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December 31, 2024

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On the Letter-Brief

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*AMENDED LETTER-BRIEF ON BEHALF OF RESPONDENT-MOVANT,  
TOWNSHIP OF OCEAN SCHOOL DISTRICT*

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Honorable Chief Justice and Associate Justices of the  
Supreme Court of New Jersey  
Richard J. Hughes Justice Complex  
Trenton, NJ 08625-0970

Re: Giuseppe Amato (Petitioner-Respondent) v. Township of Ocean School  
District (Respondent-Movant)  
Appellate Docket No.: A-2543-23  
Supreme Court Docket No.: 090133

Civil Action: On Motion for Leave to Appeal from an Order of the  
Superior Court of New Jersey, Appellate Division

Sat Below: Honorable Lisa A. Puglisi, J.A.D.  
Honorable Lisa Rose, J.A.D.  
Honorable Patrick DeAlmeida, J.A.D.

Honorable Chief Justice and Associate Justices:

Kindly accept this Letter-Brief on behalf of respondent-movant,  
Township of Ocean School District, in support of its motion for leave to appeal  
from the November 25, 2024 Opinion of the Appellate Division.

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### PRELIMINARY STATEMENT

This is a motion for leave to appeal from an Appellate Division Opinion, which affirmed an Order from the Division of Workers Compensation, in which the petitioner decedent was declared to be an essential employee under N.J.S.A. 34:15-31 during an alleged period of occupational exposure.

Petitioner filed a dependency claim petition against respondent, alleging that his wife suffered COVID-19 in the course of her employment as a teacher employed by respondent, which caused her death. Petitioner moved to declare the decedent to be an essential employee as defined by N.J.S.A. 34:15-31.11.

The clear language of N.J.S.A. 34:15-31.11 does not identify teachers and other educational employees as essential employees. Furthermore, these employees are not deemed to be essential employees anywhere in the legislative history that lead to the enactment of the statute because there was no need to include teachers in the definition of essential employees because after the initial shutdown during the COVID-19 pandemic, schools were closed and learning occurred virtually.

The Judge of Compensation declared the decedent to be an essential employee based on nothing but petitioner's attorney's certification and legal argument, despite the existence of genuine issues of material fact. The Judge of Compensation concluded that teachers fall within the definition of essential



employees and that this teacher, the decedent, would be declared to be an essential employee.

The Judge of Compensation therefore erred procedurally and substantively by summarily declaring the decedent to be an essential employee.

The Appellate Division found that teachers fall within the definition of essential employees, and that the Judge of Compensation did not abuse her discretion by granting petitioner's motion even in the absence of any statement of material facts that would be required under the summary judgment standard required by the Court Rules.

For the reasons that follow, it is respectfully submitted that respondent should be granted leave to appeal.

### PROCEDURAL HISTORY

On August 6, 2021, petitioner, Giuseppe Amato, filed a Dependency Claim Petition against respondent, Township of Ocean School District, alleging that his wife, Denise Amato, suffered an occupational disease when she was exposed to COVID-19 in the course of her employment with respondent that resulted in her death. (Ra1-2).<sup>1</sup> On September 8, 2021, respondent filed a Respondent's Answer to Dependency Claim Petition, admitting that the decedent was employed by respondent, but denying that her exposure occurred in the course of her employment. (Ra3).

Petitioner filed a Notice of Motion for Essential Worker Presumption seeking to declare the decedent to be an essential employee and entitled to the presumption set forth in N.J.S.A. 34:15-31.11 on November 4, 2021. (Ra4-40). Respondent filed an Answer to Motion for Essential Worker Presumption in opposition to petitioner's motion on December 13, 2021. (Ra41-43). On May 4, 2022, respondent filed an Answer to Motion Supplemental Pleading also in opposition to that motion. (Ra44-47).

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"Rra" refers to appendix to this letter-brief.

"Ra" refers to the appendices filed by respondent on June 7, 2024 in the Appellate Division in the underlying appeal.

"1T" refers to February 21, 2024 motion transcript.

"2T" refers to March 14, 2024 motion transcript.

Respondent filed a Notice of Motion to Recuse Judge Joann Downey on January 24, 2024. (Ra48-61). Petitioner filed an Answer to Motion to Oppose Respondent's Recusal on January 25, 2024. (Ra62-65). After oral argument on February 21, 2024, the Honorable Joann Downey, J.W.C., of the State of New Jersey Department of Workforce Development, Division of Workers Compensation, Freehold Vicinage, denied respondent's motion. (1T12-22 to 1T22-17, Ra66). Respondent moved to stay that Order. (1T33-20-25, 1T36-1 to 1T37-7). On March 14, 2024, Judge Downey denied respondent's motion to stay the Order denying recusal. (2T1-15 to 2T6-12, Ra67).

On March 14, 2024, after oral argument, Judge Downey granted petitioner's motion to declare the decedent to be an essential employee, and entered an Order on that date. (2T71-2 to 2T94-25, Ra68). Respondent moved to stay that Order. (2T94-3 to 2T96-9). Judge Downey denied respondent's motion for a stay. (2T96-10 to 2T97-21, Ra69).

Respondent filed a Notice of Motion for Leave to Appeal from the February 21, 2024 Order denying respondent's motion to recuse the Judge of Compensation on April 2, 2024. (Ra70). Leave to appeal was granted in an Order that was filed on April 23, 2024. (Ra71).

Respondent filed a Notice of Motion for Leave to Appeal from the March 14, 2024 Order declaring the decedent to be an essential worker on



April 3, 2024. (Ra72). Leave to appeal was granted in an Order that was filed on April 23, 2024. (Ra73).

Petitioner filed a Notice of Motion for Judgment on Liability on April 4, 2024, which remains pending as of this filing. (Ra74-75).

The appeal from the Order declaring the petitioner decedent to be an essential employee (Docket No. A-2543-23) was consolidated with the appeal denying the motion for recusal (Docket No. A-2542-23) for oral argument before the Appellate Division on October 17, 2024.

On November 25, 2024, the Appellate Division affirmed the Orders below in an Opinion that has been approved for publication. (Rra1-17).

#### STATEMENT OF FACTS

Petitioner's wife was employed by respondent as a teacher during the time period of January 2021 to May 18, 2021. (Ra1). Respondent disputes that petitioner contracted COVID-19 in the course of her employment with respondent. (Ra3).

Petitioner moved to declare the decedent to be an essential employee entitled to the presumption of compensability set forth in N.J.S.A. 34:15-31. (Ra4-5). (2T55-12 to 2T60-24). Petitioner's moving papers did not include any affidavit or certification from anyone having personal knowledge of the facts of this case, and did not include any competent evidentiary materials at

all. (Ra6-40). Instead, petitioner submitted a certification from his attorney that contained conclusory allegations, a copy of Executive Order No. 103 signed by Governor Philip D. Murphy, a one-page document labeled, "Essential Employees," which is guidance promulgated by the Cybersecurity and Infrastructure Agency, an Advisory Memorandum, and a CISA Memorandum. (2T55-12 to 2T60-24, Ra61-15 to Ra69-13, Ra6-40).

Petitioner did not provide any evidence that the decedent should be considered to be an essential employee or that teachers, in general, should be considered to be essential employees. (Ra61-15 to Ra69-13).



## LEGAL ARGUMENT

### POINT I

RESPONDENT SHOULD BE GRANTED LEAVE TO APPEAL TO AVOID IRREPARABLE INJURY THAT IT WILL SUFFER AND THAT ALL OTHER SCHOOL DISTRICTS WILL SUFFER IF TEACHERS ARE ERRONEOUSLY TREATED AS ESSENTIAL EMPLOYEES.

The Court should grant leave to appeal under R. 2:2-2(a) to prevent irreparable harm that this respondent will suffer and that all other school districts in the State of New Jersey will suffer if the Appellate Division Opinion stands, and erroneously brings teachers within the definition of essential employees under N.J.S.A. 34:15-31.11.

This statute is often referred to as the "Presumption Statute" because it entitles an essential employee to a rebuttable presumption that if the employee contracted COVID-19, it was related to employment. The Presumption Statute therefore shifts the burden of proof to a respondent in a worker's compensation matter to provide proof to rebut the presumption that the employee contracted COVID-19 at work.

The Appellate Division Opinion below has been approved for publication, and is the only published decision that includes teachers in the definition of essential employees. For the reasons that follow in Point II, infra,

teachers are not essential employees and should not be entitled to a rebuttable presumption of compensability when they have contracted COVID-19.

This respondent and all school districts in the State of New Jersey will suffer irreparable injury if they must try cases involving teachers with COVID-19 with the rebuttable presumption of compensability only to have to retry those same cases if this Court does not address this issue until it is presented to this Court on certification from a final order. This is precisely the type of broad policy issue that warrants leave to appeal to prevent irreparable injury under R. 2:2-2(a).

## POINT II

PETITIONER WAS NOT ENTITLED TO A FINDING THAT  
THE DECEDENT OR TEACHERS IN GENERAL ARE  
ESSENTIAL EMPLOYEES.

(November 25, 2024 Appellate Division Opinion, pp. 10-17,  
Rra10-17)

Petitioner was not entitled to a finding that the decedent was an essential employee within the definition of N.J.S.A. 34:15-31.11. The statute 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,

including services provided in health care facilities, residential facilities, or homes;

(3) performs functions which involve physical proximity to members of the public and are essential to the public's health, safety, and welfare, including transportation services, hotel and other residential services, financial 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. 34:15-31.12 then provides for the following rebuttable presumption:

If, during the public health emergency declared by an executive order of the Governor and any extension of the order, an individual contracts coronavirus disease 2019 during a time period in which the individual is working in a place of employment other than the individual's own residence as a health care worker, public safety worker, or other essential employee, there shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable for the purposes of benefits provided under R.S.34:15-1 et seq., ordinary and accidental disability retirement, and any other benefits provided by law to individuals suffering injury or illness through the course of their employment. This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence.

Teachers are conspicuously omitted from the employees that are



identified as essential in N.J.S.A. 34:15-31.11 and 31.12. The statute was not intended to designate teachers to be essential employees for the simple fact that after the initial shutdown during the COVID-19 pandemic, schools were closed and learning occurred virtually. Thus, while teachers, and this decedent in particular, returned to work virtually during the relevant time period, they were not required to return to in-school instruction.

The Appellate Division affirmed the Judge of Compensation's finding that teachers are essential workers because:

section (4) [of the statute]...extends the definition of essential employees to include "any other employee deemed an essential employee by the public authority declaring the state of emergency." Thus, even if the statute did not identify teachers as essential employees, it nevertheless encompassed any other employee the governing authority deemed essential. Teachers were deemed essential employees through the Governor's delegation of the responsibility to protect the public to OEM [Office of Emergency Management] and OEM's adoption of CISA's [Cybersecurity and Infrastructure Security Agency's] list of essential employees, which included teachers.

This 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 support 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.' Exec. Order No. 175, 52 N.J.R. at 1699. As a result, of EO 175, schools reopened while there was still a public health emergency in place.

(November 25, 2024 Appellate Division Opinion, pp. 14-15, Rra14-15).

At the outset, the foregoing cited Executive Order and CISA guidance are only advisory and should not be dispositive on the question of whether teachers are essential employees. Under that rationale, it would be difficult to imagine any public employee that would not fall under the definition of an essential employee. Had the Legislature intended to include teachers in this definition, it would have named teachers among the other employees that are specifically named in the statute. Teachers therefore should not be included in the definition of essential employees under N.J.S.A. 34:15-31.11.

Section (3) requires an individual to perform functions which involve physical proximity to the public and are essential to the public's health, safety, and welfare to meet the definition of essential employee. The statute is written in the conjunctive. Both requirements must be met. Executive Order 175 states:

access to school buildings is not available to the general public and the individuals present in a school building do not vary from day to day, which creates a lesser risk of COVID-19 transmission than exists in spaces generally open to the public and makes contact tracing substantially easier in the event of an outbreak;"

Furthermore, this respondent was denied due process because the Judge of Compensation summarily granted petitioner's motion after relieving petitioner of the basic requirement to present affidavits from individuals with personal knowledge of the relevant facts. Regardless of whether the Judge of

Compensation treated the motion to declare the decedent an essential employee as an "other motion" under Workers Compensation Rule N.J.A.C. 12:235-3.5, or as a motion for summary judgment under R. 4:46-2, petitioner failed to satisfy his burden of proof.

If treated as an "other motion" under the Workers Compensation Rules, N.J.A.C. 12:235-3.5(b) required petitioner's motion to "be supported by affidavit made on personal knowledge setting forth facts which are admissible in evidence to which the affiant is competent to testify."

If treated as a motion for summary judgment, R. 4:46-2(a) required petitioner's motion to be supported by a statement of material facts, which "set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portion of exhibits relied on."

Petitioner did not provide any support for his motion for the Judge of Compensation to even consider the motion, regardless of which of the foregoing Rules applied. The question whether this decedent fell within the definition of N.J.S.A. 34:15-31.11(4) ("any other employee deemed an



essential employee by the public authority declaring the state of emergency") was a genuine issue in dispute. Since teachers are not specifically named in the statute, this petitioner would have to show that the decedent was entitled to this presumption as an "any other employee" based on the facts and circumstances pertaining to her employment, including but not limited to her duties, whether she was working remote or in person, and whether her specific school district deemed their full-time teachers to be essential employees.

If petitioner were among the employees whom are specifically named in the statute, these proofs would not be necessary. However, to bring decedent, a teacher, within the purview of the statute, petitioner would have to prove that the decedent was entitled to that presumption as an "any other employee" that satisfied the definition in section (4).

The foregoing Rules must be enforced to afford a respondent its basic right to due process, which includes the right to a full hearing to litigate the issue of whether the decedent in this case fell within the purview of the definition of essential employees under N.J.S.A. 34:15-31.11. Workers compensation claims proceed as summary proceedings. The parties are afforded limited discovery and limited rights to depositions. See N.J.A.C. 12:235-3.8 and 3.9.

To permit the finding below to stand based on a summary decision that did not even follow the basic requirements of the Workers Compensation Rules or the New Jersey Court Rules denied respondent its right to due process. Such a finding would also encourage motion practice in a field that is designed for summary hearings with little or no discovery.

Petitioner's "proofs" consisted of nothing more than his attorney's certification of conclusory allegations, a copy of Executive Order No. 103, a one-page document labeled, "Essential Employees," which is guidance promulgated by CISA, an Advisory Memorandum, and a CISA Memorandum, touching on workers that are essential to critical infrastructure. (Ra6-40).

Petitioner's motion papers did not establish that there are no disputed issues of material fact. Executive Order 103 does not state that a teacher is an essential employee. The "Essential Employees" document is from a federal agency that has no power to enact any statute or regulation that addresses the compensability of a New Jersey worker's compensation claim. The CISA Advisory Memorandum states that earlier versions were meant to assist officials and organizations identify essential work functions and to allow essential workers access to their workplace. However, allowing access to the workplace differs from conferring a presumption of compensability in the context of a worker's compensation claim. The CISA Memorandum is merely

guidance on the essential, critical infrastructure workforce, but certainly does not conclusively resolve the issue of whether a teacher is an essential worker. In fact, the document was dated August 18, 2020, which predates the passage of the Presumption Statute.

The Rules of Evidence may not be relaxed to the point of infringing on the parties' due process rights or other fundamental rights. In Paco v. American Leather Mfg. Co., 213 N.J. Super. 90, 97 (App. Div. 1986), the court explained that:

Our holding today is merely a recognition of a fundamental tenet of our Anglo-American system of justice that no court or administrative agency is so knowledgeable that they can make fair findings of fact without providing both sides the opportunity to be heard. Larson, supra, § 79.84 at 15–426.295–96. As previously indicated, this opportunity to be heard includes not only the right to cross-examine the adversary's witnesses but also the right to present witnesses to refute the adversary's evidence. See, id. § 279.63 at 15–426.206; General Chemical Division, supra, 47 Del. at 547, 94 A.2d at 601. Thus, due process in administrative hearings requires that both parties have the right to present oral testimony in critical areas. Larson, supra, § 79.11, 12.

Neither the trial court nor the Appellate Division addressed what is the appropriate standard the court must use in considering this motion. The Court, in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), established the standard in summary judgment motions requiring the trial court to view the proofs in the light most favorable to the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and



determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). It would stretch rationality to suggest that a litigant in an administrative proceeding where no dispositive document exists defining teachers as essential workers, where not one affidavit or certification from an individual with personal knowledge was submitted to the trial court, and where a litigant is not entitled to discovery such as depositions would be afforded less protections than a litigant in Superior Court.

Here, respondent was denied these basic fundamental rights of the opportunity to be heard at a full hearing, to present witnesses and evidence, to cross-examine petitioner's witnesses, and to refute petitioner's evidence.

The Judge of Compensation found that while the Workers Compensation Rules do not provide for summary judgment motions, petitioner's motion could be considered under N.J.A.C. 12:235-3.5, which provides for "other motions," and strict compliance with the requirements for summary judgment under the Court Rules do not apply. (2T71-1 to 2T72-19).

The Appellate Division concluded that:

Because the judge's decision here turned on statutory interpretation and analysis of public documents, the lack of a statement of material facts was not fatal to the application and the judge did not abuse her discretion in considering the application absent the statement.

(November 25, 2024 Appellate Division Opinion, pp. 16-17, Rra16-17).

The Appellate Division reached this conclusion after finding 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," citing Weir v. Mkt. Transition Facility of NJ, 318 N.J. Super. 436, 442-443 (App. Div. 1999). (November 25, 2024 Appellate Division Opinion, p. 16, Rra 16).

However, petitioner did not file his motion under the DJA, so respondent had no opportunity to respond under that statute. Furthermore, this issue would not have been appropriate for consideration under the DJA. This matter did not simply involve a ruling on statutory construction. It required consideration whether the decedent should have been considered an essential employee based on the specific facts and circumstances pertaining to her employment, including but not limited to her duties, whether she was working remote or in person, and whether her specific school district deemed their full-time teachers to be essential employees. Had this been filed under the DJA the litigants would have been afforded the right to engage in full discovery. Respondent should have had the opportunity to litigate these issues.

The Appellate Division Opinion, which affirmed the Order declaring the decedent to be an essential employee and which found all teachers to be

essential employees should therefore be reversed, and this matter should be remanded to another Judge of Compensation for a trial on the merits.

### CONCLUSION

For all the foregoing reasons, it is respectfully submitted that respondent should be granted leave to appeal from Appellate Division Opinion, which affirmed the Order declaring the decedent and all teachers to be essential employees.

Respectfully submitted,  
LEITNER TORT DeFAZIO & BRAUSE, P.C.  
Attorneys for Respondent-Movant

By: s/Randolph Brause  
RANDOLPH BRAUSE

### CERTIFICATION

1. Confidential Information/Confidential Personal Identifiers. I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and this his 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 may 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. Briefs Posted Online. 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 pending the resubmission of the document.

Dated: December 31, 2024

s/Randolph Brause  
RANDOLPH BRAUSE