously Liable For Her Alleged Actions.

Plaintiffs argue that the June 24, 2024, Decision was erroneous based on three lines from the Trial Court's opinion. However, Plaintiffs fail to acknowledge the Trial Court's extensively detailed opinion and reasons it found that the Brick BOE was not vicariously liable for Ms. Stump's actions. (3T16:5-T18:10). Those reasons are outlined not only above but in the Trial Court's opinion.

POINT IV

THE DERIVATIVE CEPA CLAIM WAS PROPERLY DISMISSED BY THE TRIAL COURT (3T26:7-14).

The June 24, 2024, Decision should be affirmed in its entirety as the Trial Court properly dismissed Plaintiffs Halsey and J.H.'s derivative CEPA claims as Plaintiff Uszenski was unable to establish a CEPA claim. As outlined above, the Trial Court correctly found that Plaintiff Uszenski was unable to establish that an adverse employment action was taken against him by the Brick BOE and that there was no causal connection between the alleged whistleblowing activity and the alleged adverse employment action. As such, the Trial Court correctly found that Plaintiffs Halsey and J.H.'s derivative CEPA claims were dismissed as Plaintiff Uszenski was unable to establish a CEPA claim against the Brick BOE.

Had the Trial Court not found Uszenski's CEPA claim failed, Plaintiff J.H.'s claim should still be dismissed, as he failed to exhaust the administrative process and procedure before the New Jersey Department of Education, Office of Controversies and Disputes, and New Jersey Office of Administrative Law. Moreover, the failure to establish that J.H. was denied a free and appropriate public

education, ("FAPE"), is fatal to his CEPA claim as he cannot establish an essential element, that he suffered the equivalent of an adverse employment action.

While the following cases analyze the requirement to exhaust administrative remedies for a disability and retaliation claim under the New Jersey Law Against Discrimination, the same analysis and grounds for dismissal of this matter is applicable and can be applied to CEPA claims and to the within matter. Under the NJLAD, it is unlawful to deny benefits to a disabled person because of her disability. N.J.S.A. 10:5-1, et. seq. New Jersey courts apply the standards developed under the Americans with Disability Act (hereinafter "ADA") when analyzing NJLAD Claims. Lasky v. Moorestown Twp., 425 N.J. Super. 530 538 (App. Div. 2011). In order to establish a *prima facie* case of failure to accommodate under the ADA, the plaintiff must demonstrate that s/he: (1) had a disability; (2) was otherwise qualified to participate in the program at issue; and (3) was denied the benefits of the program or otherwise discriminated against because of her disability. J.T. v. Dumont Public Schools, 438 N.J. Super. 241, 264 (App. Div. 2014).

The "benefit" under the third prong of the failure to accommodate claim, in the context of special education, is the provision of a FAPE to the student. Id. at 265. In the context of the within matter and Plaintiff's CEPA claim, the "benefit" that was denied and/or retaliatory act, was the alleged removal of special education

benefits and services and would be the third prong/element that Plaintiff must prove to sustain a CEPA claim.

If parents disagree with the IEP provided by the District, they can request a due process hearing through the NJDOE, which if the controversy cannot be resolved, an adjudicatory hearing on the merits is held at the OAL. N.J.A.C. 6A:14-2.7. The purpose of the NJDOE administrative proceedings is **to determine** whether the student has been provided a FAPE by the school district. 20 U.S.C. 1412(a)(1); N.J.A.C. 6A:14-2.7; Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 181-82 (1982).

Plaintiff has alleged that he was retaliated against when he was denied the benefit of an I.E.P. and declassified. In this matter, there is no finding by the O.A.L. that J.H. was denied a FAPE, as Plaintiffs voluntarily dismissed their action. In special education cases, the Administrative Law Judge's decision is the final administrative decision. N.J.A.C. 1:1-18.6. Before seeking a new judicial forum for a new claim, Plaintiffs **must** exhaust administrative remedies before seeking relief under IDEA or other federal laws. J.T., 238 N.J. Super. at 259, 260.

There is no prior finding that J.H. was denied a FAPE, as Plaintiffs failed to exhaust their administrative remedies, **voluntarily** withdrawing their administrative claim. In addition to failing to exhaust their administrative remedies, without a prior

finding of a denial of FAPE by the OAL, Plaintiff would have lacked proof of an essential element of his CEPA claim, thus warranting its dismissal on separate grounds had the Trial Court not dismissed the derivative action.

CONCLUSION

For the foregoing reasons, Defendant-Respondent respectfully requests that this Court affirm the Trial Court's June 24, 2024, Order entering summary judgment in favor of the Defendant.

Respectfully submitted,

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By: */s/ Anthony Vinhal*
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Dated: January 15, 2025

WALTER USZENSKI, JACQUELINE HALSEY, and J.H., A MINOR, Plaintiffs-Appellants v. BRICK TOWNSHIP BOARD OF EDUCATION, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003834-23 T4 *Civil Action* ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, Dkt. No. Below: MON-L-001823-23 SAT BELOW: HON. OWEN C. MCCARTHY, P.J.CV. *Submission date: Jan. 29, 2025*

REPLY BRIEF OF PLAINTIFFS-APPELLANTS, WALTER USZENSKI, JACQUELINE HALSEY AND J.H., A MINOR, TO DEFENDANT BRICK BOARD OF EDUCATION'S AND FORMER DEFENDANT DONNA STUMP'S OPPOSITION BRIEFS TO PLAINTIFFS' APPEAL

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PRELIMINARY STATEMENT

At the heart of this case are fact-sensitive issues, genuine issues of material fact, that must be resolved by a jury, not a judge. One such issue is whether supervisor Donna Stump's retaliatory and allegedly corrupt attack on Walter Uszenski, lies within the scope of her employment by the Defendant Brick Board of Education (the BBOE) or, if not within the scope of employment under traditional standard, still gives rise to entity liability under the second branch of the Lehmann standard. A second fact-sensitive issue in this case that must be resolved by a jury is whether Stump's allegedly corrupt and retaliatory acts, her lying to the Prosecutor during the pre-grand jury investigative phase by saying Uszenski had engineered a "fraudulent" IEP for his grandson, caused the issuance of an arrest warrant that triggered the grand jury proceedings.

Defendant has submitted a brief that reads like a defense closing argument at trial. That rhetorical approach violates our summary judgment rules and precedents by viewing the evidence in a light favorable to itself, the BBOE, instead of the Plaintiffs. Defendant does not offer a cogent argument that no genuine issues of material fact exist. The court below likewise took the approach of accepting the pro-defense approach to the facts, instead of drawing all reasonable inferences in Plaintiffs' favor. This Court should therefore reverse.

As to the first issue, viewing the evidence in a light favorable to the Plaintiffs, the BBOE is clearly liable for Stump's acts. She was a supervisor at the time the Prosecutor interviewed her and she, cloaked with her supervisory authority and her experience as the Director of DSS, falsely declared that the IEP for Uszenski's grandson was fraudulent. Her job as supervisor and former Director was to review and ensure that IEP's were compliant with the law. Pa1678; Pa1807. She was, only by virtue of her employment as a supervisor and Director, uniquely positioned to declare with authority that the IEP was fraudulent. Viewing all those facts in a light favorable to Plaintiffs, a reasonable jury would conclude that she acted within the scope of her authority or if technically outside the scope she met the Lehmann standard for entity liability.

As to the second issue, causation, viewing the evidence in a light favoring the Plaintiffs and drawing all reasonable inferences in Plaintiffs' favor, the Prosecutor did not decide to seek an arrest warrant and trigger the grand jury process until he got Stump's statement that the IEP was "fraudulent." For months before that the Prosecutor did not seek such a warrant. All he had was the statement of a disgruntled school bus driver, Ms. Butterly, whom Uszenski had fired for leaving a child on the bus. Butterly had none of Stump's supervisory authority and knowledge, and so there was no probable cause to proceed. After Stump made her false statement, she put her staff in jeopardy because they, not

Stump signed off on the "fraudulent" IEP. One such employee was Dana Gonzalez who signed the IEP. The record shows she knew she was in legal jeopardy; because of Stump's lie she had no choice but to cut an immunity deal with the Prosecutor and testify in sync with Stump, a fact barely but clearly revealed in the grand jury transcript. Pa1000, GJ at 1T171:5-11; 1T171:16-18.

Viewing the evidence in a light favorable to the Plaintiffs and drawing all inferences in their favor, a jury would likely conclude that Stump's lie to the Prosecutor was "a determinative factor" in triggering Plaintiffs' arrests, the grand jury, and the adverse employment actions. NJ Model Jury Charge 2.32, citing, Donofry v. Autotote Systems, Inc., 350 N.J. Super. 276, 296 (App. Div. 2001) (plaintiff's "burden of proof is to prove...that his protected whistle-blowing...was a determinative...motivating factor in defendant's decision;" plaintiff need not prove that his whistle-blowing...was the only factor). Disregarding the pro-defendant spin Defendant brings to interpreting the OCPO Detective's testimony about these facts (Db 25-26), a jury could reasonably conclude that he actually admitted that Stump's accusation of "fraud" was a determinative factor in the decision to arrest and seek indictments.

On appeal from a grant of summary judgment, this Court must view the evidence like a trial judge and the burden is on the Defendant to prove no genuine issue of material fact exists. Defendant has failed at that.

POINT I

BBOE IS VICARIOUSLY LIABLE FOR STUMP'S AND OTHER EMPLOYEES' RETALIATORY ACTIONS (Pa7-8)

A. Defendant Is Liable for the Actions of its Supervisor Stump, and Other BBOE Employees or Board Members

Defendant attempts to distinguish the Lehmann line of cases regarding entity liability for supervisory retaliation, undertaken both within the scope of employment and even outside the scope of employment where the supervisor uses the authority vested in her to retaliate, by ignoring or misstating evidence. Lehmann v. Toys-R-Us, 132 N.J. 587 (1993); Abbamont v. Piscataway Twp. Bd. of Ed., 138 N.J. 405 (1994).

For example, under CEPA, Stump is clearly a "supervisor" including under the second, highly relevant phrase:

> d. "Supervisor" means any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee, **who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or** who has been designated by the employer on the notice required under section 7 of this act.

N.J.S.A. § 34:19-2d. (emphasis added).

Donna Stump, as Director of SSD, had the "authority to take corrective action" (the second, highlighted clause) with regard to Ciesla's no-work job, the hiding of $750,000 in invoices, and, even once she was demoted to a supervisor,

had authority over the cutting and pasting IEP's in violation of federal and state regulations.

Moreover, Defendant dismisses Board member Reid's claim that after Uszenski exposed Ciesla's no-work job under Stump the Board turned retaliatory toward Uszenski, alleging Reid could come up with no concrete examples of Board retaliation. Improperly drawing all inferences in Defendant's favor, Defendant ignores that a Board member, Mike Conti, falsely testified before the Grand Jury that Dr. Uszenski had a duty to personally perform a background check on Mr. Morgan, when he had no such duty because BBOE had an HR department for its over 1,000 employees. Pa1452 at (Conti) GJ 3T113:9-24; Pa1454 at GJ 3T115:5-10.

Mike Conti, as a member of the Board, who also gave false testimony to the OCPO and grand jury, clearly falls into the first part of the definition of "supervisor" because he had direct control over Uszenski.

Under CEPA, Stump, Conti and McFadden, as Head of HR, meet the definition of "supervisor" such that BBOE can be vicariously liable for their actions.

B. <u>Stump and Others Acted Within their Scope of Authority</u>

BBOE is vicarious liable for their employees' falsehoods to the OCPO, that all began with Stump's false, defamatory Press Release against Uszenski.

Again, such questions must be decided by the jury, not by a court on summary judgment.

Contrary to Defendant's argument, defamation and other bad acts by employees do not negate vicarious liability. See Printing Mart-Morristown Corp. v. Sharps Electronic Corp., 116 N.J. 739, 770-771 (1989) (liability for defamation claim made against employees could be imputed to employers under *respondent superior* basis and motion to dismiss reversed); Singer v. Beach Trading Co., Inc., 379 N.J. Super. 63 (App. Div. 2005)(summary judgment reversed as an employer can be held liable for the negligent misrepresentation of a former employee's work history and there were material questions of fact).

The trial court erred when it found that because Stump allegedly wrote the false Press Release on her own computer that it was somehow created as part of her own "personal life." A jury could reasonably conclude however that Stump typed the Press Release on her own computer to further obscure that she was the "author" of the fake, false and vile Press Release. When she did it, she clearly was doing so to impact not her personal life, but her professional one, at her place of work as an employee. She also caused it and the other defamatory materials to be placed in each of the Board members work mailboxes, mailed it to the County's Superintendent of Schools, and also distributed it at BBOE Board meetings. Despite Defendant's claim that Stump did not testify at the

Grand Jury, the prosecutor had this this venomous document read verbatim to the Grand Jury. It falsely accused Uszenski of knowingly hiring a former drug dealer to work among school children. A Grand Juror openly expressed shock at the accusation:

> **Juror 4**: No one checked his [Morgan's] background including members of the Board? ...**I'm totally miffed by that. I just want to make that clear...I'm just in disbelief. They're working with children**...
>
> [Pa1416, GJ, 3T77:17 to 25]

Defendant attempts to argue that Stump's actions were not retaliatory, even though she admitted she was "mad" at Uszenski for demoting her when she wrote the false Press Release that included smearing Dr. Uszenski in the last paragraph. Pa619 at D. Stump Dep. at 140:25-141:9. She also admitted that when she wrote it she had not asked Dr. Uszenski about his alleged knowledge of Mr. Morgan, she falsely implied that Morgan had voted illegally as a convicted felon and that he had no certifications in education, and that she did nothing to determine if the information about Uszenski was accurate or not. She admitted that her husband, a former FBI agent, mailed it to the BBOE members, to the County, and gave it to Board President Cantillo. Pa614-619, Stump Dep. at 119:10 to 141:9.

Contrary to the trial court's decision, Stump was not exercising any "political activity" nor 1st Amendment rights—defaming Dr. Uszenski and

giving false testimony is not protected activity under the 1st Amendment. Pb 54-55, citing State v. Hill, 256 N.J. 266, 281-82 (2024) and Brennan v. Norton, 350 F.3d 399, 412 (3d Cir. 2003).

C. Even If Not Within the Scope, BBOE Is Still Liable For Their Employees' Actions

It is for a jury, not the trial court, to decide genuine questions of material, disputed facts including whether Stump and others BBOE's employees' actions were "within the scope" or "outside of the scope" of their employment. The trial court also erred by focusing *solely* on Stump and the Press Release, and not the other employees and the Board member, Mike Conti, who also gave false testimony or false information to the OCPO. Clearly, McFadden and Conti's false testimony that Uszenski as superintendent had a duty to personally check Morgan's background before he recommended him for hiring, was within their scope of their work, because they testified in their capacity as BBOE's Head of HR for McFadden and as a Board member for Conti. See infra, at 12-13. BBOE is liable for their falsehoods, and is also vicarious liable for Stump and the CST employees' falsehoods under Section 219(1) of the *Restatement (Second) of Agency*, as detailed in Lehmann, 132 N.J. at 619-620, "(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

The trial court also failed to apply Section 219(2) of the *Restatement (Second) of Agency*: "(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, **unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.**" Lehmann, 132 N.J. at 619-620(emphasis added).

Here, Stump, McFadden, Gonzalez and Conti, as well as other BBOE employees, "purported to act or to speak on behalf of BBOE and" in speaking with authority and expertise they each "relied upon apparent authority or [they were] aided in accomplishing the tort by the existence of the agency relation" – such that BBOE is vicariously liable under Section 219(2)(d).

BBOE is also liable for Stump and the other employees and Board member Conti's falsehoods to the OCPO under Section 219(2)(b) because BBOE was negligent or reckless in not investigating Stump when it knew that her husband was distributing the defamatory Press Release that falsely smeared Uszenski with knowingly hiring a convicted drug dealer. As Plaintiffs indicated previously, BBOE had a duty to investigate who had launched the retaliatory

campaign against Uszenski. Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999)(failure to remove a harasser from the workplace gives rise for a hostile work environment). Had BBOE investigated Stump to determine if she was the author (as her husband distributed the false Press Release for her), it would have stopped further retaliatory actions by her and others in the CST, including their subsequent removal of JH's IEP the following school year, and their subsequent falsehoods to the OCPO about JH's IEP amendment.

POINT II

THERE WAS A CAUSAL CONNECTION IN THIS CEPA CASE AND SUCH FACT-LADEN ISSUES SHOULD BE DECIDED BY A JURY, NOT THE TRIAL COURT (Pa7-8; 3T18:11-26:6)[1]

Defendant[2] continues to ignore material facts established by Plaintiffs by either omitting those inconvenient facts from its alleged timelines or misstating them. Defendant also completely ignores the line of well-reasoned cases cited by Plaintiffs that found that whether there is a causal connection between the whistleblowing activities and the adverse employment action is highly fact-sensitive and should be left to the jury to decide. See Pb 38-39, citing Est. of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000); Maimone v. City of Atlantic City,

[1] All references to deposition or court transcripts are the same as designated in Plaintiffs' opening Brief. Pb 3, fn.1.

188 N.J. 221, 237-39 (2006); Hernandez v. Montville Twp. Bd. of Ed., 354 N.J. Super. 467, 475-76 (App. Div. 2002), aff'd by, 179 N.J. 81 (2004); Kolb v. Burns, 320 N.J. Super. 467, 479-483 (App. Div. 1999); Hester v. Parker, 2011 WL 1404886 (N.J. App. Div., Apr. 14, 2011).

Defendant also attempts to downplay Stump's retaliatory campaign and her lies to the OCPO. The two bold face lies by Stump to the OCPO were primarily that Uszenski knew about Morgan's criminal conviction from 1989 when Morgan was hired and alleged lack of credentials (see false "Press Release" at Pa1671, last line, "Clearly, he [Dr. Uszenski] was well aware of his [Morgan's] background and lack of valid credentials before recommending his services to the board of education."), and that a modification to Uszenski's grandson's existing IEP to mainstream the child was "fraudulent." Pa468, at Pa486. Both of these lies were central to the criminal charges lodged against the Plaintiffs, namely, that Uszenski knowingly hired Morgan, a convicted felon, so that his grandson's IEP could be modified to allow for out-of-district preschool at taxpayer expense. Pa1735, at 1745.

In truth, Dr. Uszenski knew nothing about Morgan's criminal past from 1989 when he recommended him to be hired decades later in 2013 and when he later heard rumors about it, he wanted to suspend Morgan, but the Board's

attorney instructed him not to, so the Board's attorney could investigate. Pa311, Uszenski Dep. at 1T44:13-45:13, 1T59:20-62:19.

In truth, Uszenski had no responsibility to do any criminal background check on any new hires. Mr. McFadden, as the Head of HR for BBOE, falsely testified before the grand jury that Uszenski had the final say on the job description, for hiring and even for checking Morgan's background:

> Q. Now the posting for this position is done by Dr. Uszenski, what will be on it and the terms and all that, correct, that's the Superintendent's responsibility?
> A. Not in total, no.
> Q. No? Who's responsibility is it?
> A. I mean it's one of those things where, like you said, you collaborate to make sure and some of it's just from previous job background and experience.
> Q. Who collaborates?
> A. **Well, the Human Resources and Dr. U.**
> Q. Yeah, but who's – who's the ultimate authority, who's ultimately responsible for the contents of the posting?
> **A. Well, Dr. Uszenski.** (Pa1373 at GJ 3T34:5-19)
>
> ***
>
> Q. Okay. And you were in charge of Human Resources at that time, correct?
> A. Yes.
> Q. Did you perform any investigation whatsoever into anything that Mr. Morgan put on that form?
> A. Just what the State Police did.
> Q. Okay. That's the criminal part, right? A. Right.
> Q. Okay. Are you aware of anybody conducting any investigation as to – regarding anything that Mr. Morgan put on that form?
> A. No. (Pa1385-1386, at GJ 3T46:19 to 47:5).
>
> * * *

> Juror #6: I would think that HR would have the responsibility to check in to final applicants' work history and signing off on that, before it went to Dr. Uszenski's desk. A. **Well, not all the time. And I never had the final. HR is not the final on anything. They aren't. You know, it's a misnomer. You know, what you think HR is and what I think HR is.** PAULHUS Q. Well, let me as you this. Not the final as far as decision making goes who gets on the agenda for hiring, correct? **But I think the Grand Juror is asking you who's the final authority for investigating the background of the applicant? Is that your question, sir? Juror 6: Yes, sir. Thank you.**
>
> **A. At any point in time a number of people could have called for references. I didn't call, because at the time I was going through many other applications.**

[Pa1431 at (McFadden) GJ 3T 92:19 to 93:14].

Stump's campaign against Uszenski (and Morgan) led directly to employees "turning" against Uszenski. Clearly, one of those was Mr. McFadden as well as Dana Gonzalez. BBOE's own President, Ms. Cantillo, admitted at deposition that BBOE had over 1,000 employees and some 10,000 students at the time. Pa2087, Cantillo Dep. at 2T44:23-45:18. Yet, McFadden falsely testified that the Superintendent was ultimately responsible for also checking an applicant's background.

Similarly, BBOE member Michael Conti, falsely testified before the grand jury that it was somehow Dr. Uszenski's "core" responsibility to check Morgan's background. Pa1452 at (Conti) GJ 3T113:12-24; Pa1454 at GJ 3T115:5-10.

Likewise, Stump and others on the CST falsely claimed that J.H.'s IEP modification in the Summer of 2013, was fraudulent despite BBOE NOT having

any in-district preschool during the summer for non-autistic children with behavioral issues and that all out-of-district IEP students get transportation. Pa1735; Pa2089, at 2T52:3-22, 2T48:1-49:25. In truth, J.H.'s IEP modification in the Summer of 2013 was approved by the CST and Stump and the funds approved by BBOE.

Contrary to BBOE's opposition, Stump who was still the Director, actually attended the IEP modification meeting with Morgan and the CST to address the modification to J.H.'s IEP. Pa531 at No. 14; Pa1915. Her silent approval at the time of that meeting clearly carried weight. Dana Gonzalez – who was a part of the CST – falsely testified before the grand jury that she felt pressured to go along with the amendment of JH's existing IEP: "Because he [Morgan] was a friend of the Superintendent, the instructions that he [Morgan]– that he was given – that he was giving sounded like they were a direct order from the Superintendent **and my Director [Stump], who was sitting right there had no comment or no words, said nothing."** Pa965 GJ 1T136:12-17. Thus, contrary to Defendant's arguments, Stump was directly involved in J.H.'s IEP amendment. Contrary to Defendant's arguments, Stump was copied on all of the emails to process the payments for J.H.'s out-of-district placement at Ocean Early. See, e.g., Pa1769-1770; Pa1771-1772. Yet, Stump never voiced any objection to the IEP amendment until March 2015 when she was interviewed by

the OCPO in her capacity as the then Director and now Supervisor of DSS and she seized on an opportunity to retaliate further against Uszenski for his whistleblowing by falsely asserting for the first time that his grandson's IEP was fraudulent.

As Judge Roe found, it was reasonable to attempt to mainstream J.H., a child with a disability since as early as 2011, over the Summer of 2013, and simply because there may be disagreement as to the IEP by the CST and/or parents, does not make it criminal. Pa1735 at Pa1761. A jury could reasonably conclude that had Stump, Gonzalez, McFadden and Conti told the truth to the OCPO that J.H.'s amended IEP was appropriate and not fraudulent, and that Uszenski knew nothing about Morgan's criminal background before he was hired and had no duty to check his background, that OCPO would have not proceeded with the arrest and subsequent indictments of Uszenski and his daughter, Ms. Halsey. The trial court erred in its usurpation of the jury's role in deciding disputing issues of material facts including about what the Prosecutor would or would not have done had these BBOE upper-level employees not lied to them.

Defendant tries to downplay the significance of the false Press Release by alleging that it was just one of many exhibits before the Grand Jury. Yet, that fake Press Release exhibit (Pa1671) was displayed to and testified about

numerous times before the Grand Jury with no less than seven (7) witnesses: Det. Llauget at Pa1035, at GJ 2174:21-24, Pa1231 at GJ 2T280:7-281:1, 282:1-284:4; Board Member Michael Conti at Pa1454-1457, at GJ 3T115:22 – 118:11; Board Member Lawrence Reid at Pa1485-1489, at GJ 3T146:18-150:17; Board Member Sue Suter at Pa1507-1509, at GJ 4T13:14-29:2; Board Member Cusanelli at Pa1552-1553, at GJ 4T58:25- 59:8, 59:16-61:13 (NY Times article); Board Member Pannucci at Pa1603-1608 at GJ 4T109:16-114:21; and Board President Cantillo, at Pa1638 at GJ 4T144:1-24.

BBOE misleadingly argues that there is no support for the admission of Board Member Lawrence Reid that the Board seemed to "turn against" Dr. Uszenski once Stump began her campaign, (Pa1824, Reid at 41:23-44:4), by arguing that he could not give an example of how the Board turned against him at his deposition when cross-examined by BBOE's own counsel. Yet, it does not negate Reid's testimony that the Board turned against Uszenski. In fact, another Board member, John Barton, testified that he, in the Fall of 2014, had reported speculative, false gossip about Uszenski to OCPO. That admission by another Board member supports the testimony from other Board member Reid that the BBOE members had begun to "turn against" Uszenski as a result of Stump's smear campaign. Pa1824, Reid Dep. at 41:23-44:4; Pa1977, Barton Dep., at 80:5-82:7, 82:18-83:11, and 83:23-85:5. It matters not that Barton had

not yet been sworn in as a Board member at the time he went to OCPO, as it supports Reid's testimony that Board members, including those when Uszenski was later suspended and later terminated, had "turned against" Uszenski, because Barton who was about to be a board member saw fit to report speculative gossip about Uszenski to the OCPO.

President Cantillo admitted that the false information about Uszenski allegedly knowing about Morgan's criminal background was getting out there. Defendant does not dispute that the false Press Release was actually mailed to each of the BBOE's members' work mailboxes and that it was distributed at Board meetings by Mr. Stump. Even Donna Stump admitted this. Yet, despite knowing that the false, fake Press Release was distributed by Supervisor Stump's husband, BBOE did nothing to investigate who authored it and never bothered to discipline their employee, Ms. Stump, for spreading false, defamatory information about the Superintendent.

Likewise, Defendant continues to falsely allege that the Board gave Dr. Uszenski a new contract with a longer and better terms after Stump distributed her false Press Release and packet of materials. Defendant's argument is false and misleading. The Board did so before the smear campaign started. It was not until after Dr. Uszenski's contract was renewed on June 27, 2013 that Stump's false "Press Release" was authored and later distributed on July 14,

2013, and it was not received by the Ocean County Superintendent of Schools until July 16, 2013. Pa1671. The false Press Release clearly was not drafted until after June 27, 2013. Indeed, the Release states in part: "At the regular board of education meeting held on June 27, 2013, the board hired Andrew Morgan of Morgan and Associates to be the Interim Manager of Special Services." Pa1671. Accordingly, the Press Release could not have been written by Stump until after June 27, 2013 and certainly was not distributed until July 14, 2013, after BBOE had already renewed Dr. Uszenski's contract weeks earlier on June 27, 2013. At that same meeting on June 27, 2013, BBOE appointed Mr. Morgan to replace Stump as the head of the Special Services Department, effective as of July 1, 2013 (Stump was the head of Special Services, as its Director, until June 30, 2013). Pa1729; Pa306-307.

Defendant's time sequence, designed to make it appear that the BBOE treated Uszenski well immediately after Donna Stump started her retaliatory campaign, is false. In truth, her campaign began **after** his contract was renewed. As to Uszenski's performance review, it does not negate the fact that the Board did nothing to protect Uszenski from Stump's attack which escalated when she was interviewed by the OCPO in March 2015.

After Stump had her fake, false Press Release distributed, the Board began to evince a retaliatory attitude towards Uszenski. Board member Reid testified

that the Board as an entity retaliated against Uszenski. A jury could reasonably conclude that by failing to act promptly against Supervisor Stump after she caused the wide distribution of a Press Release defaming Superintendent Uszenski by stating he must have known of Morgan's criminal record when Uszenski hired him, that BBOE condoned and ratified her behavior and empowered her to move on to her further false statement to the OCPO that the IEP was "fraudulent." It was not normal that a Board would do nothing at all to protect its Superintendent from public defamation by a Director who he has just demoted.

Hence, a jury could reasonably conclude that immediately after her demotion by Uszenski in 2013, Stump, driven by retaliatory animus against Dr. Uszenski, distributed her false Press Release. Unpunished by the BBOE for tortiously attacking their Superintendent, the BBOE's emboldened Supervisor Stump to further attack Dr. Uszenski via her false claim to the OCPO in March of 2015 that J.H.'s IEP was "fraudulent." That false claim activated a criminal investigation that had been dormant for 4 months by giving Detective Mahony and Prosecutor Paulhus probable cause to arrest Halsey and Uszenski and charge them with indictable offenses that had to be brought before a grand jury. Without Supervisor Stump's huge lies about Uszenski knowingly hiring a drug dealer and Uszenski via that ex-con coercing the Child Study Team to create a

"fraudulent IEP," there would have been no arrests, no mandatory suspension of Uszenski, no indictment, and no termination of Uszenski and barring of Halsey from teaching, and no yanking J.H. out of an IEP and declassifying him. Supervisor Stump's lies poisoned everything for the Plaintiffs.

Defendant's narrative largely ignores Stump's March 2015 false statements to the OCPO, uttered within the scope of her authority and employment as a BBOE Supervisor and former Director, that J.H.'s IEP was "fraudulent" and that Dr. Uszenski knew about Morgan's arrest back in 1989, when he did not. These retaliatory statements by BBOE's Supervisor Stump led directly to the Plaintiffs' Uszenski's and Halsey's arrests in May 2015 and later indictments, which events caused the BBOE to suspend Uszenski with pay on May 7, 2013, and later without pay on September 29, 2013, and ultimately, to not renew his employment contract on September 14, 2017. The BBOE continued to suspend Uszenski without pay and failed to investigate Stump, despite Judge Roe dismissing the first and superseding indictments in February 2017 and two Board members, Lawrence Reid and John Talty, calling the actions against Plaintiff retaliatory. Contrary to Defendant's argument, Uszenski's PTI had no admission of guilt to it and his record was ultimately expunged. BBOE could have, but failed to, suspend him with pay – especially once Judge Roe dismissed the superseding Indictments.

In the face of these disputed, material facts, the trial judge erroneously usurped the jury's function when it found no causal connection between Uszenski's whistleblowing and the adverse employment actions. A jury could reasonably conclude that BBOE's management level employees (i.e., Stump, Gonzalez, McFadden, and others on the CST, as well as Board Member Conti, were all tainted by Stump's campaign against Uszenski and Morgan) caused and contributed to the OCPO's decision to arrest and seek indictments.

Defendant tries to distinguish the cases cited by Plaintiffs about an employer as an entity being liable under the Lehmann, supra, line of cases for supervisory retaliation undertaken both within the scope of employment and even outside the scope of employment where the supervisor uses the authority vested in her to retaliate. Its distinctions fall flat. As explained herein, BBOE is liable for Stump and its other employees' falsehoods to the OCPO. Moreover, Defendant fails to address that even some Board members, including Mike Conti, falsely testified that Uszenski had a duty to personally do a background check on Morgan. Pa1452 at (Conti) GJ 3T113:9-24; Pa1454 at GJ 3T115:5-10.

A. Plaintiffs Do NOT Need to Prove any Conspiracy To Hold BBOE Liable and BBOE is Liable for Stump and its Other Employees' Retaliatory Acts

Defendant argues inaccurately that Plaintiffs, Dr. Uszenski (and by extension against the other two plaintiffs, his daughter, Jacqueline Halsey, and

his grandson, J.H.), have to prove a conspiracy between OCPO and the BBOE. The trial judge also implied that such a conspiracy was necessary in his Decision granting summary judgment to BBOE. However, the law does not require that such a conspiracy be shown or that ultimate decisionmakers like OCPO or even the BBOE subjectively and personally shared Stump's retaliatory animus. Rather, Plaintiffs' evidence – which should have been viewed most favorably to Plaintiffs as the non-moving parties but was not by the trial court – that Donna Stump's retaliatory campaign against Dr. Uszenski, infected OCPO's decision-making process of those who arrested and sought indictments against Plaintiffs. A jury could reasonably conclude that Stump and other employees at BBOE all knew that an arrest or indictment of the Superintendent would be grounds for his suspension and termination as BBOE.

It matters not that they were subordinate employees to the Superintendent or that, as Stump argued, she did not have the authority to discipline the Superintendent. Stump's retaliatory campaign against him, infected others employees to turn on Uszenski, including the BBOE members. Stump and others in the troubled Department of Special Services knew that once Dr. Uszenski was suspended, that they could refuse to provide J.H. with an IEP and needed care. All of which was sufficient under the Lehmann principles and under the Cat's Paw theory discussed below to overcome summary judgment.

That said, as detailed in Plaintiffs' Opening Brief, this is the rare case where a member of the Board admits the Board had subjective retaliatory intent, which the trial court ignored. Pa1835-1836, at Reid Dep. at T41:23-44:4.

Under the Cat's Paw theory, which parallels the Lehmann standards, the question is whether Stump's negative retaliatory campaign against Dr. Uszenski "influenced the decision-makers," not whether all ultimate decision-makers subjectively harbored retaliatory intent. Delli Santi v. CNA Ins. Co., 88 F. 3d 192, fn. 11 (3d Cir. 1996). In Delli Santi, the Third Circuit reinstated a jury verdict for retaliation under the LAD, and found that the New Jersey Supreme Court would hold an employer liable for the discriminatory conduct of its supervisors irrespective of the subjective intent of the ultimate decision-makers. In so doing, it relied upon authorities within the Third Circuit as well as citing to Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990), and stated, "if a committee 'acted as the conduit of a [supervisor's] prejudice – his cat's paw – the innocence of its members would not spare the company from liability.'" Delli Santi, at fn. 11.

In Staub v. Proctor Hosp., 562 U.S. 411, 131 S.Ct. 1186 (2011), the United States Supreme Court reinforced the use of the cat's paw theory in

discrimination and retaliation cases, applying it in a USERRA[3] claim, to uphold a jury verdict for the employee, and held:

> Proctor, on the other hand, contends that the employer is not liable unless the *de facto* decisionmaker (the technical decisionmaker or the agent for whom he is the "**cat's paw**") is motivated by discriminatory animus. This avoids the aggregation of animus and adverse action, but it seems to us not the only application of general tort law that can do so. Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA. **And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that [are] too remote, purely contingent, or indirect."** Hemi Group, LLC v. City of New York, 559 U.S. 1, 9, 130 S.Ct. 983, 989, 175 L.Ed.2d 943 (2010) (internal quotation marks and brackets omitted). We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent." The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. See Sosa v. Alvarez–Machain, 542 U.S. 692, 704, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). **Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable."** Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996) (internal quotation marks omitted).
>
> Staub, 562 U.S. at 420. (emphasis added)

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[3] Uniformed Services Employment & Reemployment Rights Act.

Similarly, relying in part on Staub, supra, New Jersey courts have used the "cat's paw" theory to hold an employer liable for actions of subordinate employees who infect decision-makers' actions. Ofori v. U.M.D.N.J., 2012 WL 3889134 (NJ App. Div., Sept. 10, 2012). In Ofori, the Appellate Division upheld a jury verdict for racial discrimination, with this jury instruction, finding that the charge, did not constitute plain error:

> Defendant [UMDNJ] may be liable for discrimination if you determine that a bias[ed] subordinate employee influenced the final decision maker to trigger a discriminatory employment action.
>
> The plaintiff can establish discrimination by demonstrating that an individual other than the ultimate decision maker influenced the termination decision based on discriminatory animus.
>
> Subordinate bias comes into play when an allegedly biased subordinate accomplishes her discriminatory goals by misusing the authority granted to her by the employer. For example, the authority to monitor performances, report disciplinary infractions, and recommend employment actions.
>
> The plaintiff at all times bears the ultimate burden of convincing you that it's more likely than not that defendant engages in intentional discrimination....

Ofori, at * 6.

Here, Stump "intended the adverse action" and "influenced" – caused – the decision-makers both in the OCPO and the BBOE as she smeared Dr. Uszenski in order to get him fired or arrested or both. It is certainly foreseeable that once she told the OCPO that J.H.'s IEP was "fraudulent," that OCPO would

arrest and later have a grand jury indict Plaintiffs, thereby causing the BBOE to suspend Uszenski, with and later without pay, and ultimately to terminate him by not renewing his contract. And her actions (and other BBOE employees' actions, including those on the CST, like Gonzalez, as well as HR Head McFadden and Board Member Conti) "influenced" *i.e.*, "caused" both events by creating probable cause to arrest him through her allegation of a "fraudulent IEP." Once there was an arrest, the law required that Dr. Uszenski be suspended (and Ms. Halsey's ability to teach be put on hold until the charges were cleared) and then following the indictment, he was suspended without pay.

Det. Mahoney's admitted at his deposition that OCPO would not have proceeded with an arrest and sought indictments against Plaintiffs if OCPO had not gotten Stump's statements that the IEP was "fraudulent" and others in the CST went along with her: **"I don't believe that we [the OCPO] would have proceeded on any criminal charges if that's all we had, no."** Pa455, Mahoney Dep., at 66:14-67:18. Defendant argues that Mahoney's cross-examination where defense counsel asked him leading questions to try and undo his truthful admission, (Pa455, at 68:16-70:2)—which Plaintiffs did, in fact, cite to in their opening Brief (Pb40) – somehow negates Mahony's original admission. It does not. It is for the jury, not the trial court, to decide whether Mahony's testimony is credible. In fact, Det. Mahony, Prosecutors Paulhus and Coronato were found

to have withheld exculpatory evidence by Judge Roe to the grand jury. Pa1735, at Pa1738-62.

BBOE ignores that other BBOE employees, all tainted against Uszenski because of Stump's retaliatory campaign that began in July 2013, also gave false testimony and information to the OCPO. A jury could easily find that OCPO would not have proceeded to arrest and seek indictments against Uszenski and his daughter, Ms. Halsey, had Stump not tainted BBOE members and employees against Uszenski and later lied to OCPO about J.H.'s IEP amendment being fraudulent. Stump's retaliatory falsehoods do not need to the only cause of either OCPO or BBOE's actions. See NJ Model Jury Charge 2.32, citing, Donofry, supra. Defendant's argument that OCPO had other alleged evidence, such as alleged expert testimony, which was not presented to the grand jury, is woefully insufficient to grant summary judgment to Defendant. In fact, it turns the summary judgment standard on its head by viewing inferences in the non-moving party's favor.

As to temporal proximity, Defendant does nothing meaningful to address the line of cases cited by Plaintiffs. It ignores that an adverse employment action under CEPA can take the form of a continuing hostile work environment. Here, it began with Stump's defamatory smear campaign against Uszenski in July 2013, and continued with her lies to the OCPO.

Defendant fails to appreciate, as the trial court failed to appreciate, that temporal proximity, while it may be a factor, it is not the only one, since a sophisticated employer .... would not immediate retaliate." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995). Here, there was temporal proximity when Stump began her retaliatory campaign against Uszenski in July 2013, right after Uszenski had demoted her, and Stump's defamatory campaign did not end there, as she jumped on the opportunity to repeat her defamatory smears to the OCPO through her false Press Release and added that J.H.'s amended IEP was fraudulent, when it was not, in March 2015. Retaliation can take years as recognized in the other cases previously cited by Plaintiffs. Pb, at 46-48.

Accordingly, the trial court's finding of a lack of causal connection was in error. Such questions are highly fact sensitive and quintessentially a jury question given the numerous disputed issues of material facts outlined herein and in Plaintiffs' Opening Brief.

POINT III

THE DERIVATIVE CEPA CLAIM FOR THE MINOR, J.H., DID NOT REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES AS CEPA SEEKS DAMAGES, NOT AN IEP, AND REGARDLESS, J.H., EXHAUSTED HIS ADMINISTRATIVE REMEDIES (Pa7-8)

Defendant continues with its argument that the minor Plaintiff, J.H., must first exhaust his administrative remedies despite it not being required under

CEPA – a remedial statute that must be liberally construed. See Lippman v. Ethicon, Inc., 222 N.J. 352, 378, 388 (2015)(CEPA does not contain an exhaustion requirement), along with N.J.S.A. 34:19-1, et seq. First, the trial court never reached the issue over whether JH needed to exhaust his administrative remedies, as it relied solely on the dismissal of Plaintiff Uszenski' CEPA claim, for the granting summary judgment to BBOE on the other two Plaintiffs' derivative CEPA claims.

Second, to the extent that this Court wants to address the exhaustion argument as to J.H.'s damages' claims in his derivative CEPA claim, not only was J.H.'s Petition moot, it could not address, nor award, as his derivative CEPA claim can, J.H.'s damages caused by the withdrawing of his IEP, with no 504 plan ever being implemented, as promised, nor the delay caused by his IEP not being promptly reinstated when he regressed. In short, the OAL cannot decide compensatory and punitive damages available under CEPA.

Nonetheless, J.H's parents had, in fact, utilized their administrative remedies to re-classify J.H., obtain a new IEP for him, including additional examinations for him. Eight months later, after moving to Pennsylvania and obtaining appropriate IEP services for him in that other state, his parents properly withdrew their OAL Petition without prejudice because it was moot since he no longer lived in Brick. Pa729-732. The Petition was appropriately

withdrawn without prejudice and BBOE's exhaustion defense is not grounds for summary judgment of J.H.'s derivative CEPA claim.

POINT IV

FORMER DEFENDANT DONNA STUMP'S OPPOSITION BRIEF SHOULD BE DISREGARDED (Pa1-6)

With respect to former Defendant Donna Stump's Opposition Brief, it should be disregarded by this Court as she failed to file a Case Information Statement in this Appeal as required by Rule 2:5-1(c) which requires that a "respondent shall file a case information statement within 15 days after service of the notice of appeal."

Even if this Court were to overlook that deficiency, Stump was not a defendant at the time and did not participate below in the trial court's June 24, 2-24 summary judgment Order (Pa7-8) at issue in this Appeal. She was a party to the earlier, Motion to Dismiss Order, which dismissed claims against her **without prejudice (Pa1-6) – based upon an earlier complaint**, not the Third-Amended Complaint at issue when summary judgment was decided. No discovery had taken place at the time of that earlier Order, and it was based on an earlier complaint. Pa1-6.

Plaintiffs were not required to re-join Stump as a party-defendant in order to hold BBOE – her employer – vicariously liable for her retaliatory actions under CEPA. Yet, as Plaintiffs indicated previously, the trial court below, when

it granted summary judgment relied upon that earlier dismissal without prejudice Order to buttress its decision that BBOE had no liability for her actions: "this Court is unaware of how the Brick [BOE] could be held vicariously liable for an employee who was previously dismissed from this litigation at its inception." 3T18:7-10. Defendants do not dispute that a "without prejudice" order cannot bar any subsequent action against Stump, nor her employer, BBOE. Pb 60. In fact, the trial court in Ocean County had refused to grant dismissal of the CEPA claims against BBOE on its Motion to Dismiss. In short, the trial court in Monmouth County should have not relied upon that earlier dismissal Order as to Stump in its summary judgment Decision. To do so was in erroneous, and requires reversal of the June 24, 2024 summary judgment Order.

To the extent that Stump's arguments are considered by this Court, they are duplicative of BBOE's baseless arguments which Plaintiffs have addressed.

CONCLUSION

Plaintiffs request that the summary judgment Order (Pa7) be vacated and this matter remanded back for a trial on Plaintiffs' CEPA and derivative CEPA claims against Defendant BBOE.

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Dated: January 29, 2025