NEW JERSEY SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-004117-23

JEANNEY WATSON, Plaintiff/Respondent, vs. MCRECH, INC. D/B/A TURNERSVILLE CHRYSLER DODGE JEEP RAM, ERICK ESCOBAR, ROBERT ARMSTRONG, ANTHONY METELLO, ET AL, Defendants/Appellants.	CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY Trial Court DOCKET NO. CAM-L-1955-18 Sat Below: HON. DONALD J. STEIN, JSC

DEFENDANTS' AMENDED APPELLATE BRIEF

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Dated: January 28, 2025

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PRELIMINARY STATEMENT

The trial court made numerous legal errors in this bench trial requiring a reversal of the final judgment entered on July 19, 2024. In essence, the Court found that Plaintiff's experienced an incident of sexual harassment and as a result, Plaintiff's employer and the outside investigator were strictly liable to Plaintiff for lost wages and emotion distress.

First, to the prejudice of Defendants, the Court five years after discovery was over compelled Defendants to produce for depositions witnesses that it had no control over and then barred the witness when he failed to be deposed.

Next, the court erroneously held that Mr. Armstrong, the individual who investigated Plaintiff's sexual harassment complaint did a poor investigation and as a result he was personally liable to Plaintiff under NJLAD for lost wages and emotional distress damages.

The Court also erroneously held that Plaintiff's employer McRech was liable for sexual harassment without making any findings of fact that Plaintiff's employer knew or should have known of the harassment and failed to take effective remedial measures to stop it. Nor did the court make any findings of facts that McRech, Inc. delegated to Mr. Escobar the authority to control the working environment and Mr. Escobar abused that authority to create a hostile work environment. Nor did the court find that defendant McRech, Inc. was negligent in failing to take reasonable

steps to prevent the harassment from occurring. In fact, the Court ignored the undisputed testimony that McRech had in place a policy against harassment and discrimination and trained its employees with regard to same.

Instead, the Court erroneously found that the investigation of the sexual harassment complaint was flawed because the investigator should have met in person or recorded the only two witnesses to the alleged incident. As a result, the court erroneously held Plaintiff's employer McRech and the outside investigator were strictly liable for sexual harassment and lost wage and emotional distress damages.

The court also found that Defendants, including Mr. Armstrong, the investigator were liable for retaliation without finding that any adverse employment action was taken against Plaintiff.

The Court further erred in awarding lost wages where Plaintiff quit and Court failed to find a constructive discharge occurred. In addition, the Court erred in awarding Plaintiff lost wages, even though she failed to identify any lost wages in discovery and immediately obtained equivalent employment after she quit. The lost wages claimed by Plaintiff were allegedly incurred after she was terminated from her subsequent employer because she disagreed with management.

Finally, the Court erred in awarding Plaintiff's counsel an unreasonable fee award without explaining how the award was arrived at and awarding a fee enhancement, when Plaintiff's counsel never produced any contingent fee agreement.

Defendants recognize that under the applicable standard on appeal, this court will uphold the trial judge's factual findings, provided they are "supported by adequate, substantial and credible evidence" and give deference to the trial court's credibility determinations. However, reversal is appropriate in this case, because the trial court repeatedly misapplied the law to the facts which were found.

PROCEDURAL HISTORY

The Plaintiff initially filed a complaint in the New Jersey Superior Court, Burlington County on March 29, 2018. (a1) The Complaint named as Defendants McRech, Inc., Erick Escobar, Robert Armstrong and Anthony Metelo. McRech, Inc. and Robert Armstrong ("Defendants") filed an Answer to the Complaint on May 7, 2018 (a16) Following a motion by Defendants to transfer venue the case was transferred to Camden County on May 24, 2018. (a28) Plaintiff failed to provide discovery and a motion to dismiss the complaint was filed by Defendants on 8/14/18 which was subsequently withdrawn after discovery was answered. (a28) On 9/25/18 Plaintiff filed a motion to compel discovery and quash Defendants' subpoena on Plaintiff's current employer. (a28) On 9/26/28 Defendants also filed a motion to compel discovery. (a28) On 10/12/18 the Court entered orders denying Plaintiff's motion to compel discovery granting Defendant's motion to compel discovery relating to the wage loss claim and

denying Plaintiff's Motion to quash subpoena and entered a protective order sought by Defendants. (a42-47)

On 10/13/18 the Court issued orders dismissing from the case Erick Escobar and Anthony Metelo for Plaintiff's failure to prosecute. (a48)

On 10/29/18 Plaintiff moved to quash Defendant's subpoena to Plaintiff's current employer Wilmington Audi. (a49) On 11/15/18 Defendants filed a motion to enforce litigants rights against RK Chevrolet for failing to respond to subpoena. (a28) On 11/21/18 Defendants filed a cross-motion to bar Plaintiff's wage loss claim for failure to comply with the court's 10/12/18 order. (a49) On 1//2/19 the Court entered Orders Compelling Plaintiff to produce all current W2's from 2015-17. 2018 W2's had not yet been issued and for Plaintiff's employer to respond to the subpoena. (a49)

Plaintiff filed a motion to extend discovery on 5/27/19. (a51) Defendant filed a cross-motion to compel Plaintiff's deposition on 6/13/19. (a51) The court granted both motions by Order dated 6/21/19. (a51)

There were 512 days of discovery. (a28)

Defendant filed a motion for summary judgment on 10/25/19. (a53) The Court entered an Order denying summary judgment on 12/6/19. (a98)

On 7/8/20 Defendants filed a motion in limine to enforce Plaintiff's waiver of a jury trial. (a127) The motion was granted by Order entered on 6/19/23 providing that the case would proceed to trial as a bench trial (a127)

Plaintiff filed motions in limine on 3/8/24. (a128) On 3/11/24. Defendant sought an Order barring Plaintiff from misrepresenting that her prior employer, Cherry Hill Dodge was the same company as McRech, Inc., (a2180 to bar Plaintiff's lost wage claim after 2017 and to bar Plaintiff from describing the alleged incident as a sexual assault. (a200) On 3/13/24 Plaintiff's filed opposition to Plaintiff's Defendant's motion in limine on 3/15/24. (a268)

A virtual pretrial conference was held on March 14, 2024. [1] Defendant advised the Court that it intended to produce at trial virtually the testimony of Mr. Escobar who was the individual accused by Plaintiff of sexual harassment as he currently resided in North Carolina. (T1, 9:1-3) Mr. Escobar was previously dismissed as a Defendant for lack of prosecution. (a48) Plaintiff's counsel opposed the virtual appearance and admitted Mr. Escobar was a critical witness, but then falsely claimed Plaintiff was unable to serve Mr. Escobar because Defendant refused to accept service for him. (T1, 9:7-15) At the time the Complaint was filed Mr. Escobar was not employed by Defendant and of course, Defendant had no authority to accept service on his behalf. (a1)

[1] T1 is the transcript of the 3/14/24 pre-trial conference.

Judge Stein correctly noted that Plaintiff's objection was not as to the appearance of Mr. Escobar by Zoom, but his appearance at all. (T1, 9:16-20) Plaintiff argued that Judge Stein would not be able to judge Mr. Escobar's credibility, which argument Judge Stein rejected. (T1, 10:2-22) Judge Stein then invited plaintiff to put together a brief to request the right to depose Mr. Escobar prior to trial. (T1, 12:10-16) No motion was filed by Plaintiff.

Discovery ended in this case on 7/31/2019 (a28) On March 15, 2024, instead of filing a motion to reopen discovery or compel discovery, Plaintiff's counsel filed a letter requesting an adjournment of the trial and an order to compel the depositions of Mr. Metelo and Mr. Escobar claiming to be "shocked" that either individual would appear as witness, despite Plaintiff having named them as defendants in the complaint. (a291) Defendants filed opposition to Plaintiff's Motion in limine and the request to take depositions of third party witnesses. (a411)

The court held an in person case management conference on March 18, 2024. [2] The court immediately addressed Plaintiff's request to take depositions. (T2, 3:15-17). The court was informed that both Mr. Metelo's and Mr. Escobar's addresses were provided to the Plaintiff and remained the same during discover, but that Plaintiff's made no effort to locate or depose either individual. (T2, 4:3-15,

[2] T2 is the transcript from the March 18, 2024 Case Management Conference.

6:20-25, 7:1-9) The Court then permitted Plaintiff to submit documents showing its attempts to serve Mr. Metelo and Mr. Escobar and take their depositions and recessed. (T2, 8:7-25, 9:1-7, 10:1-23)

Plaintiff's counsel then filed exhibits on 3/18/24 to support the claim that she should be entitled to depose Anthony Metelo and Erick Escobar or the witnesses should be barred. (a291) The case management conference continued on zoom. Plaintiff continued to argue that McRech, Inc. should have accepted service for its former employees, while admitting that Plaintiff made no real attempt to obtain the witnesses depositions. (T2, 13:3-25, 14:1-19) The record relied on by Plaintiff's made clear that no subpoena was ever served on the witnesses, despite the fact that Plaintiff was provided with addresses in discovery. (a291, T2, 14:21-25, 151-26, 16:1-15) The court bizarrely found that Defendant "lulled to sleep" Plaintiff by not updated interrogatories to advise Plaintiff's that Mr. Escobar moved to North Carolina after discovery ended and he ordered that Mr. Escobar and Mr. Metelo (whose address never changed) be deposed, noting that he did not see the prejudice. (T2, 17:1-9)

However, the prejudice was that when Mr. Escobar learned that he was going to have to do more than just appear for trial, he stopped cooperating with

Defendants and refused to appear as a witness at trial and was also barred by the Court from appearing and testifying at trial.[3] (T3, pgs 3-7)

Plaintiff was asked in interrogatory #21 to identify wage loss. (a577) Plaintiff responded will be provided. (a577) Plaintiff was ordered to produce W2's in January 2019 to support wage loss claim (a42) The Plaintiff failed to update discovery to provide any W2's for 2018. At her deposition, Plaintiff was unable to identify any wage loss. (a134) Nonetheless, the Court ignoring that Plaintiff provided no discovery on lost wages, decided that the burden was on Defendants to dispute the new wage loss claim and would not require Plaintiff to produce W2 or tax return for 2018. (T2, 22:6-25, 23:1-8) The court entered an order on 3/18/24 denying Defendant's Motion to bar lost wages. (a336)

The first trial date was scheduled for 12/16/19. The trial date was adjourned twenty-one (21) times, the majority at Plaintiff's request. (a28) Another pre-trial conference was conducted on May 6, 2024.[4] The case proceed to trial on May 7, 2024 [5]and May 8, 2024[6] as a bench trial before the Honorable Donald J. Stein. The parties submitted written summations on 5/10/24. The court issued its decision in favor of Plaintiff from the bench on 5/13/24.[7]

[3] T3 is the transcript from the Case Management Conference of April 30, 2024)
[4] T4 is the Transcript of the pre-trial conference held on May 6, 2024
[5] T5 is the Transcript of trial on May 7, 2024.
[6] T6 is the Transcript of trial on May 8, 2024.
[7] T7 is the Transcript of the Court's ruling on May 13, 2024.

On 6/11/24 Plaintiff filed a motion for an award of fees and costs under NLAD. (a416) On 7/15/24 Defendants opposed the motion for fees and costs (a496) Oral argument was held on 7/19/24[8] on motion for fees and costs and Order was entered. (a628)

A notice of appeal was filed on 8/29/24. (a630) The transcripts were delivered to the Court on December 10, 2024. (a633)

STATEMENT OF FACTS

Plaintiff began working at McRech, Inc. in June, 2017. (T5, 163:12-14) Mr. Metelo was the General Manager at the Turnersville Chrysler Jeep. (T5, 28:1-9) Prior to that she worked for a different company, Foulke Management Corp. that operates car dealerships. Both the Court and Plaintiff's agreed that Foulke Management Corp. was a separate corporate entity and was not defendant in the case and not liable to Plaintiff. (T5, ppgs10-14) While the Court advised that it was aware that two entities and were separate companies and that the Court was capable of "sorting this out". The Court nonetheless made finding that incorrectly combined the two companies and attributed responsibility to McRech, Inc. for incidents that happened during her employment with Foulke Management Corp. (T5, 15:3-22, T7)

[8] T8 is the Transcript from July 19, 2024 Motion to award attorney's fees and costs.

Plaintiff worked at Foulke Management Corp. who operated Cherry Hill Triplex for five years until June, 2017. (T5, 23:1-24, 95:3-9) Plaintiff then became employed at Turnersville Dodge Chrysler Jeep, which is owned by McRech, Inc. (T5, 24:2-8, 95:7-9)

Plaintiff has a history during her previous employment at Foulke Management Corp. of complaining about her co-workers that she wanted fired. While working for Foulke Management Corp. Plaintiff made a complaint under its anti-harassment policy that another female employee was inappropriately touching her to Bob Armstrong who was designated as Foulke Management Corp.'s investigator. (T5, 95:10-20) Mr. Armstrong investigated her complaint and found corroborating evidence to support it and ultimately, the employee whom Plaintiff complained about was terminated. (T5, 96:2-16)

While working at Foulke Management Corp. Plaintiff also made a complaint that another employee was making derogatory statements related to her gender. That complaint was also investigated by Mr. Armstrong and the employee was fired as a result. (T5, 96:21-25, 97:1-7)

Plaintiff also complained while working at Foulke Management Corp. that an employee was doing drugs and she wanted that employee fired. (T5, 97:43-25) Plaintiff complained that this employee was increasing her workload. (T5, 98:1-

99:24). Foulke Management Corp. did not terminate this employee and Plaintiff left her employment approximately a month later. (T5, 100:20- 101:6)

Plaintiff testified that she left her employment with Foulke Management Corp./Cherry Hill Triplex because she was having problems with her co-workers making comments about Mother's Day and her being a veteran. (T5, 25:13-25) Mr. Armstrong was an investigator at Foulke Management Corp. and he was involved in investigating her internal complaints at Foulke Management Corp. (T5, 26:2-25) Plaintiff decided she wanted to leave the company and learned that there was an opportunity that Mr. Armstrong was aware of at McRech, Inc.'s Turnersville Chrysler where he was also responsible for investigating complaints under the discrimination policy. (T5, 27:3-15)

Plaintiff interviewed with Anthony Metelo at McRech, Inc. for the position of BDC representative who answers incoming leads from potential clients who want to purchase vehicles and work with the sales department who sells the cars. (T5, 101:17- 102:11)

Plaintiff did not have a private office at McRech, Inc., instead she had a desk in a room with at least five other desks. (T5, 102:12-19.) There was no BDC manager when Plaintiff was hired at McRech and she decided that she wanted the position. Mr. Metelo agreed to give Plaintiff the position. (T5, 103:1-14) In the

position of BDC manager, Plaintiff was equal with all other managers, included Mr. Escobar. (T5, 103:17-20)

In or about August 14, 2017 Plaintiff complained that an incident occurred between herself and Mr. Escobar in the BDC office. Plaintiff made a complaint under McRech's Anti-harassment policy. (T5, 112:18-20, a473, a480) Mr. Armstrong was identified as the person to whom complaints of violations of policy should be reported. (a480) Plaintiff believed that an incident involving Mr. Escobar that occurred on August 14, 2017 violated the policy and she told Mr. Metelo and contacted Mr. Armstrong. (T5, 118:16-119:7)

Plaintiff discussed the incident with Mr. Armstrong who was working from home due to recently having undergone knee surgery. (T5, 40:21-41:9, 44:2-7) Specifically, the day after the incident, Plaintiff in her own handwriting completed an incident report. (a473) Plaintiff reported the incident violating McRech's anti-harassment policy by calling Mr. Armstrong and telling him her version of the incident. (T5, 129:22-25, 130:1-7). Plaintiff was instructed to fill out an incident report and put her complaint in her words so that it was clear what she was complaining about to be investigated. (T5, 130:24-25, 131:1-6) Plaintiff identified her complaint as follows:

> Around 8 p.m. Erick Escobar walked into my office and approached my desk he asked how many appointments our department had for the next day. As I was pulling up the appointment list. Erick reached over my desk,

> grabbed the grabbed the top of my shirt and pulled it up. I was in such shock, I couldn't say anything. Before I could speak he just walked out. I turned to Dominic Onorato and said Dominic and then I told him what just happened.

On direct, Plaintiff agreed that what she wrote was the "sum and substance" of what happened. (T5, 46:8-10) Plaintiff also acknowledged with her signature that the information was accurate. (T5, 48:21-25, a473) Plaintiff testified at her deposition that there was nothing in the written incident report that she would have told Mr. Armstrong orally. (T5, 151:11-20) Plaintiff was wearing a tank top at the time of the incident. (T5, 37:6-18, a477)

Plaintiff did not identify Mr. Escobar as her "supervisor" (a473) Instead, she described the relationship as work related and noted that she spoke to him " very minimally". (a473) As a remedy, Plaintiff stated that she wanted Mr. Escobar to be fired. (a473) When she quit she expressly stated it was because Mr. Escobar was still employed. [9]

Dominic Onorato was in the room at the time and did not see or hear anything. (T5, 127:1-3) Plaintiff waiting until Mr. Escobar left the room to tell Mr. Onorato what happened, preventing Mr. Escobar was denied the opportunity to deny the claim. (T5, 127:4-11) Prior to this lawsuit, Plaintiff never told anyone

[9] Defendant has submitted to the Appellate court the two recordings on a thumb drive made by Plaintiff and played at trial in this matter.

that Mr. Escobar put his hand down her shirt and touched her breast. However, that was the claim at trial. (T5, 128:1-21) . Notably, Plaintiff was keeping personal notes, where she wrote down for only for her benefit what she needed to remember. (T5, 133:8-10, 134:4-10) (a471) On August 14, 2017, Plaintiff wrote in her personal notes essentially the same thing she wrote in the incident report. Plaintiff was unable to explain why she made no mention of the new claim that Mr. Escobar put his hand down her shirt and touched her breast. (a471,T5 134:11-135:10, 136:16-24). Incredibly, Plaintiff contended that her memory of the incident was more accurate in court on May 7, 2024 then it was on August 14, 2017 when she wrote her personal note. (T5, 137:5-19). Even when Plaintiff quit she threw shirts at Mr. Escobar and told him he could touch the shirts, not breasts. T5, 147:18-25, 148:1-3 and recording).

Mr. Escobar did not hire Plaintiff. While Plaintiff claims she believed that Mr. Escobar could fire her if Mr. Metelo was not in the building, no one told her that was the case. (T5, 104:18- 105:3) Mr. Escobar did not set Plaintiff's schedule. (T5, 105:4-11) Plaintiff reported to Anthony Metelo. (T5, 106:7-9)

McRech Inc. used email in 2017. (T5, 106:10-11) Plaintiff would provide either Mr. Metelo the daily appointment list from her department or Mr. Escobar if Mr. Metelo was not in. (T5, 1106:12-25) Plaintiff had the ability to communicate the appointments by email. (T5, 107:1-14).

Mr. Escobar, was the sales manager and he sat on the other side of the dealership in the showroom. Mr. Escobar did not sit in the BDC office with Plaintiff and the five other BDC representatives. (T5, 106:1-3, 107:15-23) The BDC office had a door that could be closed. (T5, 108:11-13)

While Plaintiff denied at trial that she could do her job without physically interacting with Mr. Escobar, she admitted at her deposition that she could use email or send one of her employees to ask Mr. Escobar a question, such as the price of a car. (T5, 106:10-11, 110:7-15, 112:2-11)

Plaintiff had no discussions with Mr. Escobar from the date of the alleged incident until August 21, 2017. (T5, 139:4-11) Plaintiff does not claim that Mr. Escobar ever touched her again. (T5, 141:15-21)

Plaintiff acknowledged McRech's policies, including the Anti-harassment policy, when she became employed in June 2017. (T5, 114:1-10, 115:18-22, 116:2-3) McRech's anti-harassment policy expressly acknowledged that all employees had the right to work in an environment free of discrimination and harassment which would not be tolerated.((T5, 117:6-23, a480) The policy also provided examples. (a480)

Mr. Armstrong investigated the claim and told Plaintiff that Mr. Escobar denied the claim and he could not substantiate it. (T5, 54:2-9) On August 23, 2017, Plaintiff told Mr. Armstrong that she wanted her attorney to review his

investigation. (T5, 120:1-5, 124:21-25) Plaintiff knew that Mr. Armstrong could not substantiate her complaint and Mr. Escobar was not going to be fired. (T5, 121:24-122:16) The anti-discrimination policy did not require Plaintiff to approve of the result or sign anything and no adverse employment action was taken against her because of her complaint. (T5, 125:1-15)

Mr. Armstrong contacted Plaintiff on September 1, 2017 to set up a meeting to finalize the complaint and go over his investigation with her and Plaintiff refused because she wanted her attorney involved. (T5, 60:1-25) Plaintiff went on vacation from September 2 through September 11th. (T5,62:14-16) After she returned on September 12th, Plaintiff was again asking for Mr. Armstrong's investigation so her attorney could take action against the company. (T5, 72:1-10) Mr. Armstrong advised Plaintiff that he would not be releasing any further information to her. (T5, 74:8-25) Plaintiff unbeknownst to Mr. Armstrong recorded the call. (T5, 76:2-20, recording)

Plaintiff admitted that McRech's policy against discrimination and harassment prohibited retaliation. (T5,125:16-126:5, a480) Plaintiff never emailed Mr. Armstrong to claim she believed she was being retaliated against. (T5, 16-17) Although no adverse employment action was taken against Plaintiff, Plaintiff claimed she was retaliated against because other managers came into the BDC office to "babysit" her on August 28, 2017 and also to answer leads. (T5, 141:23-

143:19) Of course, it was not unusual for salespeople to come into the BDC office to do their job. (T5, 144:1-7) Plaintiff also claimed that she was retaliated against because Mr. Escobar gave her the finger. (T5, :21-25)

After Plaintiff made her complaint under the anti-harassment policy, she was not written up or given any warnings. (T5, 145:21-25) Plaintiff's pay was not cut and she was not fired. (T5, 146:1-3) Plaintiff quit. (recording)

Plaintiff recorded herself quitting in the middle of the showroom. (recording) She stated it was because nothing was done after she complained that Mr. Escobar put his f*****g hand up her shirt because he denied it. She then threw shirts at Mr. Escobar and stated, "here Erick you can touch all these f****g shirts". (T5, 80:1-83:12)

Plaintiff could not explain why she sued Mr. Armstrong and claimed to unaware that she had sued him. (T5, 148:8-14) Plaintiff filed this lawsuit because she was mad that Mr. Escobar was not fired. (T5, 148:15-149-17)

Plaintiff received testing and training on McRech's Anti-harassment policy. (T5, 159:1-25, a482) Plaintiff agreed that McRech wanted employees to complain if they believed the policy was being violated. (T5,161:2-12) Plaintiff understood that it was McRech's policy to protect employees from retaliation. (T5, 161:17-25, 162:1, a480, a482)

After quitting her job at McRech, Inc., Plaintiff became employed by RK Chevrolet, and was then fired on January 2, 2018 (T5, 16:19-25, 17:1-6) The Court improperly, over objection of Defendant permitted Plaintiff to provide hearsay testimony and documents explaining her termination from her subsequent employment. (T5, 19:1- 21:7) The document nonetheless indicates that Plaintiff was fired. (T5, 153:15-155:10, 155:23-25, 156:1-3 a469) Interestingly, Plaintiff was fired because she was complaining about co-workers. (T5,156:4-21)

Plaintiff then became employed by Wilmington Audi in June 2018. (T5, 2:3-9) Plaintiff testified at trial that she suffered a wage loss in the amount of $1100 a week for 22 weeks, the time period between the time she was terminated from RK Chevrolet and becoming employed at Wilmington Audi (T5,167:8-17) Plaintiff testified that she had lost wages in the amount of $25,300. (T5, 90:24-92:11)

However, Plaintiff had been making $1300 a week at RK Chevrolet. (T5, 167:18-21) Plaintiff had testified in July 2019 that she had no wage loss. (T5, 169:4-170:1) Moreover, in response to interrogatories, Plaintiff failed to identify any wage loss. (T5, 170:13-171:177-8) Defendant objected to the evidence of wage loss and the Court overruled the objection and motion in limine and refused to bar the wage loss claim. (T5, 87:11-90:20)

Mr. Armstrong has a thirty year history of working in law enforcement, including retiring as chief of detectives in the Gloucester County Prosecutors office

in 2001. (T5, 18815-189:1) Mr. Armstrong was hired by Foulke Management Corp. in 2005. (T5, 189:2-5) His responsibilities included security and investigations. (T5, 190:1-3) McRech had an arrangement with Foulke Management Corp. where Mr. Armstrong's services, including investigations of sexual harassment were leased to McRech. (T5, 190:4-17) Not only did Mr. Armstrong have extensive experience in investigation, but he also had training on investigation sexual harassment and discrimination complaints. (T5, 191:22-192:2)

At the time of Plaintiff's complaint, Mr. Armstrong, was not mobile because of a recent knee surgery. (T5, 212:3-20) As a result, Mr. Armstrong's employer provided him with a reasonable accommodation to perform his job responsibilities remotely. (T5, 212:22-213:9)

Plaintiff called Mr. Armstrong to make a complaint under McRech's anti-harassment policy. (T5, 213:4-9) Mr. Armstrong conducted an investigation based on the complaint made by Plaintiff which was that Mr. Escobar pulled her shirt up. (T5, 213:10-25, 216:1-23, a473) Plaintiff never told Mr. Armstrong that Mr. Escobar allegedly touched her breast. (T5, 218:15-18) Plaintiff never told Mr. Armstrong that she was keeping notes. (T5, 186:10-12, 187:1-5)

Mr. Armstrong was aware that something happened between Plaintiff and Mr. Escobar and it was his job to investigate and determine whether there was evidence that McRech's policy was violated. (T6,67:11-18) Mr. Armstrong

began investigating the claim by interviewing Mr. Metelo. (T5, 220:8-17) Mr. Armstrong told Mr. Metelo to make sure that (T6,54:3-55:3) Mr. Escobar stay away from Plaintiff. (T5, 230:4-18) Mr. Armstrong understood Plaintiff and Mr. Escobar who were both managers on the same level. Plaintiff never told Mr. Armstrong that she was keeping notes. (T5, 237:8-18) Mr. Armstrong obtained a statement from Mr. Escobar who denied touching Plaintiff or her shirt. (T5, 240:15-23) Mr. Escobar told Mr. Armstrong that he motioned Plaintiff should pull up her tank top. (T5, 241:1, 247:14-20, 249:2-7, 249:14-20, a486) Mr. Onorato told Mr. Armstrong that he did not hear or see anything. (T5, 243:13-19, T6, 67:23-68:5, a486) Mr. Armstrong could not determine who was telling the truth. (T5, 262:19-23) Mr. Armstrong ignored the statement by Ms. Martinez that Plaintiff was intending to sue the company and did not let it impact his investigation. (T5, 265:8-21)

Mr. Armstrong never heard anything from Ms. Watson about retaliation even though she was complaining that she wanted his investigation documents to provide to her attorney. (T6, 61:25-63:5, 68:6-15) Mr. Armstrong informed Plaintiff that he could not determine whether she or Mr. Escobar was telling the truth. (T6, 34:11-14) Mr. Armstrong fully investigated the complaint and even seven years after the investigation was not aware of any reason why he should have believed Ms. Watson over Mr. Escobar. (T6,54:3-55:3) In Mr. Armstrong's

experience the fact that someone is telling the truth one day, does not mean that they are not lying the next day. (T6,69:3-5)

McRech provided training to its managers on the anti-harassment policy once a year. (T6, 60:3-12, 125:9-22) All employees receive training with a video and take a test to confirm their understanding of the policy. (T6, 60:13-17) It is the general manager of McRech who is responsible for making sure there is compliance with the policy, not Mr. Armstrong's. (T6, 60:18-61:13) McRech's policy has both formal and informal complaint procedures. (T6,69:12-24)

Mr. Metelo became employed by McRech in 2016 as General Manager. (T6,83:7-15, 84:3-5) By 2018 both Mr. Escobar and Mr. Metelo had left their employment with McRech. (T6, 86:5-23) Mr. Metelo was terminated. (T6, 122:23-123:2) Mr. Metelo received training on McRech's policy and was responsible enforcing it. (T6, 87:3-88:6) Mr. Metelo promoted Plaintiff to BDC Manager and she reported directly to him, no other managers. (T6, 92:19-93-5) BDC department worked with sales, but communicate by email. (T6, 95:13-23, 98:14-21) It was not unusual for sales employees to work out of the BDC office to make phone calls. (T6, 97:20-98:8) Mr. Escobar was not Plaintiff's supervisor and never had any control over her employment. (T6, 124:18-125:8) There was no retaliatory action taken against Plaintiff after she made her complaint. (T6, 127:18-129:2) Mr. Metelo made sure that Mr. Escobar stayed away from Plaintiff. (T6, 129:3-6)

On May 13, 2024, the Court issued a ruling from the bench. The Court never actually made any findings of fact, but instead summarized the testimony of each of the three witnesses. Some of what the court identified as being testimony was not accurate, such as the following:

- The Court's summary of Plaintiff's employment history was not consistent with the Plaintiff's testimony. (T7, 4:20-6-3)
- The Court found in direct contradiction to Plaintiff's testimony that she Plaintiff was required to report to Mr. Escobar as a supervisor after August 14, 2017. (T7, 8:1-2, 8:22-23)
- The court also found that Mr. Armstrong took no statements from witnesses, even though Mr. Escobar's and Mr. Onorato's statements concerning the Plaintiff's complaint were introduced into evidence. (T7, 8:19-20, a486)
- The court found Plaintiff had a "problem getting paid with a late bonus check". (T7, 8:25- 9:2)
- Plaintiff never received the results of the investigation. (T7, 9:14-15)
- ON 9/15 Armstrong brought her into an office and told her to call another individual. (T7, 9:16-17)
- Plaintiff was out of work after her termination for 22 weeks plus another week until her next job. (T7, 10-6-9)
- Plaintiff was employed by McRech for five years and no one stood up for her. (T7, 10:15-16)
- As a result of this incident, she asked never to be alone in a room. (T7, 11:9-10)
- After the incident Escobar came into contact with Plaintiff several times a day on a few occasions. (T7, 12:4-5)
- There's no recorded statements like the other 29 statements. (T7, 20:9-10)

The court also stated that it found Plaintiff more credible than Mr. Escobar and her statement "corroborated" even though no witness corroborated her statement. Mr. Escobar, did not testify because the court ordered his deposition before trial and

advised he was barred from testifying because he was not deposed. (T7, 23:17-20) The Court found that Mr. Escobar put his hand down Plaintiff's shirt and touched her breast. (T7, 24:5-7) Indeed, the Court expressed a personal opinion about sexual harassment:

> Defendant puts great weight on her argument in her brief that her incident report and her testimony were different. In Court she testified there was touching of her breast. In the incident report she said he puller her shirt up and lifted it up. Now, even if you take that statement standing on its own, this man has no business touching her shirt and lifting it up. And just look at – and what's the purpose if – if this is believed, this version is believed [the Plaintiff's version at the time of the incident] What's the purpose of wanting to lift up a woman's shirt? Obviously, it has something to do with her breasts.

He had no business putting his hands on her shirt or her breasts. (T7, 24:23-25:15) The conduct was "clear and pervasive". (T7, 26:8-19) Judge Stein also found that the investigation was flawed. (T7, 25:16-21) The Court concluded that there was a hostile work environment because the investigation was lacking and "they allowed this to continue and to go unpunished". (T7, 27:1-5) But nothing continued.

The Court found that Mr. Escobar gave Plaintiff the finger because Mr. Escobar did not testify to dispute the claim. (T7, 27:18-20) The Court found "retaliation occurred" (T7, 28:11)

The Court then found that the lost wage occurred because there was "not a lot of proof to the contrary…it took her 22 weeks to find another job and another week" in between to find another job and Plaintiff was awarded $23,300 in wage loss damages against McRech and Mr. Armstrong. (T7, 28:13-196-3) The Court then awarded Plaintiff $75,000 in damages for emotional distress. (T7, 29:10-13) The court also awarded Plaintiff $263,817 in attorney's fees and $3,942.28 in costs and $19,902.05 in interest. (a628) The Court denied the claim for punitive damages. (T7, 30:5-9)

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

Appellate review of a judge's verdict following a bench trial is limited. The standard of review requires that the appellate court uphold the trial judge's factual findings, provided they are "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). Credibility determinations receive "particular deference," RAB Performance Recoveries, LLC v. George, 419 N.J. Super. 81, 86 (App. Div. 2011), because of the position of the trial judge to observe witnesses and hear them testify. Cesare v. Cesare, 154 N.J. 394, 412 (1998); however, the "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, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

In this case, the Court erred in applying the law and this Court should reverse the trial court's judgment and enter judgment in favor of Defendants under NJLAD.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST ROBERT ARMSTONG INDIVIDUALLY. (T7, 25:16-26:7).

The trial court erred as a matter of law when it entered judgment against Robert Armstrong for wage loss, emotional distress and attorney's fees and costs under NJLAD. (a628) The Court provided no basis for entering judgment against Mr. Armstrong individually in its oral May 13, 2024 opinion, other than to state that he found Mr. Armstrong should have interviewed the witnesses in person during his investigation of Plaintiff's complaint and did a poor investigation because he should have believed the Plaintiff's version. (T7, 25:16-26:7)

No witness testified to any facts that would legally support a judgment against Mr. Armstrong individually under NJLAD. Mr. Armstrong was not Plaintiff's employer or her supervisor. Mr. Armstrong was not even employed by Plaintiff's employer. Mr. Armstrong's sole relationship to Plaintiff was that he was hired to investigate her complaint that she was sexually harassed under McRech's anti-harassment policy. Even Plaintiff could not explain why she sued

Mr. Armstrong and claimed she was unaware that she had sued him. (T5, 148:8-14)

Individuals can only be liable under N.J.S.A. 10:5-12(e), specifically if they aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so. In Tarr, the Court determined to construe "aid" or "abet" in accordance with section 876(b) of the Restatement (Second) of Torts (1979) stating that an individual will only be personally liable as aiding or abetting under the NJLAD if an individual "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Tarr v. Ciasulli, 181 N.J. 70 (2004). Thus, in order to hold an employee liable as an aider or abettor, a plaintiff must show that "'(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.'" Id. at 84, (quoting Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 127 (3d Cir.1999), cert. denied, 528 U.S. 1074, 120 S. Ct. 786, 145 L. Ed. 2d 663 (2000)).

The Court adopted the five factors relied upon in Hurley to determine whether "substantial assistance" to the principal violator had been demonstrated: "(1) the nature of the act encouraged, (2) the amount of assistance given by the

supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the other, and (5) the state of mind of the supervisor." Ibid.

In Tarr, the Court held that plaintiff had failed to present evidence of aiding and abetting, having failed to show that the individual defendant, Ciasulli, encouraged the wrongful conduct, that he assisted in it, or that he was even present while it occurred. Id. at 85. At most, in Tarr, the plaintiff offered proof of negligent supervision, which was insufficient to establish liability under N.J.S.A. 10:5-12(e). Ibid.

In this case, the Plaintiff presented no facts that Defendant, Mr. Armstrong aided or abetting the alleged sexual harassment by Mr. Escobar. Nor did the court find any facts that Mr. Armstrong retaliated against Plaintiff. Mr. Armstrong was not present when the alleged incident occurred. The fact that Mr. Armstrong investigated Plaintiff's claim and found it unsubstantiated does not provide a legal basis for individual liability under NJLAD as the New Jersey Supreme Court has held that such a failure to act, without more, "fall[s] well short of the 'active and purposeful conduct' that is required to constitute aiding and abetting for purposes of their individual liability." Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563 (2008). Accordingly, this Court must reverse the judgment entered against Mr. Armstrong individually.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING MCRECH LIABILE UNDER NJLAD (T7, 26:14-27:5).

The court determined that Plaintiff was sexually harassed by Mr. Escobar on August 14, 2017 and then determined that as a result McRech was strictly liable to Plaintiff.

The Court misapplied the law. Even if the court correctly found that Plaintiff proved she suffered sexual harassment that was severe and pervasive, an employer is not automatically liable for the sexual harassment of an employee. An employer's liability for a hostile environment, caused by lower-level supervisory employees or plaintiff's co-workers, exists if an official representing the institution knew, or in the exercise of reasonable care, should know, of the harassment occurrence, unless the official can show that he or she took appropriate steps to halt it. Blakey v. Cont'l Airlines, 164 N.J. 38, 45 (2000) (Jury Charge 2.25) Instead, first plaintiff must prove that the employer knew or should have known of the harassment and failed to take effective remedial measures to stop it. Plaintiff did not prove that and the court made no such factual finding. It is not clear exactly what Judge Stein found, but it appears that despite acknowledging that Plaintiff's issues with her prior employer, Foulke Management Corp. were not relevant to the Plaintiff's claims while employed by McRech, Judge Stein appears to have lumped all of the incidents Plaintiff claimed to have ever happened to her both in her prior employment and the one incident

claimed to have happened while she was employed by McRech and held McRech liable for all of it.

The court found that the Defendant's investigation of Plaintiff's complaint by Mr. Armstrong was flawed. (T7, 25:16-17) Even if a company's investigation into complaints of sexual harassment is lacking, the employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is also lacking. In other words, the law does not require that investigations into sexual harassment complaints be perfect. Rather, to determine whether the remedial action was adequate, the question is whether the action was "reasonably calculated to prevent further harassment." See, e.g., Saxton v. AT&T Co., 10 F.3d 526, 535 (7th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983); Knabe v. Boury Corp., 114 F.3d 407, 412-13 (3d Cir. 1997). See Ryczek v. Guest Servs. Inc., 877 F. Supp. 754, 759 (D.D.C. 1995) ("Even if the investigation was not handled perfectly, the plaintiff has presented no evidence to suggest that the employer did anything that would have allowed any harassment to continue."); cf. Konstantopoulos v. Westvaco Corp., 112 F.3d 710 (3d Cir. 1997) (rejecting a per se rule that requiring an employee to work in close proximity to co-

workers responsible for prior harassment constitutes hostile work environment**).** Plaintiff does not get to dictate the remedial measure to be taken by the company. Plaintiff began working at McRech, Inc. in June, 2017. (T5, 163:12-14) The alleged incident occurred on August 14, 2017. The undisputed testimony was that as soon as Plaintiff put Mr. Metelo on notice of her complaint, Mr. Metelo contacted Mr. Armstrong and Plaintiff admits that Mr. Escobar never touched her or sexually harassed her again. Plaintiff received testing and training on McRech's Anti-harassment policy. (T5, 159:1-25, a482) Plaintiff agreed that McRech wanted employees to complain if they believed the policy was being violated. (T5,161:2-12) Plaintiff understood that it was McRech's policy to protect employees from retaliation. (T5, 161:17-25, 162:1, a482)

To the extent that the court ruled that McRech was liable under NJLAD because Plaintiff had to continue to work with Mr. Escobar the ruling is inconsistent with the law. The law does the law require as Plaintiff's believed that McRech was required to fire Mr. Escobar. In fact, the legal question is not whether the alleged perpetrator was disciplined but whether Defendant took prompt action so that Mr. Escobar never sexually harassed Plaintiff again. Knabe v. Boury Corp., 114 F.3d 407 (3d Cir. 1997). Plaintiff admitted and Judge Stein found that Plaintiff was not subjected to any alleged sexual harassment after her complaint of August 14, 2017.

Second, the Court did not find, nor were there any facts to support a finding that McRech, Inc. delegated to Mr. Escobar the authority to control the working environment and Mr. Escobar abused that authority to create a hostile work environment. Plaintiff claimed that Mr. Escobar was her supervisor on Mr. Metelo's day off, that alone is not enough to prove vicarious liability under the law. First, Plaintiff had to admit that her supervisor was Mr. Metelo her supervisor. Plaintiff admitted that Mr. Metelo had the power to hire, fire, give raises, and control her schedule and work tasks. Mr. Escobar had no such power. Plaintiff admitted that. Mr. Escobar and Plaintiff were managers of their respective departments and equals. (T5, 104:18- 105:3) Mr. Escobar did not set Plaintiff's schedule. (T5, 105:4- 11) Plaintiff reported to Anthony Metelo. (T5, 106:7-9)

Plaintiff did not identify Mr. Escobar as her "supervisor" (a473) Instead, she described the relationship as work related and noted that she spoke to him " very minimally". (a473) As a remedy, Plaintiff stated that she wanted Mr. Escobar to be fired. (a473) When she quit she expressly stated it was because Mr. Escobar was still employed. (recording)

Third, the court made no findings of fact that defendant McRech, Inc. was negligent in failing to take reasonable steps to prevent the harassment from occurring.

To determine whether defendant McRech, Inc. was negligent, the Court was required to consider the following:

- Whether it had in place well-publicized and enforced anti-harassment policies;

There were three witnesses in this case: Plaintiff, Mr. Armstrong and Mr. Metelo and everyone agreed that McRech had in place a well-publicized and enforced anti-harassment policy. (a480-494)

- Whether it had effective formal and informal complaint structures;

All three witnesses testified that there were formal and informal complaint procedures. All witnesses testified that Plaintiff could complain via Mr. Armstrong's email as set forth in the policy or by calling Mr. Armstrong, or by complaining to their manager. It was clear from Plaintiff's testimony that she had no issue with making her complaint. Judge Stein's opinion fails to address the policy.

- Whether it had in place anti-harassment training programs;

Similarly, all witnesses testified that McRech had in place training for all employees and management. All employees, including Plaintiff were trained and tested to make sure that they understood the policy. Plaintiff admitted to being trained and tested on the policy. (D7) The test confirmed that Plaintiff understood the policy and what conduct violated it; and

- Whether it had in place harassment monitoring mechanisms.

Mr. Metelo testified that it was his job as general manager to monitor the Turnersville Chrysler Jeep workplace to make sure the anti-harassment policy was being complied with. This included him walking around the workplace to monitor what employees were doing and saying and asking employees if everything is okay and addressing any complaints. However, the absence of such measures does not automatically constitute negligence. No adverse action was taken against Plaintiff, she quit. The Court failed to consider and rule on Defendant's affirmative defense under Aguas v. State of New Jersey, 220 N.J. 494 (2015). D3, D4, &D7). The undisputed facts support a finding in favor of McRech and the trial court's decision should be reversed.

IV. THE COURT ERRED IN AWARDING PLAINTIFF LOST WAGES. (T7, 28:12-19)

A. The Court Failed to Make a Finding That Plaintiff Was Constructively Discharged. (T7, 28:12-19)

Plaintiff was not terminated. She quit after getting mad that Defendant would not fire Mr. Escobar. The Court awarded Plaintiff lost wages without making any finding that Plaintiff was constructively discharged. In contrast to a hostile work environment claim, constructive discharge requires not merely "severe or pervasive" conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. Our Supreme Court has held that a constructive discharge under the LAD occurs when an employer knowingly

permits conditions of discrimination in employment "so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (quoting Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App. Div. 2001)). The Court has explained that "the standard envisions a sense of outrageous, coercive and unconscionable requirements." Ibid. (quotation omitted). The heightened standard demanded for proof of a constructive discharge claim recognizes an employee's "obligation to do what is necessary and reasonable in order to remain employed rather than simply quit." Ibid.(internal quotation marks omitted). Prager v. Joyce Honda, Inc., 447 N.J. Super. 124 (App. Div. 2016).

The trial court made no finding of facts the Plaintiff's working environment in September 2017 was so outrageous, coercive and unconscionable that a reasonable person would not have been able to continue her employment. Plaintiff worked in a room with other employees separate from the sales floor where Mr. Escobar worked also with other employees. Mr. Metelo was very clear that Plaintiff could have emailed her BDC reports to Mr. Escobar and never had to work with him face to face. Moreover, Plaintiff testified that she was keeping notes for herself to remember what was going on a daily basis. Based on Plaintiff's notes (a471) there was nothing going on that could be considered so outrageous, coercive and unconscionable that a reasonable person would not have been able to continue

her employment. In fact, prior to quitting, Plaintiff only notes one encounter with Mr. Escobar on September 4, 2017 to talk to the BDC reps and buy them lunch. Instead, Plaintiff quit because she was mad that Mr. Escobar was not fired. (recording) She made that very clear when she recorded herself quitting and saying "you did nothing. He's still here." Of course, this was staged and only Plaintiff knew she was recording. She also clearly had already secured a job as she became employed a week later with RK Chevrolet. Because Plaintiff did not prove constructive discharge and the Court made no findings or conclusions of constructive discharge, the award for lost wages should be reversed.

B. The Court Erred in Allowing Plaintiff to Make a Wage Loss Claim.

The Court erred in allowing Plaintiff's lost wage claim because Plaintiff failed to identify any lost wages in discovery and because Plaintiff obtained subsequent equivalent employment and sought lost wages after the termination of the replacement employment. (T2, 22:6-23:11, T5:116:21-177:7)

The law in New Jersey is clear that a Plaintiff has an obligation to mitigate any damages sought and tax returns are relevant to support a claim for lost wages. When a wrongful discharge of an employee occurs the measure of damages is usually the employee's salary for the remainder of the employment period. Moore v. Central Foundry Co., 68 N.J.L. 14, 15 (Sup. Ct. 1902). However, since the employee has available time which may be used profitably, the employer has been

permitted to reduce its damages by showing that the employee has earned wages from other employment. Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N.J. Super. 437, 455 (App. Div. 1976), certif. den., 71 N.J. 503 (1976); Rogozinski v. Airstream By Angell, 152 N.J. Super. 133, 158 (Law Div. 1977), modified, 164 N.J. Super. 465 (App. Div. 1979). The employer may also reduce the award by showing that the employee could have secured other employment by reasonable efforts, but did not. See Roselle v. La Fera Contracting Co., 18 N.J. Super. 19, 28 (Ch. Div. 1952); Goebel v. Pomeroy Brothers Co., 69 N.J.L. 610, 611 (Sup. Ct. 1903); Moore v. Central Foundry Co., 68 N.J.L. 14, 15-16 (Sup. Ct. 1902); Larkin v. Hecksher, 51 N.J.L. 133, 138 (Sup. Ct. 1888). The only way that the employer can do so, is by the production of income tax returns by the Plaintiff. Campione v. Soden, 150 N.J. 163 (1997).

When a Plaintiff fails to produce tax returns, a court can properly find that without the tax returns, plaintiff's proofs of lost income are deficient and should be barred and should be barred from seeking lost wages. Redeker v. Lutz, No. A-2287-05T5, 2006 N.J. Super. Unpub. LEXIS 1653 (App. Div. Nov. 27, 2006); (a635) Manee v. Edgewood Properties, Inc., No. A-1159-04T5, 2007 N.J. Super. Unpub. LEXIS 659 (App. Div. Feb. 1, 2007) (a640). The Court recognized this, when on April 29, 2016 it Ordered Plaintiff to turn over her tax returns and W-2's or be barred from seeking lost wages at the time of trial.(a42) Plaintiff only

produced W-2's through 2017 but then based solely on her testimony at trial claimed that she sustained a wage loss in 2018 after being terminated from her subsequent employer. Plaintiff never identified any wage loss in discovery, prejudicing Defendant. The Court erred as a matter of law in allowing Plaintiff to make the wage loss claim without producing tax returns and W2's and never disclosing any wage loss claim in discovery.

C. The Court Erred In Awarding Plaintiff Lost Wages Incurred After She Was Fired from a Subsequent Employment. (T2, 22:6-23:11, T5:116:21-177:7, T7, 28:12-19)

The Court further erred in awarding Plaintiff lost wages suffered after she was terminated from her subsequent employment. The Coury found that the loss wage occurred because there was "not a lot of proof to the contrary…it took her 22 weeks to find another job and another week" in between to find another job and Plaintiff was awarded $23,300 in wage loss damages against McRech and Mr. Armstrong. (T2, 22:6-23:11, T5:116:21-177:7, T7, 28:13-196-3) The court's finding that Plaintiff was out of work for 23 weeks after she quit her job at McRech is erroneous and not "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974).

Plaintiff testified that after quitting her job at McRech, Inc., Plaintiff became employed by RK Chevrolet, and was then fired on January 2, 2018 (T5, 16:19-25,

17:1-6, 153:15-155:10, 155:23-25, 156:1-3) Interestingly, Plaintiff was fired because she was complaining about co-workers. (T5,156:4-21)

Plaintiff testified she then became employed by Wilmington Audi in June 2018. (T5, 2:3-9) Plaintiff testified at trial that she suffered a wage loss om the amount of $1100 a week for 22 weeks, the time period between the time she was terminated from RK Chevrolet and becoming employed at Wilmington Audi in 2018. (T5,167:8-17) Plaintiff testified that she had lost wages in the amount of $25,300. (T5, 90:24-92:11)

However, Plaintiff had been making $1300 a week at RK Chevrolet beginning in September 2017 (T5, 167:18-21) Moreover, Plaintiff had testified in July 2019 that she had no wage loss. (T5, 169:4-170:1) furthermore, in response to interrogatories, Plaintiff failed to identify any wage loss. (T5, 170:13-171:177-8) Accordingly, the Court's finding that Plaintiff was out of work for 23 weeks after she quit her job at McRech and suffered lost wages is erroneous and Plaintiff was not entitled to make a claim for any lost wages.

Moreover, Plaintiff became employed immediately after she left her employment with McRech, Inc. in an equivalent position without any wage loss. As such, Plaintiff wage loss claim ceased. Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). Thus, the Court erred as a matter of law in awarding Plaintiff lost wages and the award should be reversed.

V. THE COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT PLAINTIFF WAS RETALIATED AGAINST FOR MAKING THE SEXUAL HARASSMENT COMPLAINT (T7, 27:6-28-3).

The Court made no findings that Plaintiff was discharged, demoted, not hired, not promoted or disciplined. N.J.S.A. 34:19-2(e) defines "retaliatory action" as the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment. As such, employer actions that fall short of discharge, suspension or demotion, may nonetheless be the equivalent of an adverse action. On the other hand, not every employment action that makes an employee unhappy constitutes an actionable adverse action. Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 430 (App. Div. 2005). The Court accepted Plaintiff's testimony that: Mr. Escobar gave her the middle finger; managers came into the BDC office to babysit Plaintiff; managers rolled their eyes at Plaintiff; and made unspecified nasty remarks; Metelo threw papers off her desk. (T7, 27:6-14) But the court did not make a finding that the conduct of others constituted an adverse employment action under N.J.S.A. 34:19-2(e). The court erred as a matter of law in concluding Plaintiff was retaliated against. Accordingly, the trial court's judgment that Plaintiff was retaliated against should be reversed.

VI. THE AMOUNT OF ATTORNEY'S FEES, COSTS AND ENHANCEMENT AWARDED PLAINTIFF WERE UNREASONABLE. (T8, 22:23-23:6, a628)

Plaintiff initially brought a three count complaint against four (4) Defendants McRech, Inc., Erick Escobar, Robert Armstrong, and Anthony Metelo under the New Jersey Law Against Discrimination and for assault in 2018. (a1) The First Count alleged sexual harassment, the Second alleged retaliation and the Third Count alleged assault. Plaintiff only succeeded on two counts against two Defendants and was not successful on the punitive damages claim. This was not a complicated case; it involved one alleged incident of sexual harassment to which there were no witnesses. The case was tried as a day and a half bench trial. Plaintiff sought an award of attorney's fees in the amount of $367,113.75 and costs in the amount of $3,942.48. The court awarded attorney's fees in the amount of $263,816 which included a 20% enhancement and the full amount of costs. The Court failed to do the proper analysis explaining how it arrived at that amount which included a 20% enhancement. (T8, 23:9-11, a628)

Plaintiff's fee application sought attorney's fees for no less than 10 attorney's and total of 19 billers on this case. (a) The duplication of time in the application is overwhelming. Moreover, the billing records are rife with charges for administrative work that are not at all legal in nature and not billable under the court rules or the Rules of Professional Responsibility.

It is the Plaintiff's burden to prove that an award would be "reasonable." See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 433, 437 (1983); Blum v. Stenson, 465 U.S. 886, 896 (1984); The ARC of New Jersey v. Township of Voorhees, 986 F. Supp. 261, 269 (D.N.J. 1997) ("The party requesting fees bears the burden of proving that the request is reasonable"). Furthermore, trial courts must "not accept passively the submissions of counsel" in support of a fee request. Rendine v. Pantzer, 141 N.J. 292, 335 (1995). The Appellate Division has summarized as follows the standards that the New Jersey Supreme Court considers appropriate for determining a fee award:

> This requires the court to evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party. As to the number of hours, the Rendine Court emphasized the importance of "billing judgment" and directed trial courts to "exclude hours that are not reasonably expended. Yueh v. Yueh, 329 N.J. Super. 447, 464-465 (App. Div. 2000) (internal citations omitted) (footnotes omitted).

The Supreme Court has similarly stated that the results obtained are "particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole time a reasonable hourly rate may be an excessive amount. Id. at 436. The court incorrectly applied

the law and determined that it did not matter that Plaintiff did not prevail on all claims. (T8, 22:12-16)

It is well-established that a proper lodestar calculation requires that the results achieved by the prevailing party be compared to the relief that the party hoped to obtain. Rendine, 141 N.J. at 335. First, the lodestar should be reduced by the hours identifiably spent on unsuccessful efforts. The lodestar must then be reduced to account for Plaintiff's limited success in the litigation. McDonnell v. United States, 870 F. Supp. 576, 587 (D.N.J. 1994) (for the lodestar to properly reflect Plaintiff's degree of success, the trial court should "affect a general reduction of the lodestar, completely disallow hours spent on wholly unsuccessful claims or use a combination of both methods") (citations omitted). The Defendant "should not be financially accountable for the considerable time spent on pursuing...unsuccessful claims." Id. at 589. See also Hensley, 461 U.S. at 434 (hours spent on unsuccessful claims should be excluded from the lodestar calculation); Szczepanski v. Newcomb Medical Ctr., 141 N.J. 346, 355 (1995).

As to what the appropriate size of the reduction of counsel fees under circumstances similar to what is now before this Court should be, courts have varied on the ultimate size of such reductions. See Blakey at 608 (reducing lodestar by 30%). See also McDonnell v. United States, 870 F. Supp. 576, 589 (D.N.J. 1994) (reducing lodestar by 60%). See also Field v. Haddonfield Bd. of Educ., 769 F.

Supp. 1313, 1323 (D.N.J. 1991) (reducing lodestar by 50%). Plaintiff's fee application sought duplicative charges. (a426) For example, the billing from 3/2/18 to 4/6/18 included close to 11 hours to prepare the complaint and two hours to prepare a form summons. While Plaintiff's counsel serve the same written discovery in every case, Plaintiff's counsel billed over 12 hours preparing discovery requests. Similarly, Plaintiff billed an unreasonable more than 13 hours responding to written discovery. Multiple attorney's in Plaintiff's counsel's firm spent 19.6 hours on discovery motions. (See time entries from 9/19/18-10/12/18). This time is unreasonable. On 3/22/19 there is an entry appearing for communications with the Monmouth county clerk's office that cannot have anything to do with this case.

Six lawyers spent 12.4 hours preparing for Mr. Armstrong's deposition. (See entries on 10/23/19 and 11/1/19) This time is unreasonable. Similarly, for Mr. Metelo's deposition, Plaintiff's counsel spent 8 hours for two different lawyers to prepare. (See 3/18/24 and 3/19/24) Two lawyers billed for appearing at Mr. Armstrong's depositions on 11/1/19. Mr. Armstrong's deposition began at 10:00 am and ended at 3:20 p.m. Mr. McOmber billed 8 hours for a deposition that that did not take 8 hours. CLK billed 6 hours for the same deposition. Plaintiff produced two audio tapes that were played in court. In total both recordings were less than 10 minutes long. However, on 3/12/24 Plaintiff's counsel billed 1.1 hours and on 3/18/24 billed 4.7 hours to listen to those tapes. Plaintiff billed 184 hours in connection with the

summary judgment motion. That is the equivalent of one attorney working on nothing but the summary judgment motion for 8 hours a day for over a month. (See entries from 11/1819 -12/6/19) The billed time is wholly unreasonable. Two lawyers preparing to argue the summary judgment motion for over 15 hours. Yet Plaintiff's billing requests payment for over 171 hours for trial preparation. That is approximately 21- eight hour days for trial preparation. That equates to over four full weeks of trial prep. For a day and a half bench trial. That is incredibly unreasonable. Plaintiffs spent an unreasonable 37.7 hours to address the motion in limine to bar the jury trial, which Plaintiff agreed to and the Court confirmed. (see entries beginning from 8/28/20 which includes 10 hours of alleged research on one single day)

In addition to seeking excessive fees, the Court awarded a 20% enhancement because Plaintiff claimed that the case was entirely contingent. Yet, Plaintiff produced no contingent fee agreement and when asked about the agreement Plaintiff's counsel stated, "we don't want defense counsel to see our agreement." (T8, 21:7-11) Not only did Defendants not prove that there was a contingent fee agreement to justify any enhancement, but the fact that Plaintiff intentionally concealed the retainer agreement, suggest that the terms would not have warranted an enhancement. Moreover, the court incorrectly held that an enhancement was warranted by law because there were no settlement discussions and the case involved

emotional distress claims. (T8, 21:19-25, 22:1-11) Those are not legally recognized reasons to apply an enhancement.

Finally, Plaintiff sought expenses in the amount of $3,942.48, but failed to provide any receipts and the majority of which appear to be courier services without any description of what was being sent or where it was being sent and if same actually pertains to this case. The court erroneously concluded that Plaintiff sufficiently proved these were legitimate expenses incurred in this case. Accordingly, the court's order for final judgment should be reversed.

VII. COURT ERRED IN ORDER DEPOSITIONS OF METELO AND ESCOBAR TO PREJUDICE DEFENDANTS. (T2, 16:16-17:10, T3, 4:1-4)

Discovery ended in this case on October 19, 2019. The complaint in this case was filed on March 29, 2018. The extended discovery end date was October 1, 2019. The initial trial date was scheduled before Covid on December 16, 2019. The trial was adjourned twenty-one times, of which at least 10 were at the request of Plaintiff's counsel.

Plaintiff never properly sought the depositions of Mr. Metelo or Mr. Escobar during discovery. Plaintiff never made any motion to re-open discovery in this matter. Nor did Plaintiff's seek the depositions of Mr. Metelo or Mr. Escobar at any time in the five years after discovery ended. In fact, while both individuals were initially named as defendants, they were dismissed for lack of prosecution

and the record indicates that Plaintiff never took any steps to locate either individual at any time.

During argument on the Motions in Limine prior to trial on March 18, 2024, Plaintiff requested that they be permitted to depose Mr. Metelo and Mr. Escobar without any motion and again requested that the trial date be adjourned. The court from the bench stated it would permit Plaintiff to depose these individuals. No legal basis was identified to support this verbal order made without motion or due process. No written Order was ever proposed by Plaintiff and to date, no written order has been entered by the Court to permit Plaintiff's to take depositions five years after the end of discovery. The Court's order compelling Metelo's and Escobar's deposition caused prejudice to Defendants. When Mr. Escobar learned that he was going to have to do more than just appear for trial, he stopped cooperating with Defendants and refused to appear as a witness at trial and was also barred by the Court from appearing.[10] (T3, pgs 3-7) Notably, the court made finding based on Mr. Escobar's failure to appear at trial after he barred Mr. Escobar. The Court never made any findings of exceptional circumstances as required by Rule 4:24-1(c) to extend discovery, which provides that after a trial date is set, extensions of discovery shall only be granted upon a showing of "exceptional circumstances". Bender v. Adelson, 187 N.J. 411, 427 (2006). The

[10] T3 is the transcript from the Case Management Conference of April 30, 2024)

Court's erroneous ruling compelling Defendants to produce individual over whom it had no control and barring the testimony at the time of trial caused prejudice to Defendants. The court made note that Mr. Escobar failed to appear (forgetting that he was barred) and found Plaintiff's testimony uncontroverted as a result. (T7, 27:18-20) Accordingly, the trial court's judgment should be reversed.

CONCLUSION

The trial court made findings of fact that were not "supported by adequate, substantial and credible evidence" and erroneously applied the law to the facts. Accordingly, the trial court's judgment should be reversed.

CAPEHART & SCATCHARD, PC
Attorneys for Defendant, McRech, Inc. and Robert Armstrong

/s/ Laura D. Ruccolo
By: _____
Laura D. Ruccolo

Dated: January 27, 2025

JEANNE WATSON; Plaintiff-Respondent, vs. MCRECH, INC. D/B/A TURNERSVILLE CHRYSLER DODGE JEEP RAM, ERICK ESCOBAR, ROBERT ARMSTRONG, ANTHONY METELLO, ET AL.; Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-004117-23 On Appeal From: Superior Court of New Jersey Law Division – Camden County Docket No. CAM-L-1955-18 Sat Below: Hon. Donald J. Stein, J.S.C

BRIEF OF PLAINTIFF/RESPONDENT JEANNE WATSON

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I. PRELIMINARY STATEMENT

After nearly seven years of litigation and after successfully enforcing a jury waiver, Defendant/Appellant McRech Inc. d/b/a Turnersville Chrysler Dodge Jeep Ram ("Defendant McRech") lost a bench trial – fair and square. Plaintiff/Respondent Jeanne Watson ("Plaintiff"), a mother and a veteran of the United States' armed forces, prevailed because the Trial Judge found her testimony (and supporting documentation) to be credible while finding that the testimony of Defendant McRech's employees to be evasive and their actions to be negligent. In turn, the Trial Court concluded that Plaintiff was subjected to sexual harassment, discrimination, and retaliation in violation of New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("NJLAD").

More specifically, the trial record reflects that Plaintiff was sexually harassed by her supervisor, Erik Escobar ("Escobar") when he entered Plaintiff's office under the guise of wanting to speak with her about work-related issues. Without warning, Escobar reached into Plaintiff's shirt, lifted it, and touched and ran his fingers across her breasts. Visibly shaken, Plaintiff went straight to the General Manager, Anthony Metelo ("Metelo") and then to Corporate Investigator Robert Armstrong ("Armstrong"). Despite their assurances that Plaintiff's complaints would be investigated and remedied, Defendants did nothing of the sort. Among other things, Armstrong admitted to failing to speak to witnesses, to failing to investigate

Plaintiff's subsequent complaints of retaliation, to failing to separate Escobar, and to purposefully refusing to discuss with Plaintiff any type of remedial plan or corrective action, resulting in her constructive discharge.

Defendant McRech now appeals the Trial Judge's factual determinations, relying upon the same baseless arguments that were repeatedly rejected below. For example, Defendant McRech argued at summary judgment – as it does here – that it is not vicariously liable as a matter of law and that Plaintiff was not subjected to adverse employment action. The Honorable Morris G. Smith, J.A.D. rejected both arguments as clear factual disputes precluding summary judgment. Likewise, in a Motion in Limine, Defendant McRech – as it does again here – sought to bar Plaintiff as a matter of law from pursuing economic loss damages. The Honorable Donald J. Stein, J.S.C., rejected Defendant McRech's argument, as the damages issue was for the trier of fact. Then after a full blow-trial (in which the dealership did not call a single witness in its case in chief), Defendant McRrech repeated those same arguments based on the trial record in a written post-trial summation. Yet again, Judge Stein, in a thorough and well-reasoned decision, concluded that the evidence overwhelmingly supported Plaintiff's claims and entered judgment in her favor and awarded appropriate counsel fees pursuant to the NJLAD's fee-shifting mechanisms.

In short, while it is not entirely clear what relief Appellant seeks on this appeal, it seems to ask this Court to make its own factual findings, to reverse all of

the decisions and findings of the Trial Judge(s), and then summarily enter judgment in its favor on all counts. While there is simply no basis to disturb the trial court's verdict, there surely is nothing to suggest the "findings and conclusions were **'so manifestly unsupported** by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)); see also Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)) (in bench trial, "findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence"). Respondent respectfully submits that the Trial Court's entry of judgment should be affirmed in its entirety.

II. PROCEDURAL HISTORY[1] (a1, a16, a49-50, a53, a100-253, a146-178, a337-410, a495, a496-627, a628-629, a630-632, Pa299, Pa300-333, Pa334)

On March 29, 2018 Plaintiff filed her Complaint and Jury Demand in the Superior Court of New Jersey, Camden County, alleging) violations of New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (the "NJLAD") for sexual

[1] Pa – Plaintiffs/Respondents' Appendix
1T – Transcript of Status Conference (March 14, 2024)
2T – Transcript of Pre-Trial Conference (March 18, 2024)
3T – Transcript of Pre-Trial Conference (April 30, 2024)
T4 – Transcript of Pre-Trial Conference (May 6, 2024)
5T – Transcript of Trial (May 7, 2024)
6T – Transcript of Trial (May 8, 2024)
7T – Transcript of Oral Decision (May 13, 2024)
8T – Transcript of Motion (July 19, 2024)

harassment, hostile work environment and retaliation and assault against Defendant/Appellant[2]. (a1). On May 7, 2018 Defendant McRech filed an Answer to Plaintiff's Complaint. (a16).

Thereafter, the parties engaged in discovery and extensive motion practice. Defendants conducted the deposition of Plaintiff and Plaintiff conducted the depositions of Mr. Armstrong and Mr. Metelo. With respect to motion practice, Defendant filed a (i) Motion to Transfer to Another Venue; (ii) Motion to Dismiss Plaintiff's Complaint; (iii) Motion to Compel Discovery; (iv) Cross Motion for Protective Order; (v) Motion to Enforce Litigants Rights; (vi) Cross Motion to Bar; (vii) Cross Motion to Compel Deposition; (viii) Motion for Summary Judgment (a53); (ix) Motions in Limine (a100-253); and (x) a Motion to Strike Plaintiff's Jury Demand (a100). Plaintiff also filed a (i) Motion to Compel Discovery (a337-410); (ii) two Motions to Quash (a44-45) (a49-50); (iii) five Motions in Limine (a146-178); and (iv) a Motion to Compel Deposition (a337).

On March 14, 2024, in advance of the scheduled trial date of March 18, 2024, the parties attended a conference ("Pre-trial Conference"). At that conference, the Court permitted the parties to request relief regarding the depositions of Escobar and Metelo. (2T). Both of these individuals – who were management-level employees of

[2] On May 7, 2018, Plaintiff filed a First Amended Complaint to reflect a typographical error in the caption of Plaintiff's original Complaint. Plaintiff was unable to serve Defendants Erick Escobar and Anthony Metelo and, in turn, they were dismissed for lack of prosecution. Robert Armstrong was voluntarily dismissed by prior to the verdict (Pa300). Escobar never showed up for trial.

the dealership – did not answer the discovery or participate in discovery (however defense counsel clearly was able to contact and communicate with both individuals). (2T). On March 15, 2024, Plaintiff submitted her Motion to Compel the depositions of Escobar and Metelo in advance of trial. Defendant opposed the motion. The Court requested additional clarification on the issue and Plaintiff filed an amendment with on March 18, 2024. Later that day, the Court conducted oral argument. (2T).

At argument, the Court granted Plaintiff's request for the depositions of Metelo and Escobar prior to trial (2T). The very next day, on March 19, 2024, Plaintiff took the deposition of Metelo. (Pa98). On April 19, 2024 Plaintiff requested a case management conference to address ongoing deposition issues with Escobar and Metelo. (Pa274). On April 24, 2024, Defendant filed its opposition to Plaintiff's request. On April 25, 2024, Judge Stein issued a text order stating: "Per Judge Stein please file a motion." (Pa299) Accordingly, on April 26, 2024, Plaintiff filed a Motion to Compel (a337-410). Plaintiff requested that Defendant be ordered to (i) produce Metelo and Escobar's contact information; (ii) produce documents relating to pre-dating defense counsel's sudden legal representation for depositions only; and (iii) produce Escobar for his deposition within seven (7) days of the Order. Id.

On April 30, 2024, the parties attended a conference wherein His Honor clarified that he "ordered that the depositions take place before trial" and trial would be moving forward with the testimony received (3T). On May 3, 2024, Defendant

filed a "request for reconsideration" of the Court's verbal order, styled as an Opposition to Plaintiff's Motion to Compel. On May 6, 2024, Judge Stein conducted a Pre-trial conference. (4T).

Trial began on May 7, 2024, before Judge Stein. Trial concluded on May 8, 2024, and the parties submitted their final summations in lieu of closing statements on May 10, 2024. (Pa300-333). On May 13, 2024, Judge Stein rendered a verdict in Plaintiff's favor on all claims presented: (Count I) NJLAD: Sexual harassment and hostile work environment, and (Count II) NJLAD: Retaliation. (8T).

On June 11, 2024, Plaintiff filed a Motion to Pay Counsel fees and on June 17, 2024 the Court entered an Order reflecting the award of damages to Plaintiff (a495). On July 11, 2024, Defendant filed Opposition to Plaintiff's Motion (a496-627). On July 15, 2024, Plaintiff filed a reply brief. (Pa334). On July 19, 2024 the Court conducted argument on Plaintiff's Motion and entered an Order issuing attorney's fees and costs to Plaintiff for a total amount of $387,961.53. (a628-29). On August 29, 2024 Defendant McRech filed a Notice of Appeal. (a630-32).

III. FACTUAL BACKGROUND (a74, a354, a473-475, a476, a486-487, a493, Pa179, Pa220, Pa223, Pa226, Pa344)

Plaintiff was employed by Defendant McRech as the BDC Manager. (a354 at Interrogatory No. 5). Defendant McRech employed Metelo as a General Manager (6T at 83:22-84:5), Escobar as a General Sales Manager, and Armstrong as an Investigator and Director of Security. 5T at 190:12-191:10. Metelo was the "highest

ranking employee at the dealership." 5T at 84:17-19. Metelo was Plaintiff's primary supervisor but when Metelo was not at work, Escobar was her supervisor and "next in line". 5T at 104:2-13; 5T at 28:10-24. Escobar was higher in the chain of command than Plaintiff. 5T at 103:17:24. In the event something occurred when Metelo was not at work, but Escobar was, Plaintiff understood that Escobar had the power to terminate her employment. 5T at 104:19-25.

For over five (5) years, Plaintiff, a mother and a veteran of the United States' armed forces, worked for Defendant McRech at both its Cherry Hill and Turnersville locations. 5T at 24:9-26:2. When hired, Plaintiff did not receive training on Defendant McRech's anti-harassment and anti-discrimination policy. However, on June 19, 2017, Plaintiff did have to complete a computer-based test in Metelo's office, but the answer key was provided to her at the same time. 5T at 159:1-15.

While employed, Plaintiff was nothing short of a consummate professional and even received promotions as a result of her excellent job performance and attitude. Nevertheless, despite her stellar work performance, Plaintiff was subjected to sexual harassment, gender discrimination, and retaliation. Specifically, while Plaintiff was employed at the Turnersville location, she was assaulted by Escobar. 5T at 31:6-25. Escobar entered Plaintiff's office under the guise of wanting to speak with her about work-related issues when, without any warning whatsoever, Escobar reached into Plaintiff's shirt and his fingers touched her breasts. Id. He immediately

exited the area without any explanation, pretending like nothing had transpired. Visibly shaken by being touched by her supervisor, Plaintiff confided in a coworker, Dominic Onorato, went straight to her manager, Metelo, and then to Armstrong to report Escobar. 5T at 32:19-21; 35:11-21; 40:10-16.

Immediately after the incident occurred, Plaintiff "froze," was "completely shocked," and "couldn't believe that it actually happened". 5T at 32:1-5. Plaintiff was "baffled". Id. Plaintiff turned to Mr. Onorato, told him what happened and showed him what Escobar did to her. 5T at 127:16-127:4. Mr. Onorato did not witness Escobar's sexual touching; however, Mr. Onorato submitted a witness statement to Armstrong that corroborated Plaintiff's testimony: "it looked like she had seen a ghost. She looked frightened…She said he stuck his hand down her shirt and pulled it up. It looked like she was scared". 6T at 6:20-7:8.

Plaintiff explained what occurred to Metelo and "showed him exactly what [Escobar] did, putting his hand in [her] shirt and said he pulled it up." 5T at 127:18-24. Plaintiff spoke with Armstrong over the phone the next day wherein she explained to him what occurred the night before. 5T at 130:4-18. Armstrong admitted that Plaintiff told him that Escobar put his hand inside her shirt and pulled it up. T5 at 218:19-21. Armstrong did not take a recorded statement of Plaintiff. 5T at 133:4-6. Armstrong directed Plaintiff to call "Irene" at Mitsubishi to fill out an incident report. 5T at 130:22-131:1. Armstrong did not tell Plaintiff he was going to

take any intermediary steps to make sure she was safe in the work environment while he investigated. T5 at 48:6-10. Neither did Metelo. 5T at 48:14-18.

Plaintiff submitted her formal incident report. (a473-a475). Within the report, Plaintiff stated "I would like this person to be terminated. I am very upset and have been shaking since the incident. I am very uncomfortable especially since he is one of my supervisors. I do feel as though there will be repercussions to my filling out a complaint." (a475). Plaintiff also emailed Metelo and explained her uncomfortableness working with Escobar as her supervisor. 5T at 51:7-24:1 (citing P4). Specifically, the email read:

> Anthony,
>
> Last night you told me that you would take care of the situation that I brought to your attention. Since nothing has been done to rectify this, I do not feel comfortable coming in tomorrow. While you are not here, I am not at all comfortable being under the supervision of Eric, the general sales manager, that thinks it is ok to put his hands on me. Furthermore, I was extremely uneasy and uncomfortable this morning, when I came in to find out the person that put their hands on me was the supervisor until you arrived. How can I be expected to report to Erick or bring any issues to him after this?

5T at 51:7-24:1.

Metelo did not respond to Plaintiff's email, nor did he contact Plaintiff to speak about it in person or over the phone. 5T at 52:2-6. No action was taken in response to Plaintiff's complaint. 5T at 52:8-11. Armstrong did not know about this complaint until the litigation. 5T at 233:18-25; 235:11-16. Armstrong was unaware

that Escobar was acting as Plaintiff's supervisor. Id. Armstrong conceded "that should have never happened." 5T at 234:25-235:4.[3]

After Plaintiff filed a formal complaint with Armstrong (a473-475); (a486-487), Armstrong conducted his "investigation" which consisted of speaking with Plaintiff (5T at 130:4-18), a 5-minute conversation with Escobar (6T at 13:9-11), and looking at Escobar and Mr. Onorato's statements. 6T at 13:9-23. Armstrong did not speak to anyone in person as part of this investigation (which was unlike the 29 other investigations he has done). 6T at 13:24-14:1; 15:16-16:6. Armstrong did not take a recorded statement of Plaintiff. 5T at 133:4-6. Armstrong did not ask Plaintiff for any emails or documents to support her complaint, 5T at 54:21-23, and did not ask Plaintiff for any documents, despite Plaintiff having noted in real time in her personal calendar Escobar's touching of her. 5T at 134:4-20; T5 at 187:1-5; T5 at 275:10-12. In his past investigations, Armstrong conceded, he had asked for contemporaneous notes or journals the victim had regarding their complaints. 5T at 277:8-12. While he did not ask Plaintiff for such here, Plaintiff's entry in her calendar for the day of the incident states:

> Around 8:50 pm., Eric came in and asked about appointments. Dominic and I were in the office. Erick reached across my desk and pulled up the top of my shirt and pulled the top of my shirt up. I froze and told Dominick. I went to find Anthony who was outside with Eric. Asked

[3] Defendant Armstrong—a police investigator for 29 years and chief of detectives— was the only individual responsible for investigating employee complaints at Defendant McRech. 6T at 11:25-12:5; 5T at 190:12-17. Defendant Armstrong had carte blanche to investigate any employee complaint in any manner he saw fit. 5T at 197:7-13.

> Anthony to walk with me. Told him what happened. Said he would take care of it.

5T at 134:13-20 (citing D9).

Mr. Onorato's statement aligned with Plaintiff's version of events. (a476). Armstrong deemed Mr. Onorato's statement credible, but he did not place any "value on it because he didn't see anything." 6T at 8:6-10; 9:19-10:7. After reviewing Mr. Onorato's statement, Armstrong did not have any follow-up about his statement. 6T at 10:19-11:2. Armstrong conceded that because Mr. Onorato did not see the incident itself, it was not relevant to the investigation or his findings. 6T at 11:11-14.

Armstrong spoke with Escobar for approximately 5 minutes. 6T at 13:9-11. After speaking with him, Escobar also submitted a statement. (a74). After reading Escobar's statement, Armstrong never asked what Escobar meant by "isolated incident"; "handled in a different manner"; what Escobar meant by Plaintiff's wardrobe being "revealing"; "the shirt was coming apart" "motioned her shirt" or what Plaintiff was wearing; 5T at 247:14-250:20. Armstrong also did not ask Escobar about the other alleged complaints he received regarding Plaintiff's dress attire in the past and was not concerned with it, despite knowing their validity "possibly" could have been helpful in determining Escobar's truthfulness and credibility. 5T at 256:3-258:2. Armstrong did not speak with Escobar after receiving his statement or have any another conversation with Escobar. 5T at 260:7-11.

Ultimately, Armstrong **did not** substantiate Plaintiff's complaints **simply because Escobar had opposite versions of what occurred**. 6T at 16:11-15. Armstrong testified "without [Escobar's] admission…I wouldn't be able to substantiate her complaint." 6T at 16:20-24. This was despite **Escobar admitting to an "isolated incident" and admitting it could have been handled differently.** (a74) ("I apologize for this isolated incident as I acknowledge it could have [been] handled in a different manner"). Thus, Armstrong did not substantiate Plaintiff's complaints even though he knew her to be 100% credible and truthful. 6T at 19:8-12 ("Q. And you've never, ever, ever working with McRech or working with Ms. Watson ever had any reason, never seen anything that indicated that she was less than truthful with you, correct? A. That's correct.").

Armstrong also testified:

> **Q.** I know that what Miss Watson claimed happened to her is not on a recording, it's not on video and there's no witnesses. When she reported what -- to you what happened to her, did you believe her?
>
> **A.** **I know Jeanne. Her credibility with me is 100 percent.**
>
> ***
>
> **Q** **…** did you ever have an issue – [] with -- with Miss Watson not being truthful or not being credible?
>
> **A.** No, I did not.

(Pa179 at 174:6-7; 175:11-19; 77:7-11).

Q. Did the video comport with what Ms. Watson had described to you in her statement?

A. Yes, sir, it did.

Q. Was it 100 percent accurate?

A. Yes, it was.

5T at 206:2-6[4].

Q. Did you find that Ms. Watson's report about what happened to her to you, did you find that it was, after you done your investigation, did you find her report to have been truthful?

A. Yes, I did.

Q. Accurate?

A. Yes, I did.

Q. One hundred percent credible?

A. Yes, I did.

5T at 210:15-23[5].

Q. Okay. I believe also you had had some experience with Ms. Watson as a witness in other investigations. Do you recall anything like that?

A. Yes, I do.

Q. And do you recall her always being truthful and credible with you 100 percent?

A. Yes.

[4] This testimony is in reference to a prior complaint of Plaintiff's to Defendant Armstrong to which he substantiated.
[5] This testimony is in reference to a prior complaint of Plaintiff's to Defendant Armstrong to which he substantiated.

5T at 211:17-23.

Throughout Armstrong's "investigation" and after, Escobar remained at work leaving Plaintiff uncomfortable and fearful. Indeed, Armstrong's investigation report found no "following steps" to be taken. (a75). As a result, unfortunately for Plaintiff, Escobar, together with Metelo spearheaded a retaliatory campaign against Plaintiff just one day after Plaintiff formally complained to Armstrong. Defendants' retaliation included, but was not limited to:

(1) Escobar giving Plaintiff the middle finger. 4T at 64:22-9.
(2) different managers entering Plaintiff's office to "babysit" her (sit and stare at Plaintiff the entire eight-hour day watching her work); 5T at 65:18-66:5; 5T at 142:13-21; 143:1-3 (citing D9)). 5T at 144:20-25.
(3) male managers and employees rolling their eyes, making nasty faces, and mumbling under their breath when Plaintiff walked by. 5T at 65:18-66:5.
(4) consistently being subjected to nasty remarks by Metelo, including but not limited to belittling her during manager meetings, loudly cursing and yelling at her in front of other employees, and making comments about the more feminine materials she had on her desk. Id.
(5) Metelo entering Plaintiff's office, taking papers off of Plaintiff's desk and throwing them down at her, intentionally knocking materials from her desk onto the floor and then walking out of her office. 5T at 67:11-16.
(6) Plaintiff's pay not coming along with the other employees like it typically did. 5T at 65:10-17; 5T at 144:8-17.

Armstrong admits that if Escobar continued to go into the BDC, gave Plaintiff the middle finger and threw papers on her desk in an angry fashion, he would be in violation of his directive to Escobar and a form of retaliation. 6T at 45:9-21. Escobar was "absolutely not" staying away from Plaintiff after he touched her in a sexual manner. 5T at 139:9-11. Plaintiff reported this to Armstrong. 5T at 67:8-24. And

although Armstrong says he told Metelo to tell Escobar not to have contact with Plaintiff, Armstrong never took action to ensure he was staying away. 6T at 17-21; 5T at 230:11-231:10. Armstrong also did not reflect this directive on his "investigations results" document as he typically does. (a75); 5T at 202:2-12. All the while, Armstrong testified once the investigation was over and Plaintiff's complaint was unfounded, they should never have worked together again. 5T at 262:5-263:7.

On August 18, 2017, merely four days after Plaintiff's report of sexual harassment, Escobar reported to Armstrong that another employee told him that Plaintiff threatened to file a sexual harassment suit against Escobar. (a493); 5T at 264:22-265:21. Armstrong admitted he told Escobar to document this but did not investigate the report because he did not believe it was related to the investigation into Plaintiff's sexual harassment claims. 5T at 266:10-14. Even worse, the following day, Escobar made another written report of misconduct against Plaintiff. On August 19, 2017, Escobar noted in Plaintiff's file that "per Metelo," Plaintiff was a "no call no show." (a494). Armstrong did not investigate this but rather told Metelo to "let it die" because "there's no reason for this for me." 5T at 273:19-22; 274:7-9. Because Armstrong did not receive a complaint from Plaintiff about this "no call no show" he just "discarded that memo." 5T at 274:10-15.

But Plaintiff could not have known about the allegation because (i) it was an internal correspondence, not sent to her, and (ii) she would have no knowledge of

being a no-call no show, because she got prior approval to be off from work. Indeed, Plaintiff requested off for August 19, 2017, and Metelo approved it on August 8, 2017. (Pa223). Although Defendant attempted to establish that this day off was unapproved, the record and witnesses' testimony conclusively demonstrate otherwise. (Pa223). Armstrong claimed he did not think it was retaliatory at the time, however, he recognized at trial that he should not stop an investigation with an incident if there is retaliation after the reporting of the incident. 5T at 269:7-24.

On September 1, 2017, Armstrong contacted Plaintiff to request her availability to meet to discuss the results of his investigation. (Pa226). Plaintiff responded within the hour with her availability and reiterated she would not sign any documents until an attorney reviews them. Id. Armstrong did not respond to Plaintiff, so on September 12, 2017, Plaintiff emailed Armstrong to follow up. 5T at 72:3-10. Specifically:

> Good evening. I replied to your e-mail dated September 1st, 2017, and have yet to receive a response from you. Thursday will be a month since the incident occurred and I still have yet to receive the results of your investigation in writing. My attorney has asked that we receive this as soon as possible, so he's able to review it and proceed. Thank you. Jeanne Watson.

5T at 72:3-10; (Pa220)

Thereafter, Metelo went to Plaintiff's office to tell her that Armstrong wanted to meet with her. 5T at 73:14-74:7. Plaintiff assumed Armstrong was physically there but he was on the phone. Id. While in Metelo's office, Armstrong called Metelo

and Metelo put the phone on speaker for Plaintiff to speak. 5T at 73:14-74:16. Another individual (unknown to Plaintiff at the time) was also present. Id.

On this call, Armstrong, in no uncertain terms, intentionally and purposefully refused to share information with Plaintiff and refused to institute any corrective plans once he learned she had obtained an attorney, stating: **"On prior occasions, I gave you the results of my investigation. Since then, you have retained an attorney, so because of that, now that's how we're going to proceed. We will not be releasing anything else to you. So that is obviously up to your attorney. He is going to do whatever he has to do."** 5T at 76:10-15; (Pa344). This was the last conversation Armstrong had with Plaintiff. 5T at 77:11-18.

From August 14, 2017 through September 15, 2018, Metelo did not speak to Plaintiff about her complaint either, including her email complaint on August 15, 2017 wherein she expresses her uncomfortableness working with Escobar, especially when he is her supervisor. 5T at 83:20-84:1. Plaintiff was unable to avoid interacting with Escobar at work. 5T at 109:2-4; 112:12-17. At her wits end with the intolerable working environment wherein no one was taking any action to protect her from further harassment or retaliation, Plaintiff told Metelo, in relevant part:

> [] I'm done. I really didn't think that I would be working for a company that lets someone touch me. So, he can touch all these shirts he wants and I'm done. It's been a month. Nothing's been done. You told me you'd take care of it. He put his hand in my fucking shirt. No one did anything about it. And because he said he didn't do it, nothing happened. And then continues to come in my office. How can -- how

> can you allow that to happen?
> ***
> I came to you right after it happened. You saw how shooken up I was. I told you, you said you would take care of it. He's still here and still comes in my office. How can I be expected to report to a guy when you're not here that thinks it's okay to put his hands on me? He put his hand in my f****** shirt Anthony.
> ***
> You said 'I will take care of it.' You did nothing to protect me. He didn't stop coming in my office. You could have just said stop going in there. You did nothing to protect me.

6T at 43:9-44:4.

Metelo told Plaintiff he was "sorry." 6T at 44:14. While Plaintiff was explaining the aforementioned to Metelo, Escobar walked up to the conversation at the same time. 5T at 79:15-17. After this interaction, neither Metelo nor Armstrong contacted Plaintiff. 5T at 82:8-13. Plaintiff did not return to work. 5T at 82:8-13.

Metelo and Armstrong's refusal to take any corrective action to protect Plaintiff demonstrates that Defendant McRech had no interest in trying to rid the workplace of sexual harassment and discrimination. To the contrary, Armstrong's statement shows Defendant McRech was going to wait for Plaintiff's attorney to take action to protect her and until then, all he told her was that her complaint was "unfounded". 5T at 121:24-122:4. Simply put, Defendant McRech admits to inviting this lawsuit by failing to implement any corrective action in response to Plaintiff's complaints. As a result, Plaintiff was constructively terminated from employment.

IV. LEGAL ARGUMENT

A. Standard of Review.

A review of a judge's verdict in a bench trial is **limited.** "The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).[6] Appellate courts apply a deferential standard in reviewing factual findings by a judge, rather than a jury. Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). The deferential standard is applied "because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020).

Thus, "[r]eviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless **convinced** that those findings and conclusions were **'so manifestly unsupported** by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "[L]imiting the role of a reviewing court is necessary because '[p]ermitting appellate courts to

[6] See State v. Camey, 239 N.J. 282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (findings are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record").

substitute their factual findings for equally plausible trial court findings is likely to undermine the legitimacy of the [trial] courts in the eyes of litigants.'" State v. McNeil-Thomas, 238 N.J. 256, 272 (2019) (alterations in original) (quoting State v. S.S., 229 N.J. 360, 380-81 (2017)). When the issues on appeal are mixed questions of law and fact, the appellate court gives deference to the supported factual findings but reviews de novo the trial court's application of legal rules to those factual findings. State v. Pierre, 223 N.J. 560, 576 (2015); State v. Nantambu, 221 N.J. 390, 404 (2015); State v. Harris, 181 N.J. 391, 416 (2004).

B. The Trial Court Did Not Find Armstrong Personally Liable for Damages and Plaintiff Withdrew Her Claims Against Armstrong In His Individual Capacity. (a628-29, Pa300-19)

Defendant McRech and Armstrong incorrectly assert that Plaintiff is seeking to hold Armstrong personally liable for wage loss, emotional distress and attorney fees and costs. Deft. Br. at 25. This is simply false. At trial and in Plaintiff's final summation, Plaintiff made this clear. (Pa300-319). Plaintiff does not seek damages from Defendant Armstrong in his individual capacity"). It is further evidenced from Judge Stein's Order entering judgment against Defendant McRech – and Defendant McRech only[7]. (a628-29). This point was made clear again in the oral argument on Plaintiff's motion for attorney fees and costs wherein the Court unequivocally

[7] The Order specifically reads: "It is on this 17th day of June, 2024; ORDERED that judgment is entered against Defendant McRech, Inc., under the New Jersey Law Against Discrimination for sexual harassment and retaliation."

confirmed same. 8T at 12:14-15 ("I was clear there was a finding that I didn't make an award against Mr. Armstrong").

This Court should not countenance Defendant McRech's attempt to rely upon a mere clerical order made within the Order for counsel fees awarded to Plaintiff, which mentions Armstrong in the preamble and states "Defendants" in the plural. (a628). This is not a basis for appeal – particularly as Defendant McRech did not file a motion to correct the typographical error with the trial court and Plaintiff and the trial Court have repeatedly made clear that Plaintiff did not seek, and the Court did not award damages against Armstrong, in his individual capacity.[8]

C. The Trial Court Correctly Found Defendant McRech Vicariously Liable for NJLAD Sexual Harassment. (a47, a354)

Defendant McRech does not contest on appeal that Plaintiff was subjected to sexual harassment, nor does it challenge the fact that Escobar's sexual harassment was severe or pervasive conduct.[9] Rather, Defendant McRech only appeals the Trial Court's determination that it is vicariously liable for Escobar's conduct because (i) Escobar allegedly was not a supervisor, and (ii) the Court failed to consider the so-

[8] Defendant McRech does **not** appeal or contest the Court's finding that Defendant Armstrong's actions (or lack thereof) render Defendant McRech vicariously liable, nor could they.

[9] With respect to "did the incident occur as alleged by plaintiff on August 14th?" the Trial Court specifically found, "I do believe the testimony of Ms. Watson and this took place"; "I do find that Escobar touched her breasts in this matter. I further find that this conduct was clear and pervasive"; 7T 22:18-21; 24:5-7. The Trial Court highlighted that "[Escobar] had no business putting his hands on her shirt or her breasts"; and "the single act of touching [Plaintiff's breasts it's clear and [per]vasive. The plaintiff has met their burden." 7T at 25:11-15; 26:20-22.

called Aguas affirmative defense. Deft. Br. 28. Both of these contentions were considered by the Trial Court and both were rightly (and unequivocally) rejected.

In Aguas v. State, the New Jersey Supreme Court set forth the standard for analysis of employee harassment claims and employer defenses. 220 N.J. 494 (2015). In that case, the plaintiff asserted two NJLAD claims against her employer, the State of New Jersey. Id. at 499, 505. The claims alleged that her supervisors had subjected her to sexual harassment and created a hostile work environment. Id. at 499-500. The plaintiff in Aguas verbally reported her allegations to supervisors but failed to file a written complaint with the Equal Employment Division pursuant to the anti-harassment policy, "a copy of which the plaintiff admitted she received." Id. at 504. The trial court found that plaintiff had successfully presented a prima facie hostile work environment claim. Nevertheless, the court granted summary judgment "because the State established an affirmative defense by showing an effective anti-harassment policy was in place," which plaintiff had failed to follow. Id. at 506.

The Supreme Court observed that since Lehmann it had recognized that employer liability in sexual harassment cases is governed by principles of agency. 132 N.J. at 511. Employee harassment claims fall into two categories: they are either "a direct cause of action against the employer for negligence or recklessness under Restatement § 219(2)(b)[,]" or "a claim for vicarious liability under Restatement § 219(2)(d)." Id. at 512. Although "often discussed in tandem,"

the Court distinguished two types of claims as "analytically distinct from and independent of one another" and, therefore, each claim "must be addressed separately." Id. With respect to direct claims, plaintiff must prove the employer "failed to exercise due care with respect to [] harassment in the workplace, that its breach of the duty of care caused the plaintiff's harm, and that [he or] she sustained damages." Ibid. "An employer's implementation and enforcement of an effective anti-harassment policy" is "a critical factor in determining negligence and recklessness claims under Restatement § 219(2)(b)." Id. at 499.

The Court in Aguas noted that the prevailing jurisprudence established by Lehmann and its progeny "strongly supports the availability of an affirmative defense, based on the employer's creation and **enforcement of an effective policy against sexual harassment[.]**" Ibid. (emphasis added). As a result, the Court adopted the Ellerth/Faragher test, set forth by the United States Supreme Court for defending claims alleging vicarious liability for supervisory harassment under Restatement § 219(2)(b). In other words, an affirmative defense is available to the employer if it can establish, among other things, that **upon receipt of a complaint of harassment the employer conducted an adequate investigation and took proper remedial action** to protect employees from further discrimination, harassment, and retaliation. Aguas, 220 N.J. at 525.[10]

[10] Aguas holding means, that to avoid vicarious liability, the employer must establish: (i) it had formal anti-harassment,

The Trial Court correctly found that Defendant did meet its burden here. **First**, the evidence demonstrates that Escobar was Plaintiff's supervisor. The Trial Court made findings of fact of Escobar's status as a supervisor based on the undisputed evidentiary record presented at trial. The evidence showed (i) Metelo was her primary supervisor but when Metelo was not at work, Escobar was her supervisor and "next in line" (5T at 104:2-13) (5T at 28:10-24); (ii) Escobar was higher in the chain of command than Plaintiff (5T at 103:17:24); and (iii) in the event something occurred when Metelo was not at work but Escobar was, Plaintiff understood that Escobar had the power to terminate her employment (5T at 104:19-25).

Moreover, Plaintiff presented evidence of Escobar's supervisor status in her incident report and subsequent complaint to Metelo. (a475) ("I am very uncomfortable especially since he is one of my **supervisors**"); see also 5T at 51:7-24:1 ("Furthermore, I was extremely uneasy and uncomfortable this morning, when I came in to find out the person that put their hands on me was the **supervisor** until you arrived. How can I be expected to report to Erick or bring any issues to him after this?"). Escobar too conceded in his statement that he is a "General Sales **Manager**"

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discrimination, and retaliation policies in place; (ii) it maintained useful formal and informal complaint structures for victims of discrimination, retaliation, and harassment; (iii) it properly trained its supervisors and/or employees on the subject of discrimination, retaliation, and harassment; (iv) it has effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; (v) it had an unequivocal commitment from the highest levels of management that harassment will not be tolerated, and demonstration of that policy commitment by consistent practice; and (vi) it conducted a prompt and thorough investigation of employee complaints of harassment with remedies that are reasonably calculated to stop any harassment found. Id. at 525; see also Gaines v. Bellino, 173 N.J. 301 (2002) (same).

and one of his duties is to "[meet] with [his] sales staff…**BDC Manager"**. (a492). Plaintiff was the BDC Manager. (a354 at Interrogatory No. 5 ("Plaintiff held the position of BDC manager during her employment with Defendant")). In light of same, the Court correctly found: "…Escobar was still the backup **supervisor** and [she] had [to] interact with him". 7T at 8:19-23. Thus, Defendant McRech's contention regarding Escobar's non-supervisory status is baseless.

Second, even if Escobar was not a supervisor (though he was) the Trial Court still found that Defendant McRech (i) knew of the harassment and (ii) failed to take effective remedial measures to stop the harassment. Model Jury Charge 2.25, See also, Blakey v. Continental Airlines, Inc., 164 N.J. 38, 62 (2000) (holding that "employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is ... taking place"); Cerdeira v. Martindale Hubbell, 402 N.J. Super. 486, 493-94 (App. Div. 2008) (holding employer can be held liable for co-worker harassment if employer did not have effective anti-harassment policy and complaint mechanism and failure to have effective policy, complaint mechanism caused harm to plaintiff).

That is, either way, the Trial Court correctly found that Defendant McRech was negligent in that it did **not** take appropriate steps to halt the harassment and rather, to the contrary "**There was no effort to do anything to help her. They allowed this to continue and to go unpunished**". 7T at 27:4-5. In no uncertain

terms, the Trial Court found that Armstrong conducted a "clearly flawed investigation" into Plaintiff's complaints. 7T:25:16-17. In support of these findings, the Trial Court determined Armstrong to be evasive and highlighted the failures in the investigation and remediation process (or lack thereof), explaining: "The fact that two principals gave two versions and there was **no attempt to determine anything different**. One page written statements **without follow up**. **No recorded statements** like the other 29 statements"; and "[Armstrong] understood part of Escobar's statement, [but] **not all of it**. **never followed up.**" 7T:26:16-26:13.

The Trial Court also found Defendant McRech's complaint and investigation structure to be "lacking":

> Next, is there a hostile work environment? I find that there is. This is the situation in which the Plaintiff where this incident occurred, **she made a complaint to her supervisors**. She wanted an investigation to be done. **The investigation was lacking.** At the very least, they were told to stay away. **There was no effort to do anything to help her. They allowed this to continue and to go unpunished**.

7T at 26:23-27:5. In the same vein, the evidence showed Defendant McRech did not have an effective anti-harassment policy or training in place. Indeed, any anti-harassment training consisted of the employees (including Plaintiff) going into Metelo's office to take the "training" while being presented with the answer key to the "training" at the same time. 5T at 159:1-15. Certainly, this does not qualify as any actual training in Defendant McRech's favor. With this evidence, the Trial Court correctly found Defendant McRech to be liable for sexual harassment and a

hostile working environment under the NJLAD, Escobar to be a supervisor, and rejected the affirmative defense available to Defendant McRech because it knew of the harassment and took no action to stop it or remediate the working environment.

D. The Trial Court Correctly Found McRech Liable for Retaliation. (a494, Pa223, Pa226, Pa227)

The evidence shows, and the Court agreed, that Plaintiff was subjected to retaliation and ultimately constructively discharged from Defendant McRech. Defendant McRech's baseless and naked assertion that "nothing continued," Defts. Br. at 24, is completely belied by the record.

To prove a claim of retaliation, an employee must establish that: (1) the employee engaged in protected activity as defined under NJLAD; (2) the activity was known to the employer; (3) the employee was subjected to an adverse employment decision by the employer; and (4) there existed a causal link between the protected activity and the adverse employment action. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 639-630 (1995).

An employee can show the existence of adverse employment action through many separate, but relatively minor, instances of behavior directed against an employee that may not be actionable individually, but that combine to make up a pattern of retaliatory conduct. Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003) (determining the plaintiff teacher's substandard evaluations, transfer to inferior classroom, trouble getting supplies, denial of key of science lab, rejection of

photocopying services and unfair treatment of class can constitute adverse employment action under CEPA analysis); Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002), aff'd as modified, 179 N.J. 425 (2004) (affirming trial court's determination that the plaintiff claiming retaliation under the NJLAD suffered an adverse action, even though she did not experience any pay loss).

Here, Plaintiff presented evidence that on August 18, 2017, Escobar attempted to get Plaintiff reprimanded for an "incident" involving a purported discussion with another coworker. (Pa226). Escobar did not stop there, Plaintiff also presented evidence that the very next day, Escobar submitted another internal "incident" dated August 19, 2017, that attempted to get Plaintiff reprimanded for being a "no call, no show". (Pa227). The document read: "The incident that occurred today. Per Anthony Metelo, Jeanne Watson did not call out to him, she also did not call out to me. Today she did a no call, no show." Id. However, Plaintiff got pre-approval for this day out from Metelo and it was corroborated by her internal notes. (Pa223) (August 8, 2017 entry: "Anthony verbally approved vacation & 8/19 off"). Tellingly, these were the only two "incidents" noted to Plaintiff's file, both by Escobar, one with assistance of Metelo, and only after Plaintiff's complaints against him.

Based on the evidence presented in its entirety, the Trial Court found evidence of adverse employment action and continued harassment. Specifically, the Trial Court found, despite Armstrong's instruction to have no contact with Plaintiff, "there

was contact between these parties." 7T at 27:15-17. The Trial Court also found evidence that Escobar giving Plaintiff the middle finger was retaliation and "not disputed." 7T at 27:18-3. Likewise, the Trial Court found that after the incident, "there was another written report that [Plaintiff] was a no call no show. Proofs were then presented that she had asked for this to be done…" 7T at 27:24-28:3; Compare (a494) with (Pa 223). Armstrong did not investigate this retaliation but rather told Metelo to "let it die" because "there's no reason for this for me." 5T at 273:19-22; 274:7-9. Armstrong claimed he did not think it was retaliatory at the time, however, he recognized at trial, that he should not stop an investigation with an incident if there is retaliation after the reporting of the incident. 5T at 269:7-24. The Trial Court concluded, "therefore, I do find that these acts did occur." 7T at 28:12-13.

Likewise, with respect to Plaintiff's constructive termination, the Court unequivocally found that "**there was no effort to do anything to help [Plaintiff]. [Defendant] allowed this to continue and to go unpunished.**" 7T at 27:4-5. This is undoubtedly sufficient to establish a finding of adverse employment action and constructive termination for purposes of the NJLAD. Muench v. Twp. of Haddon, 255 N.J. Super. 288, 302 (App.Div.1992) (constructive discharge is a "heavily fact-driven determination"); Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 27-28 (2002) ("[g]enerally, a constructive discharge [] occurs when an 'employer knowingly permits conditions of [] employment so intolerable that a reasonable

person subject to them would resign.' 174 N.J. 1, 27- 28 (2002) (NJLAD case) (quoting Muench v. Township of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992)[11]; Payton v. N.J. Tpk. Auth., 148 N.J. 524, 536, 691 A.2d 321, 326 (1997) (employer has duty to correct and promptly remediate harassing conduct when it occurs – "[The] timeliness of an employer's response is an important element in determining the effectiveness of an anti-harassment program. . . A slow response may be perceived as a reluctant response and call into question the bona fides of an employer's anti-harassment program. Similarly, an investigation, though timely instituted, may be pursued half-heartedly and unduly prolonged. On the other hand, a timely, vigorously pursued inquiry that corroborates the victim's accusations will compromise a well-designed anti-harassment program, if the employer drags its feet in acting on the corroborative evidence"); Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 623, 626 (1993) ("When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser").

[11] In considering whether a plaintiff was constructively discharged, trial courts should consider the (1) nature of the harassment, (2) closeness of working relationship, (3) whether the employee used internal grievance procedures, (4) *responsiveness of employer*, and (5) *all other relevant circumstances*. Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 27-28 (2002)

To this end, the Trial Court certainly made findings sufficient to establish Plaintiff suffered adverse employment action and that Defendant McrRech knowingly permitted the conditions of employment to be so intolerable that a reasonable person would be forced out, effectively constructively terminating Plaintiff. Accordingly, the Trial Court did not misapply the law or facts and correctly found Defendant McRech liable for retaliation under the NJLAD.

E. The Trial Court Correctly Found Plaintiff Suffered Economic Loss. (Pa219, Pa224)

The Trial Court correctly awarded economic damages in the sum of $23,300.00 to Plaintiff. Defendant McRech asserts on appeal that this award was error based on the same positions they asserted, but the Trial Court rejected, during Motions in Limine. At that time, the Trial Court denied Defendant McRech's Motion to strike Plaintiff's claims for lost wages, emphasizing: "I have to hear all the evidence to make a decision. **It's the defendants' burden to go forward**, I don't know what proofs are going to be available, what proofs are not going to be available, and I will make that determination at trial." 2T at 22:6-15.

The Trial Court found that Defendant McRech did not meet its burden to show Plaintiff failed to mitigate her economic damages, nor does it contend so in this appeal. Rather, Defendant McRech seeks reversal on the basis that Plaintiff did not produce all of her tax returns and because she was terminated from a subsequent employer. Defts. Br. 36-37. The Trial Court correctly rejected both arguments.

The New Jersey Supreme Court has made clear that mitigation of damages in an employment case is an ***affirmative defense and thus, Defendant—not Plaintiff—bears the burden of production and persuasion on this issue.*** Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 364-65 (App. Div. 2012). An employer has the burden of presenting "credible evidence which leads you to believe that it is more likely than not that the plaintiff failed to mitigate or minimize her damages." Model Jury Charge (Civil) 2.33, Wrongful Discharge; Mitigation of Economic Damages. An employer must show "Plaintiff made no effort or no reasonable effort to secure comparable employment **and** other employment opportunities were available that were comparable to the position Plaintiff lost." Model Jury Instruction 2.33 (emphasis added). As the Supreme Court stated in Goodman v. London Metals Exchange, Inc., "[i]n order to invoke mitigation there must, of course, be available jobs. In their absence, mitigation is not feasible." 86 N.J. 19, 24 (1981).

First, the post-2017 W-2's and Tax Returns after 2017 are not relevant and of no consequence to any economic loss analysis. As an initial matter, Plaintiff's own testimony regarding her employment history is sufficient to make a claim for lost wages. See e.g., Lewis v. N.J. Riebe Enterprises, Inc., 170 Ariz. 384, 825 P.2d 5 (1992). Tax returns shall be disclosed only when it "clearly appears" that there is a "compelling need" for their disclosure, because "the information contained therein is not otherwise readily available." Ullmann v. Hartford Fire Ins. Co., 87 N.J. Super.

409, 415 (App. Div. 1965); Harmon v. Great Atlantic & Pacific Tea, 273 N.J. Super. 552, 558-59 (App. Div. 1994). Further, the Trial Court agreed that Plaintiff's 2018 tax returns and/or W2s had no bearing on her claim for lost wages – **Plaintiff was unemployed from January 2, 2018- June 2018 and thus, her 2018 returns would not show any relevant income as she had none.** 5T at 87:8-90:21. The Trial Court further explained that no order required Plaintiff to produce tax returns beyond 2017 beyond Defense Counsel's averments that it did. Id. at 89:15-90:7. Specifically:

> **THE COURT:** Okay. The order says to be – to be accurate W-2s for 2015, '16, and '17.
>
> **MS. RUCCOLO:** But '18 didn't exist at that time. This was –
>
> **THE COURT:** The order says, 2015, 2016, and 2017. There is no order in place which you made it seem like that said that they have to have the 2018.
>
> **MS. RUCCOLO:** And I apology if I was unclear, Your Honor, but the point –
>
> **THE COURT:** You were very clear.
>
> **MS. RUCCOLO:** Okay. The point of the order was –
>
> **THE COURT:** I mean, don't tell me the point of the order. Okay. Judge Bernardo prepared it. These are the dates. That's what I go by. There's no -- not following an order. These –
>
> **MS. RUCCOLO:** Okay. But they didn't supplement discovery which is part of the problem.
>
> **THE COURT:** This is the order. There's nothing about 2018. I don't even see how that's -- they're not taking the tax -- any other loss wages after that date.

5T at 89:11-90:7.

Second, the evidence and testimony have shown that Plaintiff was unemployed for approximately one week before securing new employment. 5T at 86:7-87:15. Plaintiff certainly upheld her obligation to mitigate in that regard, however, through no fault of Plaintiff, she was discharged from her subsequent employer RK Chevrolet ("RK"). While Plaintiff had obtained comparable employment at RK, Defendant McRech is incorrect in that Plaintiff cannot recover damages after her discharge from RK. Indeed, Goodman – the only case relied upon by Defendant McRech – does not stand for such proposition. Thus, even assuming *arguendo,* that New Jersey recognized a plaintiff's failure to remain employed by a subsequent employer as a failure to mitigate, the defendant employer still bears the burden of proof on that defense, not Plaintiff. [12]

Plaintiff's separation documents from RK show Plaintiff was discharged for "Other" "Explanation: Dept. was not moving forward." (Pa219) Importantly, the

[12] Federal cases have analyzed this issue and have held that unless an employee intentionally tries to get terminated, an involuntary termination, does not preclude recovery of damages for a plaintiff. See, e.g. Thurman v. Yellow Freight Systems Inc., 90 F.3d 1160 amended on other grounds, 97 F.3d 833 (6th Cir. 1996); N.L.R.B. v. Ryder Sys., Inc., 983 F.2d 705 (6th Cir. 1993); see also N.L.R.B. v. P*I*E* Nationwide, Inc., 923 F.2d 506, 513 (7th Cir. 1991) ("a discharge from employment, without more, does not reduce a back pay award"); Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 229 (S.D.N.Y 1986) (upholding back pay where employee was discharged for cause but did not "willfully engage[ ] in conduct in order to be fired"). Likewise, the New Jersey jury instructions analyze the effect of a plaintiff's voluntary termination of subsequent employment emphasizing, the defendant employer is required to prove by a preponderance of the evidence that Plaintiff quit her subsequent employment without good cause, and only then will plaintiff's back pay award be reduced by the wages she could have earned if she had not quit. Model Jury Instruction 2.33 § C. Under the same analysis, a plaintiff who did not voluntarily quit a subsequent employer, but was involuntary terminated without cause, should be able to obtain an award of back pay damages until she subsequently mitigates her damages.

document has specific reasons for discharge that are for-cause discharges, such as poor work, violation of policies, attendance, insubordination, instances of not reporting, and misuse of equipment. Id. None of these are checked for Plaintiff because she was involuntarily discharged through no fault of her own but rather because of management differences. 5T at 21:15-23. Indeed, Plaintiff testified to same. 5T at 155:11-22. ("We had different management styles. We parted on good ways…They would hire me again. It also says that I'm eligible for rehire. [] It's not termination based on bad performance or anything of that nature."); id. at 21:15-23 ("I had a different management style. So, our department was not moving forward because of our managing differences"). Further, contrary to Defendant McRech's assertion that Plaintiff was terminated for complaining about her coworkers, Plaintiff testified that she was unhappy with her coworker's work ethic, which she reported to her supervisor, and after internal discussions, they mutually decided to part ways due to a difference in management styles. 5T at 155:11-156:21.

Following Plaintiff's involuntary discharge, Plaintiff was unable to secure employment for approximately six (6) months. During that time, Plaintiff diligently looked for employment and applied to countless jobs. (Pa30; Plaintiff's Deposition Transcript at 117:15 ("I applied everywhere. Everywhere. Many different places"); (Pa224) (Plaintiff's record of 49 job applications submitted). To this end, Defendant McRech's attempt to bar Plaintiff from recovering economic damages for this period

of unemployment, again, falls short. Plaintiff's total economic damages for her period of unemployment (twenty-three weeks total) was approximately $25,300.[13]

Ultimately, the Trial Court correctly concluded with respect to Plaintiff's lost wage claim, that there was "not a lot of proof to the contrary," confirming that Defendant McRech did not meet their burden of proof in this regard. See Quinlan, 425 N.J. Super. at 364-65, and Model Jury Instruction 2.33 (emphasis added); 7T at 28:13-19. The Trial Court did not make any error, rather it would have been an error to bar Plaintiff's claim for economic loss based on this evidentiary record. As thoroughly explained in Quinlan, with respect to future mitigation and award of front pay, "such an assessment [] rests in [the Court's] sound judgment, based on the evidence as a whole and the reasonable inferences from it." 425 N.J. Super. at 369. The Trial Court's award should not be disturbed.

F. Trial Court's Award of Attorneys' Fees, Costs and Fee Enhancement Was Exceedingly Reasonable. (a427-36, a458-65)

The Trial Court's award of attorneys' fees, costs and fee enhancement to Plaintiff should not be disturbed as the Court meticulously evaluated Plaintiff's fee petition in its entirety and thoughtfully determined a reasonable award given the nature of the case and Plaintiff prevailing on both of her NJLAD claims.

[13] The Court ultimately awarded Plaintiff $23,300.00 for 23 weeks of lost wages at a rate of $1,100.00 per week, which was likely the result of an inadvertent miscalculation. 7T at 28:13-19.

The NJLAD is a "fee-shifting" statute, which entitles a prevailing party to an award of "[a] reasonable attorney fee as part of the cost." N.J.S.A. 10:5-27.1; see also Rendine v. Pantzer, 141 N.J. 292, 322 (1995). A prevailing party is defined as a party that succeeds "on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit." Szczepanski v. Newcomb Med. Center, 141 N.J. 346, 355 (1995). As the New Jersey Supreme Court has noted, "Counsel fee awards in LAD cases should be the rule rather than the exception to encourage litigants to combat discrimination in our state." Riding v. Towne Mills Craft Centre, Inc., 166 N.J. 222, 228 (2001). "Under LAD…the first step in the fee-shifting process is to determine the lodestar: the number of hours reasonably expended multiplied by a reasonable hourly rate." Rendine, 141 N.J. at 334-335. Contemporaneously recorded time records are the preferred method for documenting the attorneys' time. Szczepanski v. Newcomb Med. Center, 141 N.J. 346, 367 (1995). The Court must decide if the amount of time spent was reasonable. Ackerman v. The Money Store, 330 N.J. Super. 336, 378 (1999); Lockley v. Turner, 344 N.J. Super. 1, 28 (App. Div. 2011).

After establishing the lodestar fee, the Trial Court may increase the fee "to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." Rendine, 141 N.J. at 337. In Rendine, the Court concluded that a fee award cannot be reasonable unless

the lodestar is adjusted to reflect the actual risk that the attorney will not receive payment if the suit is unsuccessful. Id. at 338. Likewise, the Rendine Court, in considering the lodestar enhancement for contingency fee cases, suggested that the trial court consider the contingent nature of the representation, whether the attorney was able to mitigate the risk of non-payment in any way, the strength of the claim, the proof problems and the likelihood of success. Id. at 339-40. Specifically, the Court noted, "contingency enhancements in fee-shifting cases ordinarily should range between five and fifty-percent of the lodestar fee." Id. at 343.

Notably, an award of "reasonable" attorneys' fees does not mean proportionate. Dinizo v. Twp. of Scotch Plains, 2011 U.S.App. WL 1206767, 174 (3d Cir.). Accordingly, simply because a plaintiff obtains a "modest award of damages does not mean that the attorney's fee award must be commensurately modest." Id. The Dinizo court further observed that a reasonable fee is one "that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." Id. In Dinizo, the Court did not find that awarding the plaintiff's counsel 45 percent of the lodestar amount was an abuse of discretion, and ultimately affirmed a fee award of $141,900.00 in a case where the jury found $1,500.00 in economic damages for the plaintiff. In City of Riverside v. Rivera, 477 U.S. 561 (1986), the Supreme Court upheld a fee award of $245,000, where the jury's verdict was only for $33,350. Federal courts have since reaffirmed this point.

For example, in Abrams v. Lightolier, Inc., 50 F.3d 1204, 1222 (3d Cir. 1995), the fee award under the NJLAD exceed the verdict by approximately $75,000. The Third Circuit rejected the employer's attack on the attorney's fees, stating flatly, "there is no rule that the fees award may be no larger than the damages award." Any "proportionality" argument was simply rejected as a "misstatement of law." Id.

In Szczepanski v. Newcomb Medical Center, 141 N.J. 346 (1995), the Court rejected a "proportionality" argument for fee awards:

> We decline to construe New Jersey's fee-shifting statutes to require proportionality between damages recovered and counsel-fee awards even if the litigation, as in this case, vindicates no rights other than those of the plaintiff. To be sure, an overriding public interest is also served by plaintiff's successful prosecution of this suit for retaliatory discharge under the LAD. Plaintiff's recovery of damages fulfills and vindicates the legislative purpose of preventing employers from retaliating unjustly against employees who oppose practices or acts forbidden by the LAD. The LAD's fee-shifting provision, N.J.S.A. 10:5-27.1, was intended to assure that counsel for litigants like plaintiff will receive reasonable compensation for services reasonably rendered to effectuate the LAD's objectives, even if the contingent fee payable based on the damages recovered did not constitute a reasonable fee for those services.

Id. at 366.

There are numerous cases where courts have awarded full fees, even where the verdict is less than what the jury awarded here, and even when the fee award substantially exceeded the verdict. Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1489, 1499 (9th Cir. 1995) (full fees awarded, where plaintiff was awarded reinstatement, back pay and prejudgment interest, and compensatory damages of

$10,000); Wayne v. Village of Sebring, 36 F.3d 517, 522, 532 (6th Cir. 1994) (full fees awarded where plaintiffs obtained an injunction and $55,600 in damages); Soto v. Adams Elevator Equipment Co., 941 F.2d 543, 547, 552-53 (7th Cir. 1991) (full fees granted where plaintiff awarded $7,648 in back wages and $43,000 in damages for retaliation); Williams v. Roberts, 904 F.2d 634, 636, 640 (11th Cir. 1990) (full fees awarded where plaintiff won reinstatement and $12,500 in compensatory damages); Heusser v. New Jersey Highway Authority, 2008 WL 731498, at *19-*20 (N.J. App. Div. Mar. 20, 2008) (affirming fee award of $456,082.22 in disability discrimination case under the LAD, where damages awarded were only $97,198). As one court observed, a fee award that exceeds the verdict can be the inevitable "downside" when an employer elects to deploy a "Stalingrad defense" and fight over every conceivable issue in the case. Lipsett v. Blanco, 975 F.2d at 934, 941 (1st Cir. 1992).

In any event, Defendant McRech's challenge to the fee award is baseless. **First**, Plaintiff succeeded on all of her claims brought at trial. Plaintiff's initial Complaint (a1-15) alleged three (3) counts: (Count I) NJLAD: Sexual Harassment, Hostile Work Environment Discrimination; (Count II) NJLAD: Retaliation/Improper Reprisal; and (Count III) Assault, against four (4) Defendants

McRech, Armstrong, Metelo, and Escobar.[14] Defendant McRech attempts to mislead this Court to believe that Plaintiff was unsuccessful on most of her claims, which is simply untrue. Plaintiff obtained a verdict on **all** issues presented to the Court for consideration. The Court also awarded Plaintiff the **full** specter of available economic damages as well as emotional distress damages in a matter for which there was no medical treatment. Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.")

Even so, generally, plaintiffs prevail "if they 'succeed on **any significant issue** in the litigation which achieves some of the benefit the part[ies] sought in bringing suit.'" Singer v. State, 95 N.J. 487, 494 (1984) (emphasis added; citation omitted). As such, Defendants' reliance on Blakey v. Cont'l Airlines, Inc., 2 F.Supp.2d 598, 607 (D.N.J. 1998), for the general proposition that overall success in a lawsuit is a consideration in whether a reduction of the lodestar fee is appropriate for a fee application, is misplaced. In Blakely, the plaintiff was only successful on

[14] Notably, Escobar and Metelo were administratively dismissed from the case years prior to trial because they intentionally evaded service. In addition, Defense Counsel failed to provide Plaintiff's Counsel their updated contact information until the eve of trial. During the Trial Court's analysis of Plaintiff's Motion for Counsel Fees, the Trial Court recognized that Plaintiff was not "unsuccessful" in her claims against all Defendants as Defense counsel would suggest, but instead, these claims were not pursued due to evasion of service. 8T at 17:10-17.

one out of six of her claims, pursued excessive discovery, listed over 100 potential witnesses, most of which were not used at trial and procured two high-priced law firms to represent her. Id. In turn, the court determined that the plaintiff's overall success on their NJLAD claims was limited because the plaintiff succeeded on her sexual harassment claim but not on her retaliation, disparate treatment, or punitive damages claims. Id. The Court reasoned Plaintiff's success on a single claim compared to the "great time and money" spent pursuing her claims was excessive.

The present matter, however, is wholly distinguishable. Here, Plaintiff was successful on all claims submitted at trial, identified the same critical witnesses as Defendant McRech, did not spend excessive time on meaningless discovery or depositions and Plaintiff only retained this firm to represent her. Plaintiff's billing entries are detailed. Plaintiff's counsel prosecuted this matter efficiently, and kept contemporaneous, detailed, and electronic time records. (a427-36). Defendant McRech's argument simply has no merit.

Second, Plaintiff's time entries are detailed and reasonable in light of the work required to successfully litigate her claims, and the Trial Court correctly analyzed Plaintiff's time records. As the prevailing party, Plaintiff is entitled to seek reimbursement for hours reasonably expended in the prosecution of her case from inception through verdict. Szczepanski v. Newcomb Med. Center, 141 N.J. 346, 355 (1995) (prevailing party is defined as a party that succeeds "on any significant issue

in litigation [that] achieves some of the benefit the parties sought in bringing suit."). Defendant McRech's claim that Plaintiff's time spent litigating is "unreasonable" is undermined in all respects by a complete absence of **actual support** for that spurious position. Without any proofs to the contrary, Defendant McRech's self-serving contentions in that regard should be ignored. See Defts. Br. p. 42-44.

Each billable hour of Plaintiffs' counsel is supported by specific/contemporaneous time entries for each legal task performed. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1037-38 (3d Cir. 1996) (in an employment retaliation case, affirming "computer-generated summaries of time spent by each attorney" meet the standards for specificity necessary to allow the trial court "to determine if the hours claimed are unreasonable for the work performed.") And as reflected by the docket, this case was vigorously litigated. Discovery expanded 512 days, this matter was scheduled for trial 21 times, and it took approximately six (6) years and one (1) month for Plaintiff to have her day in Court. All parties filed various discovery and dispositive motions in connection with this matter. The matter was tried to verdict. A review of the time records here reveals Plaintiff is only seeking reimbursement for hours reasonably expended to litigate this matter, that is, "those that competent counsel reasonably would have expended to achieve a comparable result." Rendine, 141 N.J. at 322.

Third, Defendant McRech argues that Plaintiff is not entitled to recoup "duplicative" fees. Defendant McRech claims Plaintiff attempted to do so because there were multiple attorneys who participated in this matter up to and including trial. However, as repeatedly noted throughout briefing and oral argument, the number of attorneys on the matter was in part due to the length of the case wherein multiple attorneys separated from the firm and new attorneys were put on the matter. Furthermore, the Trial Court, in its thorough analysis of Plaintiff's Motion for Fees, addressed and amended numerous time entries which included: (1) striking all of one attorney's preparation for trial, attendance trial, and preparation of the final trial summation; (2) reducing time spent on a Motion In Limine by fifty percent; (3) striking an inadvertent double billing of attendance of a conference; (4) striking an attorney's preparation for oral argument; (5) striking a clerk's attendance of a deposition; and (6) reducing the total time spent on the motion for summary judgment by one third. 8T at 17:10-20:14. Thus, it cannot be reasonably disputed that the Trial Court spent significant time reviewing the billing records in an effort to address any potential issues, contrary to Defendant McRech's contention. Indeed, the Trial Court ultimately concluded, "with respect to questioning other hourly or hours expended, I don't see anything unreasonable….I've looked at which time I think is significant." 8T at 20:15-18. Certainly, the Trial Court's very specific and meticulous review of Plaintiff's fees does not rise to the level of error.

Lastly, Plaintiff is also entitled to an award for the costs expended in pursuing her claims. Courts have held that "[a]ttorneys' fees include all litigation expenses that are incurred in order for the attorney to render legal services," and that "[s]uch expenses are recoverable as part of the 'reasonable' attorney's fee 'when it is the custom of the attorneys in the local community to bill their clients separately for them.'" Sergeant Hurley v. Atlantic City Police Dep't, Civ. A. Nos. 93-260, 94-1122, 1196 WL 549298, at *5 (D.N.J. Sept. 17, 1996), (a458-65) citing Abrams v. Lightolier Inc., 50 F.3d 1204, 1225 (3d Cir. 1995); Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish Sch. Bd., 919 F.2d 374, 380 (5th Cir. 1990) ("All reasonable out-of-pocket expenses…are plainly recoverable [as attorney's fees] because they are part of the costs normally charged to a fee-paying client."). Defendant McRech's contention that Plaintiff is not entitled to recover her costs because her billing records are not specific enough is plainly inaccurate and the Trial Court agreed. 8T at 20:22-24.

Plaintiff's counsel prosecuted this matter efficiently; kept contemporaneous, detailed, and electronic time records; obtained an excellent result for their client (despite the repeated assertion that the case had no merit); and bore a substantial risk by taking this matter on a contingency fee basis and all the way to verdict without ever receiving a settlement offer that exceeded $5,000.00. As the Supreme Court noted, "if a defendant in a fee shifting case could have avoided the bulk of

attorney's fees for which they find themselves liable by making a reasonable settlement offer, they cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response." City of Riverside v. Rivera, 477 U.S. 561, 581 (1986). This is precisely the predicament in which Defendant McRech created for itself here. Defendant McRech fails to set forth any credible argument or any evidence demonstrating why Plaintiff should not have received her lodestar and a fee enhancement or that the Court erred in any regard warranting reversal. Rendine, 141 N.J. 292 (1995).

G. The Trial Court Correctly Permitted The Depositions of Named Individual Defendants Before Trial. (Pa228-98)

A brief recitation of the procedural background as it relates to Escobar and Metelo is necessary. The issue of securing testimony from these deponents arose at Motions in Limine in which Defendant McRech sought to have Escobar and Metelo testify remotely at trial. At that time, Plaintiff was made aware of a new, different address for Metelo – an address that was never provided to Plaintiff's counsel during discovery. Plaintiff's counsel also learned that Defense Counsel was in full communication with Escobar – who was unresponsive to Plaintiff and ignored the trial subpoena. 2T at 16:16-20; Id. at 17:1-2.

Accordingly, the Trial Court agreed to review briefing on the issue pre-trial. The Trial Court requested additional information after initial briefing, which was

provided (Pa228-298). The Trial Court then conducted argument and Ordered that Plaintiff be permitted to take the depositions of Metelo and Escobar, and found no prejudice as it was a bench trial that was scheduled to commence shortly thereafter. Specifically:

> **THE COURT:** Okay. Well, I think it's clear, first of all, that your interrogatories named the witness that moved to North Carolina, had his address at the old address, never updated that address in your answers to interrogatories. There was some mention in the moving papers of the plaintiff that there was discussion of a bench trial, it'd probably take a day or so. That was over a year ago which further gave an impression that these witnesses were out of the picture.
>
> These witnesses were mentioned on March 11th. A trial subpoena was copied to you with that. I think maybe you could say, you could blame them all you want in doing nothing, but, at the very least I think they were lulled to sleep, that the address in North Carolina should have been amended to give them a chance if they wanted to and it was not.
>
> I'm going to allow these depositions to go forward. I don't see what the prejudice is, this is a bench trial that will begin shortly. I indicated to you that I'm not available Tuesday, tomorrow morning, and Wednesday morning anyway, due to other obligations to hearing the landlord/tenant cases. So, I don't see what the prejudice is. Then we can start next week. It should be an even playing field, so, that application will be granted.

2T at 16:16-17:16.

Now, Defendant McRech seeks reversal alleging it was prejudiced when the Trial Court permitted the depositions before the trial. Critically, Defendant McRech does not contend the Trial Court misapplied any law in this regard, but rather, it contends it was somehow prejudiced by the Trial Court's legal finding. To support

same, Defendant McRech attempts to persuade this Court that because the Trial Court did not effectuate a written order and did not use the specific words "exceptional circumstances" that somehow the Court's Order for the depositions was not legally compliant. This is simply incorrect. For one, the Trial Court issued a verbal order and Defendant McRech points to no rule, law, or precedent that requires an order to be written to be valid. 3T at 4:1-3 ("I ordered that the depositions take place before trial.") For another, while the Trial Court did not use the specific terms "exceptional circumstances" the Trial Court reviewed briefing on exceptional circumstances pre-trial, requested additional information and briefing from both Plaintiff and Defendant McRech, and conducted oral argument.

At oral argument, Defendant McRech argued that exceptional circumstances were not present (as it does here). 2T at 14:21-16:7. The Trial Court **rejected** that argument and ruled in Plaintiff's favor. 2T at 16:16-17:16. In doing so, the Trial Court did not abuse its discretion but rather effectuated an appropriate legal determination. State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)) ("[A]ppellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law'"). **Again, Defendant McRech does not allege the trial Court abused its discretion.**

With respect to Metelo's deposition, Defendant McRech makes no argument as to why the ordering of his deposition warrants reversal (because there is no basis to make such an argument). Defts. Br. 46-47. He appeared for his deposition pre-trial without issue. Defense Counsel represented him at the deposition. Both Plaintiff and Defendant McRech sought testimony.[15] Any such argument that the Trial Court's Order granting his deposition prejudicial is wholly unsupported.

Defendant McRech also baselessly claims that Escobar's failure to appear for trial also warrants reversal. To be clear, while the Trial Court did initially contemplate Escobar being barred from testifying at trial if he did not testify in a deposition pre-trial, the Trial Court still considered permitting him to appear at trial if he appeared. Indeed, the Trial Court sought clarity the day before trial and inquired ***if*** he was going to appear. 4T at 5:4-5 ("THE COURT: So, is the witness going to testify or not testify?"). Defense Counsel responded "He's not communicating with me, so, it's my expectation he's not going to appear." 4T at 5:4-7. Thus, Escobar clearly was not barred. Escobar simply did not show. The reason for his failure to appear at trial was his own choice. Defense Counsel confirmed as much, as she represented to the Trial Court that Escobar expressed to her that he was "concern[ed] that the plaintiff [was] going to try to bring him into this lawsuit again." 4T at 5:9-

[15] Defendant McRech refers to Metelo's testimony on three occasions in their final summation, however, none of the references included cites to any specific deposition testimony or transcript and none were submitted or admitted by the Trial Court at trial. Defendant McRech's unilateral characterizations of Metelo's testimony in the final summation, without any evidentiary support, is merely conjecture.

13. And even then, the Trial Court still asked Defense Counsel "Are you ready to start the trial without him?" Defense Counsel **did not object, or ask for additional time to try and further secure him** but rather, **accepted** that the witness did not want to appear. 4T at 5:14-17 ("I don't have a choice. I can't force him to come here. **Yes**"). The notion that Plaintiff's presented evidence was only "uncontroverted" because of Escobar's failure to appear for his deposition and trial (as if it was somehow Plaintiff or the Trial Court's fault) should be rejected out of hand.

V. CONCLUSION

Accordingly, for the reasons set forth above, the Trial Court's findings in favor of Plaintiff on her NJLAD hostile work environment and harassment claims, including the monetary awards to her and her counsel for attorney's fees and costs, should be affirmed.

Respectfully submitted,

/s/ Matthew A. Luber, Esq.
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Dated: March 7, 2025

NEW JERSEY SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-004117-23

JEANNEY WATSON, Plaintiff/Respondent, vs. MCRECH, INC. D/B/A TURNERSVILLE CHRYSLER DODGE JEEP RAM, ERICK ESCOBAR, ROBERT ARMSTRONG, ANTHONY METELLO, ET AL, Defendants/Appellants.	CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY Trial Court DOCKET NO. CAM-L-1955-18 Sat Below: HON. DONALD J. STEIN, JSC

DEFENDANTS/APPELLANTS' REPLY BRIEF

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Dated: March 21, 2025

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PRELIMINARY STATEMENT

Plaintiff's appellate brief mischaracterizes the basis for Defendants' appeal. Defendant appeals the erroneous findings of the trial court and its application of the law. While Plaintiff argues that trial court made the requisite findings under the law, notably, Plaintiff cannot cite to any part of the May 10, 2024 transcript to support her arguments. This appeal is based on the trial court's factual findings that are not supported by adequate, substantial and credible evidence and the trial court's failure to properly apply the law to the facts found at trial.[1]

LEGAL ARGUMENT

I. STANDARD OF APPEAL.

Contrary to Plaintiff's argument, Defendants in this appeal challenge the trial court "trial court's interpretation of the law and the legal consequences that flow from established facts" which are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995). The trial court's application of the law to the factual findings is reviewed de novo. State v. Pierre, 223 N.J. 560 (2015).

II. THE PLAINTIFF SUED ROBERT ARMSTRONG AND RECEIVED A FINAL JUDGEMENT AGAINST MR. ARMSTRONG ON JULY 19, 2024. (a628)

[1] Plaintiff also relies on deposition transcript that were never admitted into evidence at trial and not part of the record. Defendants have filed a Motion to Strike the Plaintiff's Appendix which violates R. 2:6-1.

Defendants appeal the Court final judgment from July 19, 2024 which undisputably includes a judgement against Mr. Armstrong for lost wages, emotional distress and attorney's fees. (a628) Recognizing that Defendants' arguments to appeal the judgment entered against Mr. Armstrong are unassailable, Plaintiff now makes the facetious claims she did not seek damages against Mr. Armstrong based on a footnote in a summation brief. However, this argument begs the question that if Plaintiff was not seeking a judgment against Mr. Armstrong, why did she filed a Complaint and Amended Complaint against Mr. Armstrong seeking damages? Why did Plaintiff litigate her claims against Mr. Armstrong as a Defendant for years, including opposing a motion for summary judgment seeking dismissal of the claims against him? Why did Plaintiff try the case against Mr. Armstrong as an individual Defendant? It is undisputed that Plaintiff never sought an order dismissing Mr. Armstrong as a Defendant and Mr. Armstrong was never dismissed from the action. The final judgment entered by the Court on July 19, 2024 was the form of order proposed by Plaintiff. At no time did Plaintiff ever move to correct the final judgement that awarded her money damages against Mr. Armstrong individually.[2] At no time, when rending its decision on May 10, 2024 did the trial Court dismiss Mr. Armstrong from the lawsuit or state that he was not

[2] On 7/22/24 Defendant's counsel submitted a letter to the Court objecting to the Judgment against Mr. Armstrong and asserting it was a clerical error and submitted an Amended Order that did not include Mr. Armstrong. Plaintiff did not respond, and did not consent to the entry of the Amended Order that did not include judgment against Mr. Armstrong, clearly coveting her improperly obtained money judgment against Mr. Armstrong. (a41)

liable to Plaintiff individually. Indeed, the entire opinion on liability by the Court is focused on Mr. Armstrong's actions and his investigation. (T7, pgs. 26-30) Accordingly, the July 19, 2024 Order which awards Plaintiff lost wages and emotional distress damages and attorney's fees against Mr. Armstrong should be reversed.

III. THE TRIAL COURT FAILED TO APPLY THE LAW OF VICARIOUS LIABILITY TO THE FACTS WHEN FINDING MCRECH LIABILE UNDER NJAD. (T7, 26:14-27:5)

While Plaintiff argues that trial Court correctly found McRech vicariously liable for sexual harassment, Plaintiff noticeably cannot point to anywhere in the record on May 13, 2024, where the trial judge made the requisite findings to hold McRech vicariously liable under NJLAD. Lehmann v. Toys 'R' Us, 132 N.J. 587 (1993). If an employer has exercised due care in acting to prevent a sexually hostile work environment, vicarious liability should not attach. Gaines v. Bellino, 173 N.J. 301, 302 (2002). Instead, a reading to the trial judge's ruling makes it clear, after finding the alleged incident of sexual harassment occurred, McRech was found strictly liable without any consideration of the relevant facts. (T7) Similarly, Plaintiff repeatedly argues and points to the trial judge's statement that the sexual harassment continued when Plaintiff testified that she had no discussions with Mr. Escobar from the date of the alleged incident until August 21, 2017 (T5, 139:4-11) and Plaintiff does not claim that Mr. Escobar ever touched her

again. (T5, 141:15-21) Indeed, Plaintiff's arguments that the trial judge found that "there was no effort to do anything to help" Plaintiff and Defendant allowed the conduct to continue and go unpunished (Pb25) illustrates that the trial judge's findings are not supported by adequate, substantial and credible evidence and should be reversed. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). The trial court's findings conflict with and differ from the Plaintiff's trial testimony.

While Plaintiff continues to argue as they did below that because Plaintiff referred to Mr. Escobar as her supervisor, he was her supervisor, the trial court never made any analysis or determination that Mr. Escobar was Plaintiff's supervisor under the law. (T7) In fact, while Plaintiff misstates her testimony (Pb24)[3] in order to argue Mr. Escobar was her supervisor. Plaintiff clearly testified that she and Mr. Escobar were managers of equal level and he did not hire her or control her daily activities as required by Lehmann, supra, 132 N.J. at 620 and notwithstanding her "belief" that Mr. Escovar could fire her if Mr. Metelo was not there, no one told her that. (T5, 103:17-24, 104:11-105:17). The record clearly shows that Mr. Escobar was not Plaintiff's supervisor.

[3] Plaintiff repeatedly throughout its brief cites to the record and case law and intentionally misstates same. For example, Pb24 Plaintiff cites to her testimony claiming that she stated that Mr. Escobar was "higher in the chain of command" when in fact Plaintiff testified they were equals as managers of different departments. (T5, 103:17-24)

In addition, to failing to find that McRech delegated authority to Mr. Escobar over Plaintiff, The trial court also failed find that McRech knew or should have known of the harassment and failed to take effective remedial measures. (T7) There was no such evidence in the trial record. Plaintiff testified that Mr. Escobar never touched her again. (T5, 141:15-21) Nor, did the trial court make any findings that McRech was negligent. (T7) The record demonstrated that McRech had in place a well publicized and enforced Anti-harassment policy, it had both a formal and informal complaint structure, training on its policy and had in place monitoring mechanisms.

The court's findings that Mr. Armstrong conducted a "flawed investigation" does not result in vicarious liability against McRech. See Ryczek v. Guest Servs. Inc., 877 F. Supp. 754, 759 (D.D.C. 1995) ("Even if the investigation was not handled perfectly, the plaintiff has presented no evidence to suggest that the employer did anything that would have allowed any harassment to continue.")

The trial court ignored the facts and instead contrary to the law applied strict liability to hold McRech liable because it believed that Mr. Armstrong did a bad investigation. (T7, pgs. 26-28) Accordingly, the trial court's decision should be reversed.

IV. THE TRIAL COURT FAILED TO MAKE A FINDING ON DEFENDANT'S DEFENSE UNDER AGUAS. (T7)

While Plaintiff does not dispute that the trial judge in its opinion on May 10, 2024 (T7) did not address or make any findings under Aguas v. State, 220 N.J. 494 (2015). The establishment of an effective anti-sexual harassment workplace policy and complaint mechanism evidences an employer's due care and may provide affirmative protection from vicarious liability. Gaines v. Bellino, 173 N.J. 301, 302 (2002) Plaintiff instead misstates (in bold type no less) the principals in Aguas and argues that in order to prevail under Aguas, Defendant was required to perform "an adequate investigation". (Pb23). Aguas did not include any requirement that an employer conduct any investigation, let alone as Plaintiff claims an "adequate" investigation.

Under Aguas, if no tangible employment action has been taken against the plaintiff, as is the case here, the defendant employer may assert the two-pronged affirmative defense of Ellerth and Faragher. To establish that defense, the defendant employer has the burden to prove, by a preponderance of the evidence, both prongs of the affirmative defense: first, that the employer exercised reasonable care to prevent and to correct promptly sexually harassing behavior; and second, that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. See Faragher, 524 U.S. at 807, 118 S. Ct. at 2293, 141 L. Ed. 2d at 689; Ellerth, supra, 524 U.S. at 746, 118 S. Ct. at 2262, 141 L. Ed. 2d at 644. The

employee may rebut the elements of the affirmative defense. Id. at 524. Here, the trial court failed to consider McRech's affirmative defense under Aguas and instead held McRech strictly liable for Escobar's conduct. The Court's disagreement with McRech's decision to not fire Mr. Escobar when there were no subsequent acts of sexual harassment does not result in legal liability to McRech. (T7, 27:4-5) Indeed, the employer's chosen discipline to the alleged offender is not even a consideration as to the employer's liability. Knabe v. Boury Corp., 114 F.3d 407 (3d Cir. 1997).

The evidence showed that McRech had in place a well-publicized and enforced Anti-harassment policy, it had both a formal and informal complaint structure, training on its policy and had in place monitoring mechanisms and Plaintiff had no further complaints of alleged sexual harassment. (T5, 141:15-21) The trial court ignored the facts, failed to rule on McRech's affirmative defense and instead contrary to the law applied strict liability to hold McRech liable. (T7, pgs. 26-28) Accordingly, the trial court's decision should be reversed.

V. THE COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT PLAINTIFF WAS RETALIATED AGAINST FOR MAKING THE SEXUAL HARASSMENT COMPLAINT (T7, 27:6-28-3).

While Plaintiff correctly identifies that law that is to be applied to retaliation claims and claims that the court properly applied the law, Plaintiff cannot point to anywhere in the May 10, 2024 transcript evidencing the

court did so. Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 430 (App. Div. 2005). Notably, while Plaintiff argues that many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct, the Plaintiff fails to cite to any analysis by the trial court making the finding in this case. Green v. Jersey City Bd. of Educ., 177 N.J. 434, 437 (2003).

The trial court stated that because Mr. Escobar stated that the Plaintiff was dressed in appropriately retaliation occurred. (T7, 28:3-11) Because the Court barred Mr. Escobar from testifying because he would not voluntarily agree to be deposed days before trial, Mr. Escobar was unable to dispute Plaintiff's claim that he gave her the middle finger. (T7, 27:6-14)[4] The facts in this case are not comparable to the cases cited by Plaintiff in support of her retaliation claim. The facts found by the Court do not support a finding of retaliation under the law and accordingly, the judgement should be reversed.

VI. THE COURT ERRED IN AWARDING PLAINTIFF LOST WAGES. (T7, 28:12-19)

The Plaintiff quit. As a result, if entitled to lost wages, it would only be upon proof of constructive discharge. The trial court never made any finding of

[4] Plaintiff's arguments are not based on the trial record. Plaintiff is arguing from documents not admitted into evidence were not part of the trial record. Moreover, the events Plaintiff was not even aware of the alleged events and no action was taken by the employer against Plaintiff.

constructive discharge. Plaintiff continues to point to the Court's unsupported statement that there was no effort help Plaintiff and the sexual harassment continued and went unpunished. (T7, 27:4-5) However, this statement by the court, as noted above is not supported by adequate, substantial credible evidence. Plaintiff testified that she had no discussions with Mr. Escobar from the date of the alleged incident until August 21, 2017 (T5, 139:4-11) and Plaintiff does not claim that Mr. Escobar ever touched her again. (T5, 141:15-21).

Moreover, here again, Plaintiff misrepresents the record. The trial court made the statement in determining that there was a "hostile work environment" not in connection with the Plaintiff quitting her job or her lost wage claim. (T7, 26:23-27-5) The record from May 10, 2024 demonstrates clearly that the trial court never considered, let alone determined whether or not the Plaintiff was constructively discharged. (T7)

Furthermore, the lost wages awarded by the trial court was based on the trial court's erroneous finding that "it took her 22 weeks to find another job. She had another week in which she stopped that she – in between find – when left one job to another." (T7, 28:12-19) Plaintiff fails to acknowledge the Court's erroneous factual finding and instead attempts to distract this court with mitigation arguments.

Plaintiff testified that after quitting her job at McRech, Inc., Plaintiff became immediately employed by RK Chevrolet, and was then fired on January 2, 2018 because they had different management styles. (T5, 16:19-25, 17:1-6, 153:15-155:22, 155:23-25, 156:1-3) If an employee suffers a "willful loss of earnings," however, the employer's backpay liability is tolled. N.L.R.B. v. Ryder System Inc., 983 F.2d 705, 712 (6th Cir. 1993). An employee's discharge for cause due to his willful violation of company rules will toll backpay. Brady v. Thurston Motor Lines, Inc. 753 F.2d 1269 (4th Cir. 1985). Plaintiff was terminated by RK Chevrolet for cause and thus was not entitled to wage loss claim that occurred after her subsequent employment.

Moreover, Defendants were prejudiced because Plaintiff never identified any wage loss claim in discovery and the trial court allowed Plaintiff to blind side Defendants with this new claim raised at trial. Moreover, Plaintiff had testified in July 2019 that she had no wage loss. (T5, 169:4-170:1) furthermore, in response to interrogatories, Plaintiff failed to identify any wage loss. (T5, 170:13-171:177-8) The continuing obligation to disclose or update material changes in discovery responses is well established and not refuted by defendants. See, *e.g.*, McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 370-72 (2001); Amaru v. Stratton, 209 N.J. Super. 1, 11 (App. Div. 1985). Yet, Plaintiff cannot provide any reasonable explanation as to why the lost wage claim was not disclosed in

discovery, instead, Plaintiff merely argues that the trial court was correct in not barring the wage loss claim as a result of Plaintiff's failure to provide discovery.

Notably, the prior trial judge recognized Defendants need for tax returns when on April 29, 2016 it Ordered Plaintiff to turn over her tax returns and W-2's or be barred from seeking lost wages at the time of trial.(a42) Plaintiff only produced W-2's through 2017, but then based solely on her testimony at trial claimed that she sustained a wage loss in 2018 after being terminated from her subsequent employer. Plaintiff never identified any wage loss in discovery, prejudicing Defendant. The Court erred as a matter of law in allowing Plaintiff to make the wage loss claim without producing tax returns and W2's and never disclosing any wage loss claim in discovery and then finding that Defendants failed to put up any defense to a wage loss claim that was never disclosed. (T7, 28, 12-15)[5]

VII. THE AMOUNT OF ATTORNEY'S FEES, COSTS AND ENHANCEMENT AWARDED PLAINTIFF WERE UNREASONABLE. (T8, 22:23-23:6, a628)

The Plaintiff initially argues that the trial court's award for attorney's fees was reasonable because contrary to the record Plaintiff succeeded on all claims, including its claims against Mr. Armstrong. Of course, Plaintiff fails to explain

[5] In making these arguments, Plaintiff again relies upon deposition testimony that was not entered as evidence and was not part of the trial record.

how this argument is consistent with Plaintiff's argument that she did not obtain a judgment against Mr. Armstong. The arguments and positions taken by Plaintiff cannot be reconciled.[6] Contrary to Plaintiff's argument, as set forth in Defendant's appellate brief, Plaintiff did not succeed on all claims brought to trial. Apparently, Plaintiff would also have this court believe that Plaintiff obtained a judgement on the "assault claim" and the punitive damages claim, when the record demonstrates otherwise. (T7)

Moreover, the trial court failed to follow Rendine v. Pantzer, 141 N.J. 292 (1995) and identify what attorney's hours were excluded that were not reasonably expended. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Further, the court can reduce the hours claimed by the number of hours spent litigating claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed. The court also can deduct hours when the fee petition inadequately documents the hours claimed. From the Court's order and opinion, there is no way for this court to evaluate how the trial court arrived at the fee award. (T8, a628).

Here, the record fails to identify the lodestar and how it was determined. The record also fails to provide an explanation as to how the court calculated the

[6] Plaintiff also argues in a footnote, without any evidence that Defendants Metelo and Escobar evaded service, the record shows Plaintiff never attempted to effectuate proper service, even after the dismissal for lack of prosecution even though Defendants provided their last known address.

lodestar enhancement. Moreover, the Plaintiff ignores that it never produced a contingent fee agreement to support a loadstar enhancement and provides no explanation for its failure than as it stated to the trial court: "we don't want defense counsel to see our agreement." (T8, 21:7-11) This conduct is questionable at best. If Plaintiff's counsel did in fact have a contingent fee agreement with Plaintiff why was is not produced? Why did Plaintiff's counsel not want Defendants' counsel to see the agreement that they were relying upon to obtain an enhancement? The inference is because there was not a contingent fee agreement or there was something in the agreement that would negate and enhancement.

Plaintiff argues that reasonableness of the attorney's fee award based on other cases. Rendine makes it clear that the reasonableness of the fees is based on the work required. If the specific circumstances incidental to a counsel-fee application demonstrate that the hours expended, taking into account the damages prospectively recoverable, the interests to be vindicated, and the underlying statutory objectives, exceed those that competent counsel reasonably would have expended to achieve a comparable result, a trial court may exercise its discretion to exclude excessive hours from the lodestar calculation. Rendine, 141 N.J. at 298.

While Plaintiff does not dispute that there were multiple attorneys that billed on the file, Plaintiff attempts to explain this by the length of the case. That

explanation does not explain the fact that multiple attorney's billed for the same tasks.

While Plaintiff argues that the trial court made the appropriate analysis the record reflects otherwise. The trial court failed to identify what time was reasonable and what time was stricken as required under Rendine. This Court and Defendants are left to guess at how the trial court arrived at the fee award. Accordingly, this court should reverse the trial court decision.

VIII. COURT ERRED BY ORDERING DEPOSITIONS OF METELO AND ESCOBAR AND PREJUDICED DEFENDANTS. (T2, 16:16-17:10, T3, 4:1-4)

The contradictions in Plaintiff's positions are extraordinary. Plaintiff claims that she was entitled to a wage loss claim although she never identified a wage loss in discovery, but Defendants should not have been permitted to produce witnesses at trial that they had no control over, but were identified in discovery because after discovery ended Defendants did not provide Plaintiff with the witnesses new addresses. Notably, Plaintiff do not claim, nor did they even attempt to subpoena Mr. Escobar or Mr. Metelo at their prior addresses for trial, nor did Plaintiff attempt to take Mr. Metelo's or Mr. Escobar's depositions during discovery. What was fair for the goose in this case, was not fair for the gander.

Instead, as the court noted, Plaintiff knowing full well that Defendants had no control over Mr. Metolo or Mr. Escobar sent a trial notice to Defendants counsel. (Pb47) The court could not, but did order Defendants to produce for depositions witnesses over whom it had no control over and if not produced, barred the witness from testifying, prejudicing Defendants. Plaintiff's argument that this was a discovery issue is not supported by the record. The Court barred a witness from testifying, i.e. Mr. Escobar and then based its decision on Mr. Escobar's failure to appear and refute the Plaintiff's testimony. (T7, 27:18-20). Plaintiff appears to intentionally miss the point, the Court ordering Defendant to produce a witness for a deposition over it had no control that resulted in the witness not appearing and in fact being barred from testifying at trial is the error which caused prejudice to Defendants. Plaintiff's argument that Mr. Escobar was not barred is contradicted by the record. (T3, pgs. 3-7). Had the court allowed the trial to proceed without compelling Defendant to produce for a deposition a witness over whom it had no control, as was made clear to the trial court, Mr. Escobar would have appeared. Accordingly, the trial court's decision should be reversed.

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By: */s/ Laura D. Ruccolo*
Laura D. Ruccolo

March 21, 2025