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LETTER BRIEF ON BEHALF OF PETITIONER-RESPONDENT, GIUSEPPE AMATO SUBMITTED IN OPPOSITION TO RESPONDENT-MOVANT, TWP. OF OCEAN SCHOOL DISTRICT'S MOTION FOR LEAVE TO APPEAL

Honorable Chief Justice & Associate Justices Of The Supreme Court of New Jersey Richard J. Hughes Justice Complex Trenton, N.J. 08625-0970

Re: Giuseppe Amato, Petitioner-Respondent v. Township of Ocean School District, Respondent-Movant

Appellate Division Docket No.: A-2543-23

Civil Action: On Motion for Leave to Appeal from an Order of the

Superior Court of New Jersey, Appellate Division

Sat Below: Hon. Lisa A. Puglisi, J.A.D., Hon. Lisa Rose, J.A.D., Hon.

Patrick DeAlmeida, J.A.D.

Dear Honorable Chief Justice and Associate Justices:

Please accept this Letter-Brief, on behalf of Petitioner-Respondent, Giuseppe Amato, submitted in opposition to Respondent-Movant, Township of Ocean School District's Motion for Leave to Appeal from the Appellate Division Opinion, dated November 25, 2024.

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#### PRELIMINARY STATEMENT

This Brief is submitted in opposition to the Motion for Leave to Appeal from an interlocutory opinion of the Appellate Division that was filed by the Township of Ocean School District (hereinafter referred to as "Respondent-Movant" or "Respondent"). It is submitted on behalf of Petitioner, who is the spouse of Decedent, a 43-year old, wife and mother of two young sons at the time of her death. First and foremost, Respondent's Motion for Leave should be denied because it does not meet the standard set forth in N.J. Court Rule 2:2-2(a), which states that appeals to the N.J. Supreme Court from interlocutory orders of the Appellate Division require the necessity of prevention of "irreparable injury." This matter is currently in the litigation stage before the workers' compensation judge and is waiting for the trial date to be scheduled. At that time, Respondent will be able to present arguments to rebut the presumption that the Decedent contracted COVID-19 at work, as per the Appellate Division decision below.

## **Background Information**

The COVID-19 virus was raging in New Jersey during the COVID State of Emergency from March 9, 2020, through June 4, 2021. Thousands of New Jerseyans were seriously sickened and many of those, including the Petitioner's Decedent, died. During the State of Emergency, New Jersey needed "essential workers" to report to work to secure "the public's health, safety and welfare." Decedent, a

schoolteacher, was one such "essential employee" who was summoned back for in person instruction by N.J. Executive Order 175, known as the "School Reopening Plan." The Appellate Division affirmed the Judge of Workers' Compensation Court's ruling that Decedent was an "essential employee" pursuant to the statute (N.J.S.A. 34:15-31.11), during the period of claimed occupational exposure of January 2021 to Decedent's COVID-related death on May 18, 2021. The App. Div. found, among other things, that the judge's decision "turned on statutory interpretation and analysis of public documents." (App. Div. Opinion at Rra14).

To protect the "essential workers" summoned to work during the COVID State of Emergency, New Jersey passed N.J.S.A. 34:15-31 (the "Presumption Statute"). This Statute identified classes of workers who were entitled to a presumption of causal relationship if they contracted COVID-19 during the period of the State of Emergency delineated by N.J. Executive Orders. The fact that a given individual fell into a "class" or had a "status" as an essential worker did not relieve them of the duty to prove that they actually contracted COVID-19 during the period of the State of Emergency and did not relieve them of the duty to prove that the infection caused permanent injury, or in this case, death. N.J.S.A. 34:15-31.

In making its determination that Petitioner's Decedent had the requisite status as an essential worker, the Appellate Division found that the workers' compensation judge correctly determined that teachers should be considered essential employees

under the statute, even though the statute did not specifically list them. The Appellate Division agreed with the workers' compensation judge that teachers were essential employees because section (4) of the statute extended the definition of essential employees to include "any other employee deemed an essential employee by the public authority declaring the state of emergency."

In sum, the statute relieved "essential workers" who contracted COVID during the State of Emergency from having to prove that their COVID infection was causally related to their work and most importantly, the Presumption Statute relieved "essential workers" from having to eliminate every possible vector of the virus that could have caused their infection as part of their prima facie case. The remedial legislation shifted the burden as to causal relationship to their employer. In a rational analysis, it would be well-nigh impossible for any essential worker to prove the specific viral vector came from the workplace as opposed to every other possible contact in the essential worker's life. Even after the "essential worker" finding was affirmed by the App. Div., Petitioner still needs to prove that Decedent: 1) contracted the virus during the claimed occupational exposure period (Jan. 2021 through her passing on May 18, 2021); and 2) that the COVID-19 virus was a material cause of her death. The statutory presumption is rebuttable and the Respondent has the right to prove by a preponderance of the evidence that Decedent "was not exposed to the disease while working in the place of employment . . . ." N.J.S.A. 34:15-31-12.

#### PROCEDUR AL HISTORY

Guiseppe Amato (hereinafter "Petitioner"), filed a Dependency Claim Petition on behalf of himself as surviving spouse and on behalf of their two young sons, Christian (then age 14) and Luca (then age 11). (See Claim Petition at Ra1-2.) <sup>1</sup> Respondent, the Township of Ocean School District, filed an Answer and admitted that Decedent was employed by the Respondent School District but denied that Decedent's occupational exposure to COVID occurred in the course of her employment. (Ra3).

Pre-trial discovery took place, expert reports were exchanged, and settlement negotiations were conducted, in which the Court was actively involved. In the workers' compensation court, Petitioner filed a Motion to declare Decedent as an "essential employee" under the presumption statute, N.J.S.A. 34:15-31.11 (Ra4-40), based on her status as a schoolteacher for Respondent during the claimed period of occupational exposure. In Respondent's filing and throughout all the proceedings, Decedent's status as a school teacher during that period has never been disputed or contested. (Ra41-47).

The names referring to the parties are consistent with their references in the Appellate Division Opinion. Respondent-Movant will be referred to as "Respondent" and Petitioner, Giuseppe Amato, will be referred to as "Petitioner." Additionally, Petitioner has followed the same designations of the documents as referenced in Respondent's appendices.

The Workers' Compensation Judge granted Petitioner's Motion, finding that Decedent was an essential employee. Respondent filed a Motion for Leave to File an Interlocutory Appeal of the Judge's decision and the Motion for Leave was granted by the Appellate Division on April 23, 2024. (Ra73). Respondent had also filed a Motion for Leave to the Appellate Division from the Order in which the Judge denied Respondent's recusal motion and leave was granted. (Ra71).

On November 25, 2024, after the matter had been fully briefed and oral argument held, the Appellate Division issued a consolidated opinion affirming both the denial of recusal and the essential employee decisions of the workers' compensation judge. (Rra1-17). Respondent has now filed an Interlocutory Motion for Leave to the N.J. Supreme Court on the essential employee decision. Respondent has not filed Leave to the Supreme Court on the recusal issue as of this writing. Petitioner submits this timely opposition to Respondent's Motion for Leave to Appeal.

### STATEMENT OF FACTS

The Spouse of Petitioner and the Mother to their two sons, Decedent, Denise Amato, was age 43 and a full-time schoolteacher at Respondent's middle school, when she passed away on May 18, 2021. (See Ra1). Decedent was required by Respondent to return to in-school instruction as part of the "school reopening plan" which went into effect in September 2020 for the 2020-2021 school year and this

reopening plan, directing in-school instruction, was implemented through Executive Order No. 175.

It is admitted in Respondent's Answer that Decedent was employed as a full-time, in-classroom teacher, during the January 2021 through May 2021 period of occupational exposure set forth in the Claim Petition. (Ra1). It is also undisputed that that the New Jersey COVID State of Emergency, which triggers the applicability of the COVID presumption, was in effect during the claimed period of occupational exposure. (Ibid.).

N.J.S.A. 34:15-31.11 granted a presumption of occupational causality as to COVID-19 contracted by "essential workers" during the aforesaid State of Emergency and it had been passed by the legislature and signed into law by Gov. Murphy on September 14, 2020, retroactive to March 9, 2020. (Executive Order 103, 52 N.J.R. 549(a)). The State of Emergency was not lifted until June 4, 2021, via Executive Order 244. 53 N.J.R. 1131(a). Thus, the N.J. COVID State of Emergency began on March 9, 2020, and concluded on June 4, 2021.

Respondent has admitted that Decedent was a full-time school teacher for the Respondent during the period of occupational exposure, i.e. January 2021, until her death on May 18, 2021, and the COVID State of Emergency was in effect during Decedent's period of occupational exposure. (Ra3). The balance of the essential employee motion before the workers' compensation court and the Appellate

Division involved statutory construction, evaluation of Executive Orders, and directives from the N.J. Department of Health, all properly the subject of judicial notice. There are no genuine issues of material fact in any of Respondent's submissions to the workers' compensation court, to the Appellate Division, and now to the N.J. Supreme Court.

#### **LEGAL ARGUMENT**

#### POINT I

RESPONDENT, TOWNSHIP OF OCEAN SCHOOL DISTRICT'S
MOTION FOR LEAVE FOR INTERLOCUTORY APPEAL TO THE
SUPREME COURT DOES NOT SATISFY THE STANDARD SET FORTH IN
COURT RULE 2:2-2(a) AND SHOULD BE DENIED

Pursuant to N.J. Court Rule 2:2-2(a) provides that appeals to the N.J. Supreme Court from interlocutory orders of the Appellate Division requires "the necessity of 'prevention of irreparable injury' which adequately expresses the immediacy and urgency which justify prompt Supreme Court Review." R. 2:2-2(a), Comments, para. #3. Although there are exceptions, typically irreparable harm consists of an injury that cannot be remedied by money damages or an eventual judgment on the merits.

A party does not have a right to appeal an interlocutory order. <u>Brundage v.</u> Estate of Carambio, 195 N.J. 575, 598-599 (2007). When leave is granted, "it is because there is the possibility of 'some grave damage of injustice' resulting from

the trial court's order." <u>Ibid.</u> (quoting <u>Romano v. Maglio</u>, 41 <u>N.J. Super.</u> 561, 567, certif. denied, 22 <u>N.J.</u> 574, cert. denied, 53 <u>U.S.</u> 93 (1957). In the present matter, there is no basis for the Respondent-Movant's Motion for Leave to Appeal the decision of the Appellate Division.

Showing irreparable harm is very stringent standard that applies to the New Jersey Supreme Court's review of interlocutory orders. *See* Brundage, *supra*, 195 N.J. at 599. "The rationale that supports this stringent standard may be found in our general policy against piecemeal review of trial-level proceedings." <u>Ibid.</u> (*citing* State v. Reiden, 100 N.J. 187 (1985). Respondent-Movant has not satisfied this standard.

Respondent argues, without citing any precedent, that all school districts in the State of New Jersey will suffer "irreparable injury if they must try cases involving teachers with COVID-19 . . .." (See Respondent's Brief, page 8). This is the first time Respondent made this argument. This argument was not made to the workers' compensation judge; nor was it made before the Appellate Division. Appellate courts generally will decline to consider issues not properly presented to the trial court with few exceptions. See, e.g. State v. Robinson, 200 N.J. 1 (2009). It is unfair and contrary to our rules to address new issues for the first time on appeal. See State v. Witt, 223 N.J. 409, 419 (2015). Thus, this argument is improper as well as being without merit, particularly in the setting of an interlocutory application.

In sum, Respondent's Motion for Leave of the Appellate Division decision does not satisfy the stringent standard required by <u>Court Rule</u> 2:2-2 of preventing irreparable harm. "Irreparable harm" is generally defined in equity as the type of harm "that cannot be redressed adequately by monetary damages." <u>Crowe v.</u> <u>DeGoia</u>, 90 <u>N.J.</u>, 126, 132-133 (1981). Respondent has not presented any facts or arguments to show the "immediacy and urgency" of Supreme Court review to prevent irreparable harm.

This matter is in its litigation stage and is currently waiting for the trial to be scheduled. At that time, Respondent will be able to present arguments to rebut the presumption that the Decedent contracted COVID-19 at work.

#### POINT II

THE APPELLATE DIVISION CORRECTLY FOUND
THAT THERE WERE NO MATERIAL FACTS IN DISPUTE AND THAT
DECEDENT, A TEACHER, WAS AN ESSENTIAL EMPLOYEE
PURSUANT TO N.J.S.A. 34:15-31.11

First and foremost, there are no material facts in dispute. As stated in Respondent's Brief, "Decedent was a full-time teacher in respondent's intermediate school. After ceasing in-person instruction because of the COVID-19 pandemic, the school reopened on February 8, 2021, and decedent returned to work. She became ill and died on May 18, 2021, of respiratory failure as a result of COVID-19." (Respondent Brief, page 2).

The Appellate Division noted that "review of workers' compensation cases is 'limited to whether the findings made could have been reached on sufficient credible evidence present in the record . . . with due regard to the agency's expertise[.]" (App. Div. Opinion at Rra10, *quoting* Hersh v. City of Morris, 217 N.J. 236, 242 (2014), other citations omitted). The Appellate Division added that "[n]onetheless, the judge of compensation's legal findings are not entitled to any deference and, thus, are reviewed de novo." (App. Div. Opinion at Rra11, *quoting* Hersch, *supra*, at 243.

Using this applicable standard of review, the Appellate Division affirmed the compensation judge's determination that even though the "presumption statute" did not specifically list teachers as essential employees, the statute did encompass "any other employee the governing authority deemed essential." (App. Div. Opinion at Rra14). In its affirmance, the Appellate Division relied on the statute, facts and documents that were before the workers' compensation judge:

- N.J.S.A. 34:15-31.11: which defines an essential employee as an employee in the public or private sector who during a state of emergency:
  - (1) is a public safety worker or first responder, including any fire, police or other emergency responders;
  - (2) is involved in providing medical and other healthcare services, emergency transportation, social services, and other care services provided in health care facilities, residential facilities, or homes;
  - (3) performs functions which involve physical proximity to members off the public and are essential to the public's health,

safety and welfare, including transportation services, hotel, and other residential services, and the production, preparation, storage, sale, and distribution of essential goods such as food, beverages, medicine, fuel and supplies for conducting essential business and work at home; or

(4) is any other employee deemed an essential employee by the public authority declaring the state of emergency.

An employee who is an employee of the State who is offered the option of working at home but has refused that option shall not be regarded as an essential employee.

[N.J.S.A. 34:15-31.11; App. Div. Opinion at Rra11-12.]

- Executive Order 103 (dated March 9, 2020) issued by Gov. Murphy,
  declaring a public health emergency and state of emergency in N.J. as a
  result of the COVID-19 pandemic. (52 N.J.R. 549(a); App. Div. Opinion at
  Rra12).
- Executive Order 104 (dated March 16,2020) issued by Gov. Murphy, closing all schools. (52 N.J.R. 550(a); App. Div. Opinion at Rra13).
- Executive Order 175 (dated August 13, 2020) issued by Governor Murphy, which superseded the prior Executive Orders, allowing schools to reopen for in-person instruction subject to health and safety protocols. (52 N.J.R. 1699(a); App. Div. Opinion at Rra13).

- Guidance on the Essential Critical Infrastructure Workforce Ensuring
  Community and National Resilience in COVID-19 Response (dated August 18, 2020) issued by the Cybersecurity and Infrastructure Security Agency
  (CISA), an agency of the U.S. Dept. of Homeland Security, providing guidance of who should be considered essential employees and including kindergarten through twelfth grade teachers in the list (these essential employees guidelines were adopted by the OEM). (App. Div. Opinion at Rra13).
- Dept. of Health's COVID-19 Vaccination Plan (dated October 16, 2020)
   which identified "education and child care workers" as essential employees.
   (App. Div. Opinion at Rra14).
- Executive Order 244 (dated Jue 4, 2021) issued by Gov. Murphy, ending the COVID State of Emergency. (53 N.J.R. 1131 (a); App. Div. Opinion at RRa14).

The Appellate Division disagreed with Respondent's narrow reading of the statute and found that even though the statute did not specifically identify teachers as essential employees, it "encompassed any other employee the governing authority deemed essential." (Rra14). Relying on the statute and information provided above, the Appellate Division affirmed the compensation judge's decision that Petitioner's

decedent was an essential employee. (Appellate Division Opinion at Rra 15). The Appellate Division added that "[t]his determination is further buttressed by EO [Executive Order] 175, which permitted the reopening of schools because 'in-person instruction provides students with academic, social, emotional, and mental health supports that cannot be provided with the same level of efficacy in a remote setting'" and "is critical in facilitating the social and emotional health of students." (Appellate Division Opinion at Rra15).

As correctly found by the Appellate Division, it would seem axiomatic that a public school teacher, who was required to return to in-school instruction by virtue of an Executive Order during a raging pandemic, would be performing a function "which involve[d] physical proximity to members of the public and [was] essential to the public's health, safety and welfare." N.J.S.A. 34:15-31-11.

The ruling by the Judge of Workers' Compensation, as affirmed by the Appellate Division, only allows Petitioner the presumption as to causal relationship to Decedent's employment and Petitioner still must prove through competent medical evidence the other prongs of the *prima facie* case. It relieves the essential employee from having the burden at trial to exclude every other possible vector of this virus and shifts the burden to Respondent.

#### POINT III

THE APPELLATE DIVISION CORRECTLY DETERMINED THAT THE COMPENSATION JUDGE'S DECISION "TURNED ON STATUTORY INTERPRETATION AND ANALYSIS OF PUBLIC DOCUMENTS"

The Appellate Division was "unpersuaded by respondent's arguments" that Petitioner's Motion before the compensation judge lacked any competent evidentiary materials because no evidence or affidavits other than the attorney's certification was provided and because there was no statement of material facts. (Appellate Division Opinion at Rra 15 & 16). The Appellate Division held that "a party to a workers' compensation dispute may obtain 'a declaration of rights' pursuant to the Declaratory Judgment Act (DJA), N.J.S.A. 2A:16-50 to -62." As found by the Appellate Division, personal affidavits "were not necessary to decide whether decedent was an essential employee because there was no disagreement she was a full-time teacher in respondent's school district and the issue was not determined on facts specific to decedent." (Appellate Division Opinion Rra16).

As stated above, the issue regarding the essential employee determination was correctly based on the statutory interpretation and analysis of public documents.

(Appellate Division Opinion at Rra17).

#### **CONCLUSION**

Respondent's Motion for Leave to Appeal from the Appellate Division Decision should be denied. There is no irreparable injury which requires the immediacy and urgency of prompt Supreme Court Review as set forth in R. 2:2-2(a), Additionally, the Appellate Division correctly determined that Decedent, a teacher, was an essential employee under the statute.

Respectfully,

MARTIN MELODY, LLC.

Eugene J. Melody, Esq.

#### **CERTIFICATION**

- Confidential Information/ Confidential Personal Identifiers. I certify that I
  have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and this document or
  pleading does not contain any confidential information or any confidential
  personal identifiers.
- 2. Return and Resubmission. I certify that if any confidential information is discovered in this submission and brought to the court's attention, the court will return the document or pleading to me, and I will be responsible to redact or anonymize the confidential information before resubmission. I understand the court my impose sanctions, including suppression of the brief, dismissal in extraordinary cases, and other measures for a failure to accurately make this certification or for the discovery of confidential information in a document that has been filed.
- 3. <u>Briefs Posted Online</u>. I understand that the presence of confidential information or confidential personal identifiers in a document that has been posted on the Judiciary's public website will be grounds for the removal of such online posting, pending correction by the filing party, on an expedited timeline. The court in its discretion may postpone further proceedings ending the resubmission of the document.

Dated: December 16, 2024