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DEBRA REUTER,

Plaintiff/Respondent,

v.

BERKELEY TOWNSHIP, its agents, servants, employees, CARMEN F. AMATO, JR., TED MCFADDEN, DEBBI WINOGRACKI, JOHN A. CAMERA, "ABC CORP. 1-5" and/or "JOHN DOE" 1-5 and/or "JANE DOE 1-5" (the last three being fictitious designations),

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CIVIL ACTION

DOCKET NO.: A-000138-23

On Appeal from Jury Verdict May 25, 2023

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO.: OCN-L-2806-18
Sat Below:
Honorable James Den Uyl, J.S.C.

# *REVISED* BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS BERKELEY TOWNSHIP, CARMEN R. AMATO, JR., TED MCFADDEN, DEBBI WINOGRACKI AND JOHN A. CAMERA

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Submitted on: May 7, 2024

# TABLE OF CONTENTS

## TABLE OF JUDGMENTS, ORDERS, AND RULINGS

# TABLE OF AUTHORITIES

## CASES

**FEDERAL STATUTES**



**STATE STATUTES**



**RULES**

# APPENDIX OF APPELLANTS BERKELEY TOWNSHIP, CARMEN F. AMATO, JR., TED MCFADDEN, DEBBI WINOGRACKI AND JOHN A. CAMERA

## VOLUME I

## PRELIMINARY STATEMENT

This appeal arises out of the trial court's denial of the Motion for New Trial filed by Defendant/Appellants Berkeley Township ("the Township"), Carmen F. Amato, Jr. ("Amato"), Debbi Winogracki ("Winogracki"), and John Camera ("Camera")(collectively, "Appellants") in connection with the May 25, 2023 jury verdict.

Plaintiff is an employee in the Recreation Department at Berkeley Township. Plaintiff's Complaint, filed on November 20, 2018, alleges that the Appellants committed acts of religious and disability discrimination and retaliation against her.

After an eight-day trial, the jury returned a verdict, finding that Appellants did not commit religious discrimination, even though such allegations constituted the lion's share of Plaintiff's allegations, but they did commit disability discrimination and retaliation under the New Jersey Law Against Discrimination ("LAD"). The jury awarded Plaintiff: (1) $500,001 in emotional distress damages, (2) $110,000 in economic loss damages, and (3) $1,000,002 in punitive damages.

Despite the evident incongruity and injustice of the verdict, the trial court judge, the Honorable James Den Uyl, J.S.C., denied Appellants' Motion for a New Trial on August 23, 2023, issuing a

written opinion in support of the order. The trial court erred in denying the Appellants' Motion for New Trial in the following respects.

First, the jury's verdict finding liability against Appellants for disability discrimination and retaliation under LAD is not supported by the weight of evidence presented at trial. Critically, Plaintiff offered no evidence at trial that Appellants took any adverse employment action against her because she had an actual or perceived mental disability.

Second, Judge Den Uyl's written opinion conflates the religious and disability components of Plaintiff's allegations as intertwined. The facts presented at trial demonstrate a timeline that makes it impossible for the Township to have taken adverse employment action against Plaintiff because of an actual or perceived disability.

Third, Judge Den Uyl's written opinion constitutes reversible plain error by permitting Plaintiff's testimony to materially deviate from the allegations pleaded and the discovery relied upon until the time of trial. Although Plaintiff's Complaint nebulously used the words "disability," "disability discrimination," and "retaliation," Plaintiff's material deviation testimony had a clear capability of producing an unjust result.

Fourth, the jury's damages awards were excessive and constitute a miscarriage of justice based on the dearth of evidence presented at trial.

Fifth and finally, Plaintiff's counsel made comments in summation that exceeded the bounds of the proofs presented to the jury at trial and were capable of producing an unjust result.

Accordingly, the trial court's ruling should be reversed, this matter should be remanded for a new trial, and this appeal should be granted for the reasons set forth below.

## PROCEDURAL HISTORY[1]

Plaintiff filed her Complaint on November 20, 2018. After a full period of discovery, Appellants filed a Motion for Summary Judgment.

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[1] The following list of abbreviations refer to the stenographic transcripts cited and relied upon in Appellant's Brief:

Plaintiff's Deposition Transcript for "Pltf. T";
Defendant Carmen Amato's Deposition Transcript for "Amato T";
Defendant John Camera's Deposition Transcript for "Camera T";
Defendant Debbie Winogracki's Deposition Transcript for "Wino T";

"1T" refers to Trial Transcript for proceedings on May 16, 2023.
"2T" refers to Trial Transcript for proceedings on May 17, 2023.
"3T" refers to Trial Transcript for proceedings on May 18, 2023.
"4T" refers to Trial Transcript for proceedings on May 19, 2023.
"5T" refers to Trial Transcript for proceedings on May 22, 2023.
"6T" refers to Trial Transcript for proceedings on May 23, 2023.
"7T" refers to Trial Transcript for proceedings on May 24, 2023.
"8T" refers to Trial Transcript for proceedings on May 25, 2023.

After the Honorable Craig L. Wellerson, P.J. Cv. denied Appellants' Motion for Summary Judgment on July 11, 2022, and settlement negotiations ultimately failed, the parties conducted an eight-day jury trial beginning on May 16, 2023 and concluding on May 25, 2023. The Honorable James Den Uyl, J.S.C. presided over the trial.

On May 22, 2023, Appellants orally moved for a directed verdict pursuant to R. 4:40-1(a) at the close of Plaintiff's case-in-chief. 5T:5:11-6-25—12:1-13. The court heard oral argument on the record and denied Appellants' oral motion for directed verdict. 5T:11:6-25—12:1-13.

On May 25, 2023, the jury returned a verdict against Plaintiff on her religious discrimination claims under LAD but decided in Plaintiff's favor on her hostile work environment claim based on disability discrimination and LAD Retaliation. DA079-DA084.

The jury awarded Plaintiff the following damages: (i) $500,001 for emotional distress damages under LAD; (ii) $110,000 in economic loss damages; (iii) $1,000,002 in punitive damages. DA079-DA082.

On May 26, 2023, the Honorable James Den Uyl, J.S.C. entered an Order of Judgment memorializing the jury's verdict. DA083-DA084. Pursuant to R. 4:49-1, on June 13, 2023, Appellants filed a Motion for New Trial. DA085-DA087. After the parties submitted briefs and the

court conducted oral argument, the trial court denied Appellants' motion and issued a written opinion on August 23, 2023. DA088-DA124.

On September 14, 2023, Appellants filed a Notice of Appeal and a Motion to Stay the Judgment pending appeal. DA125-DA141. On October 4, 2023, the Honorable James Den Uyl, J.S.C. entered an Order granting the Motion for Stay. DA142-DA143.

## STATEMENT OF FACTS

Plaintiff has been employed in the Recreation Department for the Township of Berkeley since approximately 2002 to the present. Plaintiff was the Municipal Alliance Grant Program coordinator from approximately 2004 to January 2018. Pltf. T:112:16-21.

As a result of financial and budgetary concerns of the Recreation Department, in or about November 2017, then-Township Chief Financial Officer, Frederick Ebenau, conducted an operational audit of the Recreation Department. 5T:43:24-25—44:1-25;45:1-25. The audit included the financial records of the Municipal Alliance Grant Program, the funds of which were pooled together with the regular Recreation Department budget, even though the Grant funds emanating from State monies allocated and funneled through the County for the program. 5T:45:24-25—46:1-11.

The audit revealed that Plaintiff paid herself approximately seventy (70) percent of the grant funds—totaling approximately $23,000—for her role as the grant coordinator and consultant to the grant program. 5T:48:8-25. In response to the audit results, on or about January 2, 2018, Defendant John Camera, acting within the scope of his duties as Business Administrator, stopped the grant stipends for Plaintiff and Josephine Reno. 5T:73:23-25—74:1-25; 75:1-13.

On January 25, 2018, Plaintiff's attorney sent a letter to the Township, asserting allegations of hostile work environment based on religious discrimination. DA071-DA073. In February 2018, Defendant Debbi Winogracki was appointed to the position of Supervisor of the Recreation Department in the Township of Berkeley. Pltf. T:133:12-25-134:1-25. Also in February 2018, Plaintiff filed paperwork for her first FMLA leave. DA161. Plaintiff's first FMLA leave lasted approximately twelve (12) weeks. Pltf. T:133:12-25-134:1-25.

On November 20, 2018, Plaintiff filed her Complaint against the Township Defendants, alleging (1) religious discrimination, (2) hostile work environment based on religious discrimination and disability discrimination, and (3) a singular allegation that Defendant Winogracki retaliated against Plaintiff for being Jewish by reprimanding her for not

working the beach concert and punishing her by ordering Plaintiff to clear the office closets. DA001-DA006, ¶¶ 1-31.

After settlement failed and the Township Defendants' motion for summary judgment was denied by the Honorable Craig L. Wellerson, P.J. Cv., this matter proceeded to trial before the Honorable James Den Uyl. The eight-day trial began on May 16, 2023 and concluded on May 25, 2023. The jury determined that the Township Defendants did not discriminate against Plaintiff because of her religion. DA079-DA082. The jury determined, however, that the Township Defendants were liable for a hostile work environment based on disability discrimination and retaliation under LAD for Plaintiff obtaining legal counsel. DA079-DA082.

The jury awarded Plaintiff: (i) $500,001 in compensatory damages for emotional under LAD; (ii) $110,000 in economic loss damages; (iii) $1,000,002 in punitive damages. DA079-DA082.

## LEGAL ARGUMENT

### POINT I
### STANDARDS OF REVIEW
### (ISSUES NOT RAISED BELOW)
### Appellate Standard of Review on Motion For New Trial

The appellate standard of review for reversible error on a motion for new trial is that "a reviewing court must take into account the views

of the trial judge insofar as firsthand observation may be significant, but, having done so, it remains the duty of the reviewing court to determine whether in its view there was a manifest denial or miscarriage of justice. Fisch v. Manger, 24 N.J. 66, 80 (1957). "'[T]he trial court's 'action should not be disturbed unless it clearly and unequivocally appears there was a manifest denial of justice under the law.'" Dolson v. Anastasia, 55 N.J. 2, 8 (1969).

**Appellate Standard of Review of Plain Error**

The appellate court reviews under a plain error analysis when a party fails to interpose a timely objection to evidence or testimony presented at trial. "When a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard." State v. Singh, 245 N.J. 1, 13 (2021). In those cases, "an unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.'" Id. (quoting R. 2:10-2).

Under the plain error standard of review, the appellate court must disregard any error or omission "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. "The possibility of an unjust result must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might

not have reached.'" State v. Ross, 229 N.J. 389, 407 (2017)(quoting State v. Williams, 168 N.J. 323, 336 (2001)).

"It is beyond cavil that '[p]lain error is a high bar.'" State v. C.W.H., 465 N.J. Super. 574, 595 (App. Div. 2021)(quoting State v. Santamaria, 236 N.J. 390, 404 (2019). "The 'high standard' used in plain error analysis 'provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error.'" State v. Santamaria, 236 N.J. 390, 404 (2019)(quoting State v. Bueso, 225 N.J. 193, 203 (2016)).

"A defendant who does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error because to rerun a trial when the error could easily have been cured on request[ ] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." State v. C.W.H., 465 N.J. Super. 574, 595 (App. Div. 2021)(quoting State v. Santamaria, 236 N.J. 390, 404-05 (2019).

## POINT II

### II. PLAINTIFF'S TRIAL TESTIMONY MATERIALLY DEVIATED FROM HER PLEADINGS AND DISCOVERY (DA001-DA006; DA020-DA046; Pltf. T:133:12-25-134:1-25; 147:14-25;148:1-25; 151:22-25—152:1-7)

#### *a. Hostile Work Environment Claim Based on Disability Discrimination*

Plaintiff's trial testimony regarding her claims for hostile work environment based on disability discrimination and LAD Retaliation materially deviated from her factual allegations pleaded in the Complaint, her certified Answers to Interrogatories, and her deposition testimony, constituting an unfair surprise that deprive the Township Defendants of a fair trial.

***Factual Allegations Pleaded In Plaintiff's Complaint***

The entirety of Plaintiff's Complaint, except for paragraphs 20 and 21, allege facts, acts, and statements regarding religious discrimination. Paragraph 20 of the Complaint states in pertinent part:

> During the course of Plaintiff's employment with the Defendant Berkeley Township, Defendants, Amato, McFadden, Winogracki, Camera, and/or John Doe 1-5…engaged in a severe and pervasive pattern of mentally abusive and offensive behavior directed at Plaintiff for being of the Jewish faith and being disabled, which conduct was designed to, among other things, punish Plaintiff for being Jewish and disabled. (DA003, ¶20).

Paragraph 21 of Plaintiff's Complaint alleges in pertinent part:

> Examples of the ongoing and severe religious and disability discrimination and daily harassment suffered by Plaintiff from Defendant Amato include but are not limited to:…
>
> (DA003, ¶21).

As demonstrated in Plaintiff's Complaint, paragraphs 21(a) through (g) list factual allegations against Defendant Amato, all of which pertain to alleged statements and acts that Amato made to Plaintiff because she was Jewish. None of these factual allegations allege any act or statement of disability discrimination. DA003, ¶¶ 21(a)-(g).

Notably, paragraphs 22, 23, and 24 plead "[e]xamples of the ongoing and severe religious discrimination and daily harassment," but glaringly do not plead disability discrimination in any specific or general way against Defendants Camera, Winogracki, or McFadden. There is no mention of disability discrimination as it pertains to these Defendants. There are no factual allegations pleaded in the Complaint alleging disability discrimination or hostile work environment based on disability discrimination against these Defendants. DA004-DA005, ¶¶ 22-24.

In fact, in paragraph 24(b) of Plaintiff's Complaint, Plaintiff states that she took "her FMLA leave due to the anxiety caused by the workplace religious discrimination and/or harassment." DA005, ¶¶

24(b). Plaintiff specifically ties her allegations of workplace religious discrimination to her anxiety. Plaintiff does not allege any facts of disability discrimination, or any facts tying her anxiety to any alleged acts or statements of disability discrimination by any of the Township Defendants.

***Factual Allegations In Plaintiff's Certified Answers to Interrogatories***

In her certified Answers to Interrogatories, Plaintiff similarly does not describe any acts or statements of hostile work environment based on disability discrimination.

In her responses to Interrogatories Nos. 1, 2, 3, and 4, Plaintiff makes general reference to "anxiety disability discrimination" and "anxiety disability" but does not describe any facts—general or specific—that remotely demonstrate disability discrimination or hostile work environment discrimination. DA023-DA025.

Critically, Interrogatory No. 3 specifically asks Plaintiff to state the factual basis for her allegation in paragraph 20 of the Complaint that she was punished for being disabled. DA024-DA025. In response to Interrogatory No. 3, Plaintiff recapitulates the factual allegations of religious discrimination from her Complaint, and does not make any

factual allegation as to how, who, when, and where she was allegedly discriminated against because of her disability. DA024-DA025.

In her response to Interrogatory No. 4, Plaintiff identifies her alleged disability as "generalized anxiety disorder." DA025. Thus, Plaintiff knew at the time of her certified Answers to Interrogatories that she believed, at the very least, that she had an anxiety disability.

It stands to reason that she was in position at the time of filing her Complaint and preparing her Answers to Interrogatories that she would have personal knowledge of any allegedly specific instances of disability discrimination. Yet, none were alleged notwithstanding the specific allegations of religious discrimination comprising her Complaint and certified Interrogatory responses.

***Plaintiff's Deposition Testimony***

Plaintiff's deposition testimony also does not describe any alleged statements or acts of disability discrimination or hostile work environment based on disability discrimination.

Plaintiff testified in her deposition about her reasons for taking FMLA leave in February 2018. Pltf. T:133:12-25-134:1-25. Crucially, even though Plaintiff testified in her deposition that she submitted complaints to Defendant Camera about "hostile work environment" when she returned from her first FMLA leave, Plaintiff did not provide

any testimony that the Township Defendants committed any acts or made any statements because of her alleged anxiety disability. Pltf. T:147:14-25;148:1-25.

Likewise, Plaintiff testified in her deposition that she believed there was an investigation conducted by the Township into her hostile work environment allegations against Defendant Winogracki for "screaming at me and trying to discipline me." Plaintiff did not provide any testimony alleging acts or statements of disability discrimination or hostile work environment based on disability discrimination. Pltf. T:151:22-25—152:1-7.

***Plaintiff's Trial Testimony***

Plaintiff's trial testimony materially deviates from the factual allegations pleaded in her Complaint, her certified Answers to Interrogatories, and her deposition testimony.

On direct examination at trial, Plaintiff offers the following testimony that materially deviates from factual allegations in her Complaint, Answers to Interrogatories, and her deposition testimony:

> Q. Did there come a time that you learned you were the source of some internal investigation?
>
> A. Yes, I was—Tim had mentioned to me that there was going to be investigations basically of Debra Reuter and—but he never was clear on or told me what he (sic) was being investigated on.

So I sent an e-mail to Gina Russo and had said that I had noticed that—or felt that Debbie was interviewing or (sic) the different staff members to kind of find some wrongdoing on my part. And I just wanted to know what exactly they were investigating or when that would take place.

…..

Q. Did you come to find out what the investigation was about?

A. I did, but I got to the investigation—Chris Daski (phonetic), their labor attorney, was questioning me about giving employees hours.
…

Q. And that time were they already aware that you suffer from anxiety and depression?

A. Yes.
Q. Do you feel that these things they were doing was an attempt to trigger your anxiety and depression?
A. Yes.

(4T:145:1-25-146:1-19; 147:21-25;148:1).

Plaintiff's trial testimony materially deviated further:

Q. Did they know you would have—did you feel like based on your prior incidents that they knew you would have an emotional response to it?

A. Yes, they did. And I feel that they triggered—tried to trigger and target me, you know, not only for my religion, but for my depression and anxiety.

(4T:148:2-7).

More egregious still, Plaintiff's trial testimony attempted to tie her factual allegation that the taking away of the Municipal Alliance Grant stipend was because of her alleged anxiety disability:

> Q. When the municipal alliance job was taken from you did think that was another thing being done to trigger your anxiety and your depression and to retaliate against you for getting counsel?
>
> A. Yes, I felt that after the events that took place in September on the 29th, after that I felt that, you know, they were just doing all sorts of things. I felt like they were trying to come up with any reason to fire me and I—you know, anything at all and to make me miserable…

(4T:148:25-149:1-10).

Equally critical, Plaintiff's trial testimony misleadingly created the impression to the jury that she felt "exposed because everyone knows about your underlying health condition." 4T:154:14-25. In her Complaint, Plaintiff never pleaded that any of the Township Defendants knew about her alleged anxiety disability, or why she took FMLA leave in February 2018 or March 2019. DA001-DA006.

In her certified Answers to Interrogatories, Plaintiff never states that any of the Township Defendants knew about her alleged anxiety disability, or why she took FMLA leave in February 2018 or March 2019. DA022-DA073. Similarly, in her deposition testimony, Plaintiff

never testified that any of the Township Defendants knew about her alleged anxiety disability, or why she took FMLA leave in February 2018 or March 2019. Pltf. T:133-1-25—160:1-16.

In sum, Plaintiff's trial testimony materially deviated from her prior factual allegations in the pleadings, discovery responses, and her deposition testimony. These deviations are material because they give the jury the misleading impression that her employer conducted an internal investigation to discriminate against her because of her disability and to retaliate against her because of she obtained legal counsel.

Further, these deviations are material because they mislead the jury that Plaintiff's municipal alliance position was taken away because of her disability. Even though, Plaintiff's pleadings, certified Answers to Interrogatories, and deposition testimony never made that allegation or tied those two allegations together.

In a case with such limited paper discovery, Plaintiff's material deviations render this jury especially vulnerable to be misled and persuaded by prevarications or embellishments that were never pleaded as factual allegations in the Complaint, stated in her certified Answers to Interrogatories, or her deposition testimony.

Accordingly, Plaintiff's material deviation in her trial testimony in the respects outlined above demonstrate its capability to produce the unjust verdict awarded by the jury.

## POINT III

### III. THE JURY'S VERDICT REGARDING DISABILITY DISCRIMINATION AND RETALIATION UNDER LAD IS AGAINST THE WEIGHT OF THE EVIDENCE (DA001-DA082; Pltf. T:133:1-25—159:1-25;4T:110-199).

The jury's verdict against Appellants for hostile work environment based on disability discrimination and retaliation under LAD is not supported by the weight of the evidence presented at trial.

The trial judge's obligation on a motion for new trial is to carefully evaluate the evidence presented to the jury at trial, and to correct clear error or mistake by the jury. Dolson v. Anastasia, 55 N.J. 2, 6 (1969).

"The courts allow wide latitude to the jury, restricting their sphere sparingly, and on an ad hoc basis, where one conclusion only seems warranted by the facts." Carrino, supra, 78 N.J. at 365 (quoting Schaublin v. Leber, 50 N.J. Super. 506, 510 (App. Div. 1958)).

A trial judge's responsibility on a motion for a new trial is "to correct clear error or mistake by the jury. Of course, the judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion[.]" Dolson, supra, 55 N.J. at 6. "Jury

verdicts should be set aside in favor of new trials only with great reluctance, and only in cases of clear injustice." Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005) (emphasis added), certif. denied, 186 N.J. 242 (2006).

In this trial, Plaintiff did not present evidence that Defendant Amato engaged in any act or made any statement evincing disability discrimination. The key criteria for establishing proof of a hostile work environment claim based on disability discrimination is: (1) That the alleged conduct actually occurred; (2) that the alleged conduct constituted unlawful harassment BECAUSE of Plaintiff's alleged disability; and (3) that the employer should be held responsible for the alleged harassing or discriminatory conduct. Lehmann v. Toys R' Us, Inc., 132 N.J. 587 (1993).

As to the first, second, and third factors, in the absence of specific and credible allegations of acts or statements of disability discrimination committed by Defendant Amato, the jury's verdict in this regard is against the weight of the evidence. Plaintiff presented no evidence that Defendant Amato made any statements or committed any acts of disability discrimination.

Plaintiff simply imputed liability for hostile work environment based on disability discrimination because Defendant Amato is the

Mayor of the Township and sits at the top of the organizational pyramid. Plaintiff provided no evidence at trial that Defendant Amato directed any subordinates to take any adverse employment actions against Plaintiff because of her alleged anxiety disability, or that he was aware of any complaints lodged by Plaintiff because of her alleged disability. In fact, Plaintiff did not present any evidence establishing that Defendant Amato knew she had an alleged anxiety disability until the filing of this lawsuit.

In addition, the jury's verdict in this regard is against the weight of the evidence as to Defendants Winogracki and Camera. Plaintiff presented no evidence at trial that Defendant Winogracki knew that Plaintiff had an alleged anxiety disability, or that she took FMLA leave in February 2018 and March 2019 because she had an alleged anxiety disability. At trial, Defendant Winogracki denied ever viewing Plaintiff's FMLA leave paperwork, or having personal knowledge of Plaintiff's alleged anxiety disability before the filing of this lawsuit. 3T:152:1-25-153:1-25; 155:1-5.

Plaintiff's trial testimony that Defendant Winogracki allegedly ridiculed her for taking FMLA leave does not establish that harassing conduct for hostile work environment based on disability discrimination. The cardinal purpose of a hostile work environment claim is that the

work environment was made hostile because of or based on the Plaintiff's alleged protected characteristic, such as a disability. Plaintiff presented no evidence at trial that Defendant Winogracki knew she had an alleged anxiety disability and committed acts or made statements because of Plaintiff's alleged anxiety disability.

Likewise, Plaintiff presented no evidence that Defendant Camera's alleged acts or statements were because of her alleged anxiety disability. In fact, Defendant Camera testified that he did not know Plaintiff suffered from any alleged anxiety disability. 4T:20:1-25. Defendant Camera denied that he disclosed the underlying health reason asserted in Plaintiff's FMLA leave paperwork to anyone in the Township. 4T:25:6-11.

Accordingly, the jury's verdict is against the weight of the evidence, and the trial court committed reversible error by denying Appellants' motion for a new trial.

## POINT IV

### IV. THE TRIAL COURT COMMITTED REVERSIBLE PLAIN ERROR BY GIVING AN IMPROPER JURY CHARGE (DA079-DA082; 8T:30:20-25—91:1-12).

The jury charges, and resulting verdict sheet in this case failed to adequately separate Plaintiff's claims and inform the jury of the law regarding claims of hostile work environment and retaliation under the

New Jersey Law Against Discrimination N.J.S.A. 10:5-1 *et seq.* As a result, the jurors were confused and returned a verdict completely inconsistent with the evidence presented and patently unjust.

A proper jury charge is a prerequisite for a fair trial. Reynolds v. Gonzalez, 172 N.J. 266, 288 (2002). Jury Instructions should correctly state the applicable law in clear and understandable language." Boryszewski v. Burke, 380 N.J. Super. 361, 374 (App. Div. 2005). "[T]he ultimate responsibility rests with the court to instruct the jury regarding the appropriate law that is applicable to the evidence." Das v. Thani, 171 N.J. 518, 530 (2002), and reversal is necessary only where the charge inadequately conveys the law and confuses or misleads the jury. Id.

In this case, the Court's instructions to the jury conflated Plaintiff's four separate claims of religious discrimination, disability discrimination, retaliation for making complaints and retaliation for seeking legal advice.

The jury should have been instructed to separately determine whether Plaintiff has sustained her burden for each separate allegation: (1) Discrimination by creation of hostile work environment on the basis of religion, (2) Discrimination by creation of hostile work environment

on the basis of disability, retaliation for making complaints about discrimination, and retaliation for seeking legal advice.

These are four independent causes of action and the jury was not adequately instructed as to each of them. Instead, the jury was instructed on hostile work environment based on religion **or** mental disability and retaliation for making internal complaints about discrimination **or** seeking legal advice, leading them to believe that Plaintiff's claims consisted of only two separate allegations.

It is fundamental that the jury charge should set forth in clear understandable language the law that applies to the issues in the case Toto v. Ensuar 196 N.J. 134, 144 (2008). An accurate charge is critical because it is a "road map that explains the applicable legal principles, outlines the jury's function and spells out how the jury should apply the legal principles charged to the facts of the case at hand. Toto v. Ensuar, 196 N.J. 134, 144 (2008)(quoting Viscik v. Fowler Equip. Co. 173 N.J. 1, 18 (2002)).

In this case, the manner in which the instructions were read made it impossible for the jury to properly determine whether the evidence supported each of Plaintiff's claims separately. As such, the jury was confused, said confusion resulted in the return of a verdict palpably

contrary to the weight of the evidence presented, and the verdict must be set aside.

## POINT V

### V. THE JURY'S DAMAGES AWARDS ARE AGAINST THE WEIGHT OF THE EVIDENCE AND CONSTITUTE A MISCARRIAGE OF JUSTICE (DA079-DA082; 2T-8T).

#### *a. Compensatory Damages for Emotional Distress*

The jury's award of compensatory damages for emotional distress is against the weight of the evidence.

Plaintiff presented no evidence at trial that any action was taken against her on the basis of her disability. In fact, on cross-examination, Plaintiff admitted that she did not lodge any complaints that the Township Defendants committed any acts or made any statements because of her alleged anxiety disability. 4T:189:1-25—191:1-25.

Therefore, in the absence of evidence that any action was taken against her because of her alleged anxiety disability, the jury's verdict is against the weight of the evidence.

#### *b. Economic Loss Damages*

The jury's award of economic loss damages is against the weight of evidence presented at trial.

The evidence presented at trial does not establish that Plaintiff suffered economic loss based on her disability. 3T:3:1-25—55:1-25. More specifically, Plaintiff's factual allegation pleaded in her Complaint states that the municipal alliance grant stipend was taken away from her because of her religion; not on the basis of any alleged anxiety disability. DA001-DA006.

Similarly, Plaintiff's certified Answers to Interrogatories and her deposition testimony both frame her allegation that the municipal alliance grant stipend was taken away from her because she was Jewish. DA020-DA046; Pltf. T:133:12-25-134:1-25; Pltf. T:147:14-25;148:1-25). Neither her certified Answers to Interrogatories nor her deposition testimony allege any facts that the municipal alliance grant stipend was taken away from her because she suffered from an alleged anxiety disability.

Further, Plaintiff's misleading trial testimony tying her allegation concerning the taking away of the municipal alliance grant stipend and her claims for hostile work environment based on disability discrimination and LAD Retaliation also warrants granting the Township Defendants' motion for new trial.

Accordingly, the jury's verdict awarding economic loss damages is against the weight of the evidence and should be set aside.

### *c. Punitive Damages*

The jury's award of punitive damages in the instant matter is clearly excessive, incongruous to the evidence presented and the result of mistake or other error. Further, evidence establishes that the award cannot survive the heightened scrutiny test it is subject to because Defendant is a public entity. As such, the award of punitive damages must be set aside in its entirety.

The trial court's responsibility to review punitive damage awards for reasonableness is heightened when such damages are awarded against a public entity because public funds will be affected in payment of any such award. Accordingly, in such cases, the trial judge "must scrutinize with great care the amount of the award to determine whether it is proportionate to the harm suffered by the plaintiff." Pritchett v. State, 248 N.J. 85, 108-113 (2021).

Because excessive punitive damages may result in a denial of substantive due process, New Jersey Courts will apply test of BMW of North America Inc. v. Gore, 517 U.S. 559 (1996), which considers the egregiousness of the conduct, the disparity between the harm or potential harm suffered and the punitive damages award and the difference between that award and other penalties imposed in comparable cases of misconduct. See generally, Baker v. National State Bank, 353 N.J.

Super. 145, 152-154 (App. Div. 2002); Dong v. Alape, 361 N.J. Super. 106, 116-118 (App. Div. 2003). (Punitive Damages Act requires the Defendant acted maliciously or with will and wonton disregard of the rights of others).

Under LAD, to receive punitive damages, a plaintiff must not only establish discrimination, but must also prove, by clear and convincing evidence, (1) actual participation in or willful indifference to the wrongful conduct on the part of upper management and (2) that the offending conduct was especially egregious.

The standard is higher than merely a preponderance of the evidence, the standard a Plaintiff must meet requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes the finder of fact to be convinced that the allegations sought to be proved are true.

Under LAD, punitive damages are reserved for punishment and deterrence of "especially egregious" behavior. A claim for punitive damages requires "actual participation in or willful indifference to the wrongful conduct on the part of upper management" and "proof that the offending conduct [is] 'especially egregious.'" Cavuoti v. New Jersey Transit, 161 N.J. 107, 113 (1999).

Therefore, punitive damages "are only to be awarded in exceptional cases even where the [NJLAD] has been violated." Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 501 (App. Div. 1994). As stated above, The Supreme Court further that the most important factor to take into consideration is the "reprehensibility of the conduct."

In Pritchett, Plaintiff a senior corrections officer for the Juvenile Justice Commission ("JJC"), sued the State of New Jersey for violating the LAD when it failed to accommodate her request for a three-month leave of absence due to her diagnosis of multiple sclerosis.

After a lengthy trial, the jury agreed with Pritchett and awarded her approximately $1.8 million in emotional distress and economic compensatory damages and $10 million in punitive damages.

The Appellate Division affirmed, but remanded for reconsideration of the punitive damages award, directing the trial court to: (1) take into account the various factors discussed in Baker v. National State Bank, 161 N.J. 220 (1999), and BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); and (2) "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," Id. at 2-3.

The Appellate Division's decision was appealed to the New Jersey Supreme Court. The New Jersey Supreme Court agreed with the

Appellate Division's discussion of the factors to be considered in awarding punitive damage awards by the jury, which are: "'the degree of reprehensibility of the [wrongful conduct,] the disparity between the harm or potential harm [suffered by the plaintiff] and the plaintiff's punitive damages award[,] and the difference between this remedy and the civil penalties authorized or imposed in comparable cases or whether the award reflects prejudice, passion, or mistake warranting a new trial on the amount of punitive damages.

The New Jersey Supreme Court further opined that the most important of those factors to take into consideration is the reprehensibility of the conduct.

However, the Supreme Court modified the Appellate Division's instructions to the trial court, as well as all trial courts, **to add that when reviewing an award of punitive damages against a public entity, the punitive damages award is further subjected to a heightened scrutiny test**. Id. at 3 (citing Lockley v. Dep't of Corr., 177 N.J. 413, 8 (2003); Green v. Jersey City Bd. of Educ., 177 N.J. 434, 828 (2003). The basis for the additional scrutiny is that public monies are the source of the award.

Even assuming that Plaintiff's allegations of discrimination on the basis of her disability and retaliation for making internal complaints and

seeking legal advice are true, the only evidence Plaintiff provides to support these allegations amounts to questionable action at best.

As set forth above, in cases involving public entities, the trial judge "must scrutinize with great care the amount of the award to determine whether it is proportionate to the harm suffered by the plaintiff." Pritchett, supra, 248 N.J. at 108-113. In the instant matter, the jury awarded Plaintiff $ 1,000,000.002 in punitive damages. By contrast, Plaintiff has proffered no evidence besides the testimony of a psychologist to support any allegations of harm suffered. Further, she is still employed by Appellants.

Her allegation that the Municipal Alliance stipend was taken away from her was limited to the allegation of religious discrimination based on testimony and pleadings, so it is inapplicable to the issue at hand. Based on the forgoing, the award of punitive damages is clearly disproportionate to the harm alleged by Plaintiff and bears no reasonable relationship to the harm alleged.

Further, the heightened scrutiny required to be undertaken by the Court in reviewing this award makes it evident that the award is excessive, incongruous with the evidence and the result of mistake or other error by the jury.

There is nothing on the record to support a claim that Defendants engaged in any type of reprehensible conduct. No evidence that Defendants engaged in or were willfully indifferent to egregious actions. Further, the record is clear that Defendant Debbi Winogracki was not a member of upper management, but was simply the Recreation Department Director, not on the same administrative level as the Mayor or the Business Administrator.

On cross examination, the following facts about Defendants' actions were elicited, including the facts that Plaintiff never complained that any action was taken against he based on her disability or that any action was taken against her based on same.

Q: But you never told John Camera you thought any action was taken against you because of your religion.
A: No.

Q: You never told Mayor Amato you thought any action was taken against you because of your religion.
A: No.

Q: You never told Ted McFadden you thought any action was taken against you because of your religion.
A: No.

Q: You never told Mr. Camera that you thought any action was taken against you because of your disability.
A: No.

Q: And you never told Mayor Amato that you thought any action was taken against you because of your disability.
A: No.

Q: You never told Mr. -- Ted McFadden that you thought any action was taken against you because of your disability.
A: I talked to Tim, I talked to Tim Yuricsin (sic). He was, he was present when Ted McFadden made the 1 1 comment about stupid Jews to me.

Q: But you never told anybody that you thought Ted took action against you because of your religion?
A: I did. I told –
Q: Action.
A: -- my direct supervisor. What -- can you -- what is action?

Q: Did he take a job responsibility away from you?
A: He didn't take a job responsibility. That was Deb Winogracki took all my job responsibilities away from me.

Q: But not because you were Jewish.
A: Because of all the complaints that I made.

Q: Right, but not because you were Jewish.
A: I don't know why.

Q: And not because you were disabled.
A: She did make fun of my FMLA all the time –

**Q: She didn't do anything to you because you were disabled. You're under oath, Ms. Reuter. Did Deb Winogracki take any action against you because you had a disability?**
**A: No.**

**Q: Okay.**

(5T:189:1-25-191:1-25).

If Plaintiff never complained about discriminatory action, then it is impossible that Appellants took any action or willfully participated in any such action because they could not have been aware of the alleged discrimination.

Further, if Plaintiff admits that no action was taken against her because of any disability, the Court cannot uphold the punitive damages award for the simple reason that Plaintiff herself admits that any conduct on the part of Appellants was not motivated by discrimination. As such, the award of punitive damages must be vacated.

## POINT VI

### VI. PLAINTIFF'S COUNSEL MADE STATEMENTS MANIFESTLY CAPABLE OF CONFUSING AND MISLEADING THE JURY PRODUCING AN UNJUST RESULT THAT DEPRIVED APPELLANTS A FAIR TRIAL (7T:57:1-25—86:1-25)

The conduct of Plaintiff's counsel during summation was clearly capable of producing an unjust result and deprived Defendants of a fair trial. As such, the verdict must be set aside and a new trial granted.

The New Jersey Supreme Court has "recognized that the cumulative effect of…errors may be so great as to work prejudice, and.. have not hesitated to afford the party suffering that prejudice relief where it has been warranted." Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 53 (2009); see also Torres v. Pabon, 225 N.J. 167, 191(2016); see also Morales-Hurtado v. Reinoso 2018 N.J. Super. LEXIS 169 (approved for publication Dec. 6, 2018).

### A. Plaintiff's Summation

New Jersey Courts have held that counsel has "broad latitude" in its closing arguments to a jury. Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 32 (App. Div. 1998). But "[s]ummation commentary ... must be based in truth, and counsel may not 'misstate the evidence nor distort the factual picture." Bender v. Adelson, 187 N.J. 411, 431, (2006); see also Biruk v. Wilson, 50 N.J. 253, 260-61 (1967) (disapproving counsel's tactics of making false factual suggestions to jury in closing argument).

However, "[w]hen summation commentary transgresses the boundaries of the broad latitude otherwise afforded to counsel, a trial court must grant a party's motion for a new trial if the comments are so prejudicial that 'it clearly and convincingly appears that there was a miscarriage of justice under the law.' R. 4:49-1(a)." Id.

Plaintiff's summation was extremely prejudicial and violated applicable law. Plaintiff's Counsel misstated the law, misrepresented facts, made statements that were inflammatory, and were clearly designed to mislead the jury. As a result, Defendants were deprived of a fair trial and the verdict must be set aside in its entirety.

### i. Plaintiff's counsel misled the jury regarding her burden of proof during summation

The jury in this case was charged with instructions for Hostile Work Environment and Retaliation on the basis of religion and disability under LAD. During summation, counsel for Plaintiff misstated the law on numerous occasions, leading jurors to believe that her burden of proof was lower than it was and took every opportunity to impugn Appellants' legitimate actions in front of the jury.

#### a. Hostile work environment claim

To maintain a claim for a hostile work environment claim under the LAD, Plaintiff must show that the complained-of conduct: "(1) would not have occurred **but for** the employee's protected status, and was (2) severe or pervasive enough to make a reasonable person believe that (3) the conditions of employment have been altered and that the working environment is hostile or abusive." Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 24 (N.J. 2002)(citing Lehmann, supra. 132 N.J. at 603-04).

Plaintiff's counsel misled the jury throughout the course of her summation. The law is clear that to sustain a hostile work environment claim Plaintiff must establish the complained of conduct was motivated **solely** by Plaintiff's religion or disability.

Despite crystal clear instruction from the Courts, Plaintiff's counsel repeatedly told the jury that all she had to prove was Plaintiff's religion or disability was one motivating factor in the alleged conduct.

Further, she infers to the jury that innocuous comments constitute unlawful discrimination by repeatedly making confusing and inaccurate statements. For example, counsel's contention that the statement "we have more work because you're on FMLA…they had no reason to know why [Plaintiff] is on FMLA leave," is patently misleading in that it conflates knowledge of FMLA leave with knowledge of the reason why the leave was taken. 7T:74:11-12.

29 U.S.C. § 28, the Family and Medical Leave Act, entitles eligible employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months for a variety of reasons, **not only for their own medical condition.**

Leave may be taken for the following reasons: (1) Because of the birth of a child and to care for the newborn child, (2) because of the placement of a child with the employee for adoption or foster care, (3) because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, (4) because the employee's own serious health condition makes the employee unable to

perform the functions of his or her job, or (5) because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status.

There was no testimony elicited at trial to support the allegation that the above statement was made by anyone specific, let alone anyone who was aware of any disability claimed by Plaintiff. Thus, the statement is not only inaccurate, but misleads the jury to believe that a statement about FMLA leave is evidence of disability discrimination.

In addition to not mentioning the remaining prongs of the test for this claim, Plaintiff's counsel mistakenly advised jurors that religion or disability must only be a reason, not the only reason, for Appellants alleged actions, thereby lowering her burden of proof substantially on the issue of the hostile work environment claim. 7T:74:18-24. Again, to maintain a claim for hostile work environment, Plaintiff must prove that "but for" membership in a protected class, the action would not have been taken.

Finally, Plaintiff's counsel misled the jury by stating that Appellants engaged in "inappropriate conduct" and that would satisfy her burden under the second prong of a hostile work environment claim. This also substantially lowered her burden of proof, as "inappropriate"

conduct clearly does not rise to the level of "severe or pervasive" conduct. (7T:61:17-21; 70:10-20—71:2-10).

As set forth above, Plaintiff's counsel repeatedly told the jury that to establish her claim of hostile work environment, **all she had to prove was that one** reason for Appellants' alleged conduct was Plaintiff's religion or disability when the test is actually a "but for" analysis. Further, she disregarded the remaining two prongs of the test in her explanation to the jury. Finally, counsel told the jury that all they had to do was believe that the conduct happened and that Appellants should be punished for it, which is an egregious misstatement of the Court's test for hostile work environment. Examples of this conduct include:

> To prove my case, I do not have to tell you that that was the only reason they treated my client this way. I just have to show you that that was one of the reasons they treated her that way.
>
> (7T:58-59:23-1).

> All you have to do is believe that the conduct happened…the conduct is inappropriate and he [Mayor Amato] should be punished for it.
>
> (7T:61:23-1).

> So, you'll get to the question…Has the Plaintiff proven, by a preponderance of the evidence, that she was discriminated against based on her disability? Again, I don't have to prove it's the only reason…
>
> (7T:74:18-22).

And again, I ask you to keep in mind I do not have to prove that was the only reason, I just have to prove it was one of the reasons.

(7T:85:13-14).

**b. Retaliation claim**

Plaintiff's counsel also erroneously explained her burden of proof when speaking to the jury about her client's retaliation claim. She repeatedly made conclusory statements indicating that every occurrence Plaintiff complained about was "in retaliation" for something, without articulating what the evidence established that Appellants retaliated against her for.

To maintain a claim for retaliation, plaintiff must plead that she "'engaged in a protected activity known to the [employer,]' the employee was 'subjected to an adverse employment decision' and there is a causal link between the protected activity and the adverse employment action." Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013) (quoting Woods–Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)).

Plaintiff must establish adverse action **causally related to a protected activity.** Appellants respectfully submit that a LAD retaliation claim involves protected activity, not membership in a protected class, as Plaintiff's counsel advised the jury).

Examples of Plaintiff's counsel's overstepping the broad latitude allowed by the Courts in summations with regard to the retaliation claim include:

> Then after she complained, after she's berated at trick -- trunk or treat, suddenly, there's an internal audit of her department. Why? Because Tim Yurcinsin is saying Debra's complaining and these are the complaints. She's being mistreated. She doesn't like this, and because she's complaining. Retaliation.
>
> (7T:70:2-7).

This statement is especially prejudicial, as it leads the jury to believe that mere complaining about mistreatment is a protected activity when it is not. For complaints to be actionable under LAD, they must be complaints about acts that are unlawful under the statute.

Plaintiff's counsel misled the jury that a "reasonable person" standard applies in retaliation complaints when, in fact, it does not. Plaintiff needs to prove she engaged in a protected activity, that an adverse employment action resulted, and that the adverse employment action was causally related to the protected activity. For example, Plaintiff's counsel stated in her summation:

> I do not have to prove, ladies and gentlemen, that they intended to retaliate. The question is, would a reasonable person believe that all of these things are happening because of their complaints?
>
> (7T:70:10-13).

> Would a reasonable person believe, it doesn't matter if they didn't intend that, would a reasonable person believe this is happening to me because of this?
>
> (7T:70:21-23).

Plaintiff's counsel again steps outside her broad latitude in summation by misleading the jury in statements asserting that non-action is retaliation and conflating discrimination allegations with retaliation allegations.

> They're going to ask you, has the plaintiff proven beyond a preponderance of the evidence under New Jersey LAD, that her employer, Berkeley Township or Debbie Winogracki, John Camera, the mayor, and Tim McFadden with his, "stupid Jews," comment did -- do you think anybody retaliated against her? I asked Debbi Winogracki, **as cocky as she is**, did you ask John Camera to fire my client? Well, what did he say? "No. She got a lawyer."
>
> (7T:75:9-20).

**ii. Plaintiff's Counsel Misstated and Distorted Facts During Summation**

The summation by Plaintiff's counsel exceeded the four corners of the evidence by misstating and distorting the facts. This conduct deprived Appellants of a fair trial and was clearly capable of producing an unjust result.

The scope of a party's summation must not exceed the "four corners of the evidence." State v. Loftin, 146 N.J. 295 (1996); State v.

Reddish, 181 N.J. 553 (2004)(applying State v. Loftin and stating that the trial court properly instructed the jury that it could not consider the portion of defendant's counsel's summation that exceeded the scope of evidence presented at trial). "The 'four corners' include the evidence and all reasonable inferences drawn therefrom." Loftin, supra, 146 N.J. at 347.

Although counsel may use forceful expressions in the heat of advocacy, he must confine himself to fair comment upon the facts in evidence. State v. Bogen, 13 N.J. 137, (1953), cert. denied, 346 U.S. 825, 74 S. Ct. 44, 98 L.Ed. 350. Counsel is not precluded from making a vigorous and forceful presentation of his case, however, "[c]ounsel in his summation to a jury should not misstate the evidence nor distort the fact[s]…." Matthews v. Nelson, 57 N.J. Super. 515 (App. Div. 1959), certif. denied, 31 N.J. 296 (1960); Colucci v. Oppenheim, 326 N.J. Super. 166 (App. Div. 1999).

"Counsel is to be given 'broad latitude' in summation." Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 32 (App. Div. 1998). However, such latitude is not without limits. Comment must be "restrained within the facts shown or reasonably suggested by the evidence adduced." Id. (citing Condella v. Cumberland Farms, Inc., 298

N.J. Super. 531, 534 (1996); Matthews v. Nelson, 57 N.J. Super. 515, 521(App. Div. 1959), certif. denied, 31 N.J. 296 (1960)).

Further, "counsel 'may not misstate the evidence nor distort the factual picture,' Matthews, supra 57 N.J. at 521, such as by using 'disparaging language to discredit the opposing party, or witness,'" Rodd v. Raritan Radiologic Assoc., P.A., 373 N.J. Super. 154, 171 (App. Div. 2004)(citing Geler v. Akawie, 358 N.J. Super. 437, 470-71 (App. Div.), certif. denied, 177 N.J. 223 (2003); Henker v. Preybylowski, 216 N.J. Super. 513, 518-19 (App. Div. 1987)); "accus[ing] a party's attorney of wanting the jury to evaluate the evidence unfairly"; "trying to deceive the jury"; or "deliberately distorting the evidence." Id.; see also Cuccurullo v. Galinsky, 2010 WL 2089669 *11 (N.J. Super. Ct. App. Div. 2010).

Furthermore, "Counsel may urge the jury to 'draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd, unless they are couched in language transcending the bounds of legitimate argument, or there are no grounds for them in the evidence."" Cuccurullo v. Galinsky, 2010 WL 2089669 *12 (N.J. Super. Ct. App. Div. 2010)(quoting Spedick v. Murphy, 266 N.J. Super. 573, 590-91 (App. Div.), certif. denied, 134 N.J. 567 (1993); see Wimberly v. Paterson, 75 N.J. Super. 584, 604

(App. Div.), certif. denied, 38 N.J. 340 (1962), overruled in part on other grounds by Johnson v. Dobrosky, 187 N.J. 594 (2006); Botta v. Brunner, 42 N.J. Super. 95, 108 (App. Div. 1956), modified, 26 N.J. 82 (1958).

"We will not disturb the trial judge's discretion over summation argument unless 'it is of such a nature as to have been clearly capable of producing an unjust result.'" Cuccurullo v. Galinsky, 2010 WL 2089669 *12 (N.J. Super. Ct. App. Div. 2010)(quoting R. 2:10-2).

In this case, examples of Plaintiff's counsel's misstatements and distortions include: misleading the jury by telling them, in no uncertain terms, that all of the alleged conduct occurred without pointing to one piece of evidence in support of this claim, or blurring the timeline of facts to bolster Plaintiff's material deviation testimony that her Municipal Alliance Grant position was taken away because of her alleged mental disability and/or as retaliation for filing internal complaints or retaining counsel. For example, Plaintiff's counsel stated:

> They're going to make the workplace intimidating, hostile and abusive, so she either quits or breaks down from-from being tired of it. **All of this happened.**
>
> (7T:76:3-6).

Counsel deliberately distorted the evidence to make Gina Russo seem dishonest and again told jurors that Defendants "did this" by stating the following to the jury at summation:

> Gina Russo came into this courtroom very confidently on direct-examination. Has Debra Reuter ever complained to you about hostile work environment? No, never. Has Debra Reuter ever complained to you about the municipal alliance? No, never. Until she's shown nine emails where she's either directly copied or cc'd with a subject line, not embedded in the body, with the subject line, "Hostile work environment." She's a human resources professional. She works on behalf of the town.
> When you think about Berkeley, the Township of Berkeley, did they do this? Yes, they did.
>
> (7T:63:7-19).

The record at trial is clear that the emails shown to Ms. Russo were **not** addressed to her and no evidence was presented at trial of emailed directed to Ms. Russo:

> MS. ZAHLER: Your Honor, objection. Those emails produced were -- were copied to my client. She -- she's not
>
> MS. DOZIER: Okay. She can clarify that.
>
> MS. ZAHLER: Ms. Dozier makes it appear that my client's not being truthful on the stand. The emails were copied to Ms. Russo.
>
> MS. DOZIER: Yes.
>
> MS. ZAHLER: They were not directed to her.
>
> MS. DOZIER: I said that she was copied. I said it wasn't directly to you, that's how I started, but you were copied on there.
>
> (6T:25:23-25-26:1-10).

Plaintiff's counsel also misrepresented the timeline of events to the jury to make a connection between the January 25, 2018 Letter of Representation and the Township's January 2, 2018 notification to Plaintiff that she would no longer continue as Municipal Alliance Grant Coordinator:

> Maybe it started being temporary, but again, the letter of representation then comes from our office, one of the protected activities under New Jersey Law Against Discrimination…she never sees it again.
>
> (8T:76:10-12; DA047-DA070; DA071-DA073).

Plaintiff's Counsel misled the jury as to the severity of conduct needed to sustain a hostile work environment claim:

> All you have to believe is that the conduct happened…it was because she was Jewish, and…the conduct was inappropriate and he should be punished for it. That's it.
>
> (7T:61:17-21).

Similarly, Plaintiff's counsel misled the jury by making disparaging, conclusory statements that were unsupported by evidence describing Appellants' alleged conduct:

> It's malicious to see [Plaintiff] complaining…no regard for her feelings…logging into her computer when you knew her mother was sick…that's malicious.
>
> (7T:83:16-25—84:1).

The trial record is void of evidence that Appellants knew anything about Plaintiff's mother at all, let alone any sickness.

Further, Plaintiff's counsel misrepresented to the jury that Plaintiff took medications for psychiatric treatment in connection with the alleged discrimination, which may have caused harm to her body and that somehow Appellants are indirectly responsible for that harm:

> She went through years of psychiatric -- psychological treatment, taking medication in her body, some of which isn't always good for her.
>
> (7T:69:21-24).

The record at trial is void of evidence establishing the duration of time that Plaintiff took medicine and what effect, if any, the medicine had on her.

### iii. Plaintiff's Counsel Abused Her Right to Forcefully Advocate for Her Client by Using Her Personal Opinion and Disparage Comments During Summation to Malign the Credibility of Appellants to the Jury

It is improper for an attorney to interject personal assertions or opinions while interrogating witnesses. Morales-Hurtado v. Reinoso, 457 N.J. Super. 170 (App. Div. 2018). Not only did Plaintiff's counsel engage in this behavior during her examination of witnesses, she repeated it during summation.

Counsel's comments regarding Appellants had no basis in law, were inflammatory and clearly an attack their character meant to influence the jury. They have no place in proper summation or commentary on the evidence or credibility of testimony. Rodd v. Raritan Radiologic Associates, P.A., 373 N.J. Super. 154 (App. Div. 2004). Specific comments made by counsel during summation include:

> This has nothing to do with a municipal alliance grant and everything to do with the hostile, abusive work environment based on her religion, her disability, **and [Defendants] just overall being bad people.**
>
> (7T:80:18-23).

I asked Deb[bi] Winogracki, **as cocky as she is…**

(7T:75:16).

[Defendant] Debbi Winogracki, **she just can't help herself**, she didn't like him either…

(7T:81:11-13).

The conduct of Plaintiff's counsel "encourage[d] the jury to depart from neutrality and to decide the case on…bias rather than on the evidence." Geler v. Akawie, 358 N.J. Super. 437, 464-65 (2003)(citing Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir.1982), aff'd on other grounds, (1984).

The summation given by Plaintiff's counsel in this case charged past the boundaries of the broad latitude otherwise afforded to counsel. Her comments were so prejudicial that they constituted a miscarriage of justice under the law and were clearly capable of producing an unjust result.

Accordingly, this court should remand this matter to the trial court for a new trial.

## CONCLUSION

Based on the foregoing reasons, the trial court's ruling denying Appellants' Motion for New Trial should be reversed, and this court should remand this matter to the trial court for a new trial.

Respectfully submitted,

**DASTI & STAIGER, P.C.**
Attorneys for Defendants/Appellants

Dated: May 7, 2024

*s/Brigit P. Zahler, Esq.*
BRIGIT P. ZAHLER
*Of Counsel & On the Brief*

*s/Christopher A. Khatami, Esq.*
CHRISTOPHER A. KHATAMI
*Of Counsel & On the Brief*

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

| | |
|---|---|
| DEBRA REUTER,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>BERKELEY TOWNSHIP, its agents, servants, employees, CARMEN F. AMATO, JR., TED MCFADDEN, DEBBI WINOGRACKI, JOHN A. CAMERA, "ABC CORP. 1-5" and/or "JOHN DOE" 1-5 and/or "JANE DOE 15" (the last three being fictitious designations),<br><br>Defendants-Respondents | SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION: A-000138-23<br><br>CIVIL ACTION<br><br>**ON APPEAL FROM THE JURY VERDICT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY**<br><br>**DOCKET NO. OCN-L-2806-18**<br><br>**SAT BELOW:**<br>**The Honorable James Den Uyl, J.S.C.**<br><br>**RESPONDENT'S BRIEF ON APPEAL**<br><br>Attorneys of Record:<br><br>William Stoltz, Esq.<br>Attorney ID: 019302011<br>E: wstoltz@rosemariearnold.com<br><br>Paige R. Butler<br>Attorney ID: 023552008<br>E: pbutler@rosemariearnold.com<br><br>LAW OFFICES ROSEMARIE ARNOLD, LLP<br>*Attorneys for Plaintiff-Appellant*<br>1386 Palisade Avenue<br>Fort Lee, NJ 07024<br>T:(201)461-1111<br>F:(201)461-1666 |

# TABLE OF CONTENTS FOR BRIEF

## TABLE OF JUDGMENTS, ORDERS, AND RULINGS

# TABLE OF CONTENTS FOR PLAINTIFF-RESPONDENT'S SUPPLEMENTAL APPENDIX



*Pursuant to R. 2:6-1(a)(2), briefs are ordinarily not to be included with an appendix. Plaintiff is filing the above-reference excerpts from the briefs submitted on Defendants' motion for a new trial in this supplemental appendix under an exception to R. 2:6-1(a)(2), specifically where "the question of whether an issue was raised in a trial court is germane to the appeal." Here, the attached documents are necessary to properly explain when Defendants' arguments on appeal were first raised. Defendant's submission to this Court misleadingly implies that their arguments were raised during/before trial, when they were not. These excerpts are also necessary so Plaintiff can comply with R. 2:6-2(a)(5)'s requirement that she specifically note where her arguments on appeal were raised below. This is necessitated by Defendants' failure to order and supply the transcript from the oral argument on their motion. Pursuant to R. 2:6-1(a)(2), "only the material pertinent" to these issues (i.e., the portions containing legal arguments) are included in this appendix.

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**



**Rules**

## PRELIMINARY STATEMENT

Plaintiff-Respondent DEBRA REUTER ("Plaintiff" or "Reuter"), via her undersigned attorney, hereby submits this Respondent's Brief on the Appeal filed by Defendants-Appellants BERKLEY TOWNSHIP ("the Township"), its agents, servants, employees ("Berkley"), CARMEN F. AMATO, JR. ("Amato"), TED MCFADDEN ("McFadden"), DEBBI WINOGRACKI ("Winogracki"), and JOHN A. CAMERA ("Camera") (collectively, "the Defendants"), which seeks to reverse and remand a jury verdict in this matter entered on May 26, 2023 which found the Defendants liable for creating a hostile work environment based on disability and retaliation under the New Jersey Law Against Discrimination ("the LAD"), and awarded the Plaintiff $1,610,003.00 in compensatory and punitive damages. As set forth at length below, the Defendants' appeal should be rejected in its entirety because: 1) the Defendants cannot demonstrate that Plaintiff committed a McKenney violation during her testimony; 2) the Defendants have neither preserved nor properly argued a challenge to the Court's jury charge as read; 3) Plaintiff's counsel's summation was proper under the plain error standard; and 4) the Jury's liability and damages verdicts are supported by the weight of the evidence. As the Defendants' Appeal is entirely devoid of factual and legal merit, Plaintiff respectfully requests that the Jury's verdict be affirmed in its entirety.

## STATEMENT OF PROCEDURAL HISTORY[1]

This matter arises out of numerous allegations of religious **and** disability-based discrimination and retaliation under the LAD. See DA-001-DA-012. After discovery was completed, an 8-day jury trial was held before the Honorable James Den Uyl, J.S.C. ("the Trial Court"). See generally, 1T – 8T. At the conclusion of the trial, the Jury entered a verdict in favor of the Plaintiff on her claims of disability-based hostile work environment and retaliation under the LAD. See DA-083-DA084. On June 13, 2023, the Defendants filed a motion for a new trial. See DA-085-DA-087. Contrary to the misleading R. 2:6-2(a)(5) references in the Defendants Brief, **their arguments on appeal were not raised during or before trial, but rather for the first time in their motion for a new trial**. See Pa1-Pa28. Plaintiff opposed this motion on July 13, 2023. See Pa29-Pa61. Defendants filed a reply on July 17, 2022. See Pa62-Pa75. On or around July 21, 2023, the

[1] Pursuant to R. 2:6-8, the record citation abbreviations used in this brief are as follows: "DA" refers to Defendants' Appendix; "Pa" refers to Plaintiff's Supplemental Appendix; "1T" refers to the Transcript of Trial Proceedings on May 16, 2023; "2T" refers to the Transcript of Trial Proceedings on May 17, 2023; "3T" Refers to the Transcript of Trial Proceedings on May 18, 2023; "4T" refers to the Transcript of Trial Proceedings on May 19, 2023; "5T" Refers to the Transcript of Trial Proceedings on May 22, 2023; "6T" Refers to the Transcript of Trial Proceedings on May 23, 2023; "7T" refers to the Transcript of Trial Proceedings on May 24, 2023; "8T" refers to Transcript of Trial Proceedings on May 25, 2023; "RT" refers to the Deposition Transcript of Debra Reuter dated June 14, 2021; "CT" refers to the Deposition Transcript of John Camera dated January 20, 2022; "AT" Refers to the Deposition Transcript of Carmen Amato dated January 20, 2022; and "WT" refers to the Deposition Transcript of Debbi Winogracki dated January 31, 2022.

Trial Court held oral argument,[2] and on August 23, 2023, the Trial Court entered an extensive and well-reasoned decision denying the Defendants' motion for a new trial. See DA-088-DA-124. This appeal commenced shortly thereafter. See DA-125-DA-139.

## LEGAL ARGUMENT

### POINT I:
### The Defendants Cannot Show that Plaintiff Committed a McKenney Violation
### (RAISED BELOW: Pa30-Pa40)

Defendants' first argument is that reversal is required because "Plaintiff's trial testimony . . . materially deviated from her factual allegations pleaded in the Complaint, her certified answers to interrogatories and her deposition testimony." Db at p. 10. However, the Defendants' brief **contains no citations to any statute, rule, case law, or any other legal authority** supporting this argument. See Db at pp. 10-18. That is because this argument is frivolous. The closest thing to legal authority that could plausibly (but does not) support the Defendants' position is arguing for a so-called "McKenney violation". See Argument Point I.A, infra. However, as set forth at length below, any such claim fails here because: 1) the Defendants failed to preserve such a claim by objecting to Plaintiff's testimony at trial (see Argument Point I.B, infra); 2) Plaintiff's testimony did not materially

[2] The Defendants failed to either order or file the transcript of this oral argument, so Plaintiff is unable to reference this transcript.

deviate from prior pleadings and discovery; (see Argument Point I.C, infra) and 2) even if it did, the Defendants have failed to prove or even articulate prejudice sufficient to Justify Finding a McKenney Violation. See Argument Point I.D, infra. As Defendants' first argument is entirely devoid of factual or legal merit, Plaintiff respectfully requests that it be disregarded, and the verdict in this matter affirmed.

## A. Legal Analysis: The Legal Standard for Finding a McKenney Violation (**RAISED BELOW: Pa31-Pa33**)

At trial, a party's **primary** remedy for a witness' inconsistent testimony is **not** a mistrial or refusal to admit evidence, but rather vigorous cross-examination. See Parker v. Poole, 440 N.J. Super. 7, 22 (App. Div. 2015) ("Cross-examination is the greatest legal engine ever invented for the discovery of truth." (quoting State v. Silva, 131 N.J. 438, 444, 621 A.2d 17 (1993)). However, in certain **extremely limited** circumstances, the Courts have held that a surprise material change in a witness' testimony from prior evidence in discovery may warrant a new trial pursuant to R. 4:50-1(c) if it results in significant prejudice **to a party's ability to present their case**. The seminal case on this question is McKenney v. Jersey City

Med. Ctr., 167 N.J. 359 (2001).[3] In that case, the Supreme Court was confronted with a complex and closely contested medical malpractice action involving claims for wrongful birth, wrongful life, and injuries sustained during a delivery. Id. at 364. The central basis of Plaintiff's theory of liability was a failure to ensure certain sonogram images were timely read and properly interpreted. Id. at 365. At trial, several key defense witnesses changed their testimony from prior depositions as to whether/when they reviewed and/or made notations on certain sonograms. Id. at 366-68. **Directly after each of these witnesses testified, Plaintiffs' counsel moved for a mistrial claiming surprise**. Id. at 368. On appeal, Counsel for the Defendants conceded that he knew the night before trial that the testimony was going to change, and that he failed to notify Plaintiff's counsel of this change. Id. at 369. Under the highly unique circumstances of that case, the Supreme Court found this to be highly prejudicial to the Plaintiff for multiple reasons:

> The surprise testimony was prejudicial to plaintiffs for several reasons. First, both De and Dr. Hu **testified after plaintiffs had**

[3] Even though their factual argument clearly states the principals of a claim under McKenney (i.e., a material change in testimony leading to unfair surprise), Defendants never cite this case, **or any other legal authority** to support their argument. See Db at pp. 10-18. Below, the Defendants nonsensically claimed **both** that they were **not** seeking relief under McKeeney **and** that McKeeney supported their argument. See Pa63-Pa67. As such, while Defendants' have not explicitly argued for a McKenney violation on appeal, Plaintiff is obligated to address this issue because: 1) it is the **only legal authority applicable** to the arguments raised by the Defendants, and 2) the Defendants claimed below (albeit inconsistently) that McKenney supported their argument.

> **concluded their trial preparations**, which had extended over several years. More damaging, the surprise evidence **was heard by the jury after plaintiffs had concluded their evidentiary presentation**. That substantially deprived plaintiffs' counsel of a reasonable opportunity to challenge their testimony. Second, this was **a close case from its inception in that plaintiffs had about a two-week narrow window of opportunity during which an abortion was a viable option**. Third, although the summary judgment order dismissing De from the case precluded defendants from arguing the "empty-chair" defense to the jury, that order did not preclude De from accepting more responsibility than had been the case in her depositions. The primary liability sought to be imposed against the JCMC and the FHC was that of *respondeat superior:* when an employee such as De is liable for acts performed within the scope of the employee's employment, so too is the hospital. Here, neither De nor the JCMC was a real party in the case at the time of trial. In addition, some of De's surprise testimony was extremely beneficial to Dr. Hu.
>
> . . .
>
> Under the circumstances presented in this close case, we cannot view with confidence the jury's determination that Dr. Hu's negligence did not deprive McKenney of the opportunity to terminate her pregnancy during the second trimester. For plaintiffs to proceed to trial without being informed of the surprise testimony created a "make believe" scenario for plaintiffs, the legal equivalent of half a deck. **Plaintiffs went to trial misled by false information**. Hence, the failure to grant a mistrial was an abuse of discretion. The trial in this case was inconsistent with the spirit of our discovery rules, which are designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments therein be rested upon the real merits of the causes and not upon the skill and maneuvering of counsel.

Id. at 373-76 (internal citations and quotation marks omitted) (emphases added).

Since the issuance of this Decision, the Supreme Court has made it clear that the new trial granted in McKenney was not an automatic result any time a witness'

testimony at trial is inconsistent with prior evidence provided in discovery. Rather, a new trial is only an appropriate when there is a **material** deviation from prior testimony which **significantly prejudices** the other party. See, e.g., T.L. v. Goldberg, 238 N.J. 218, 231 (2019) ("Plaintiffs have not shown prejudice, and that important and clear difference distinguishes this case from the relief granted in McKenney."). Moreover, the Supreme Court has held that a vital step in seeking relief under McKenney is **that the opposing party make an objection/motion for mistrial at the time of the offending testimony**. Id. ("In addition, we note that, counsel in *McKenney* objected to De's change in trial testimony during the trial, contrary to the lack of objection here."). The point of this requirement is that it "gives the court an opportunity to address [the] change in trial testimony **during the trial**." Id. (emphasis added).

B. Application: Defendants' Waived Any Right to Claim a McKenney Violation Because They Failed to Register an Objection During Trial
(**RAISED BELOW: Pa33-Pa34**)

As a preliminary matter, the Defendants waived any right to claim a McKenney violation because they failed to object to any of Plaintiff's testimony at any time while she testified, nor did they move for a mistrial/curative instruction at the conclusion of her testimony. See 4T at 110:9-201:11 (Plaintiff's testimony, containing no objections or motions for mistrial based on her testimony); id. at 201:15-202:14 (sidebar conference immediately following Plaintiff's testimony

during which Defense Counsel raised no objections/motions, nor announced any intent to do the same). Nor did the Defendants make any objections or move for a mistrial when Plaintiff's counsel rested on their case in chief; rather they only made a standard motion for directed verdict, with no reference to any supposedly surprising or prejudicial testimony warranting a mistrial or corrective instruction. See 5T at 4:20-8:24. Instead of doing any of these things, the Defendants took advantage of the **proper** remedy for supposedly inconsistent testimony, and rigorously cross-examined plaintiff. See 4T at 158:17-191:25; 199:201:1-3. In short, by failing to register any sort of objection or request a mistrial at the time of Plaintiff's testimony, the Defendants have waived any right to seek a mistrial based on supposed McKenney violation. See T.L., 238 N.J. 231. As such, the Defendants arguments concerning Plaintiff's alleged "material deviations" should be disregarded on their face, and the Jury's verdict affirmed.

### C. Application: There was no McKenney Violation Because Plaintiff's Trial Testimony Does Not Materially Depart from Prior Pleadings and/or Discovery
### (**RAISED BELOW: Pa33-Pa37**)

Turning to the "merits" (such as they are) of the Defendants' argument, they claim to have been somehow surprised by the fact that Plaintiff made claims during trial that she was discriminated against because of her disability, **despite the fact that disability discrimination has been a part of this case since its inception**. See Db at pp. 10-17; see also, DA-001-DA012 (Plaintiff's complaint, setting forth

claims for both religion- **and** disability-based discrimination). This argument is factually nonsensical.

Plaintiff has unequivocally stated **since the pleading stage** that she faced discrimination **both** because of her Jewish faith **and** because of her disability (i.e., her anxiety disorder).[4] See DA-001-DA012. As for Plaintiff's complaint, in that document she clearly made allegations of improper conduct directed at her by the Defendants on the basis of **both** religion **and** disability: See DA-003-DA-006 (¶¶ 21-24 of Plaintiff's Complaint). More critically, the Complaint quite specifically states that the "allegations set forth above **are not intended to be an exhaustive list of all the allegations against Defendants, but merely a representative sample**." Id. at DA-006 (¶ 25 of Plaintiff's Complaint).

As for Plaintiff's responses during discovery, those responses are consistent with the allegations of the complaint. For example, Plaintiff's answers to interrogatories mirror the allegations set forth above. See DA-021-DA-023 (Plaintiff's Answers Form A Interrogatories 2-3). In short, it is nonsensical to claim that Plaintiff did not plead disability discrimination at the beginning of this

[4] As much as the Defendants attempt to paint this case as involving an "either or" choice between claims based on religious discrimination versus claims based on disability discrimination, the truth is that the way the facts of Plainiff's case developed, these issues were frequently intertwined. As such, while the Jury may not have found in favor of religious discrimination, that does not mean that comments/issues related to religious discrimination are irrelevant insofar as they relate to causation of Plaintiff's psychiatric (and therefore disability) issues.

case or describe such discrimination in her Answers to Interrogatories so as to make her trial testimony concerning such issues a surprise is simply not supported by the factual record.

As for Plaintiff's deposition testimony, she testified extensively as to how she was on the receiving end of numerous discriminatory comments and actions from the Defendants and other Berkley employees relating to her Jewish Faith **and** Anxiety disorder. In fact, she testified that **these comments/actions were so numerous that Plaintiff could not recall the specific dates and times of every single comment because they were too numerous to count**. See RT at 49:24-50:15; 121:1-2; 147:14-148:12. She readily conceded that because of her anxiety issues, she has trouble remembering specific dates. See id. at 52:5-7. Nonetheless, Plaintiff was able to testify extensively and directly concerning a variety of **specific** acts of discrimination that she was subject to as a result of her Jewish Faith **and** Anxiety issues, as set forth in the paragraphs that follow. See generally id.

For example, Plaintiff testified that in January 2017, McFadden, the director of the department of buildings and grounds (a supervisory-level employee of Berkley), **in her presence and in the presence of her direct supervisor**, stated that a company who was replacing doors in their building was "**run by 'stupid jews.**" Id. at 58:2-62:1 (emphasis added). Plaintiff explained that she informed

both Yurcisin and McFadden that these comments upset her but received no apology or any indication that discipline had been instituted. See id. at 62:10-19; 63:17-64:5.

In addition, Plaintiff testified at her deposition that Amato attempted to force her to work a flag raising ceremony on September 30, 2017, and that when she informed him she needed that day off for a Jewish high holy day, he **yelled at her in a public setting**, saying "**Why do you need the day off to go sit and pray?**" See id. at 64:12-69:5 (emphasis added). Plaintiff testified that she complained about this incident to her husband and several school board members who were present, but that she did not make a specific complaint to the township because she was intimidated by the fact that she was yelled at by the Mayor of the town. See id. at 69:6-13.

In addition, Plaintiff testified at her deposition how she suffered a variety of indignities at the Berkley's 2017 Tree-Lighting ceremony. First, Plaintiff testified that while working to organize this ceremony, she was informed by Winoracki that Amato had directed the name of the ceremony be changed to "Christmas" Tree Lighting in order to avoid the ceremony being associated with the holiday of Hanukah. See id. at 76:1-79:2. Plaintiff testified that she complained about this change the moment she learned of it. See id. at 79:18-80:1. At the same time, Plaintiff was informed by Winogracki that, at Amato's direction, the color on the

fliers advertising this ceremony were to be changed from blue to red to avoid association with Hanukah. See id. at 81:24:85:13. In addition, Plaintiff was **told by her direct supervisor** that she was, on Amato's orders, barred from participating in the tree-lighting ceremony because the Mayor did not want Jewish people working the event. See id. at 86:3-87:15.

Plaintiff also testified to being on the receiving end of several anti-Semitic comments by her co-worker Winoracki. For example, Plaintiff testified that Winogracki said to her that she should not care about the name of the tree lighting ceremony, since "there are not that many Jews" and that "your people" could have a menorah lighting somewhere else. See id. at 95:21-96:3; 98:3-9. Plaintiff complained to Winogracki herself and to her supervisor regarding this comment, and that nothing happened a s result. See id. at 99:11-100:21. In addition, Winogracki chastised Plaintiff in **front of other people** for bringing in Blue and White cupcakes for the Holiday Christmas party, and said that these "Hanukah Cupcakes" were inappropriate for a Christmas party.. See id. at 100:22-101:22.

Plaintiff further testified at her deposition that **as a result of the stress generated by the above-referenced harassment**, she was forced to take a total of 12 weeks of Family Medical Leave Act ("FMLA") leave divided between two periods occurring in the months of February and May of 2018 and 2019. See id. at 17:3-18:20. During the first of these FMLA leave periods, Winogracki took away

Plaintiff's office and had her belongings sent to her home. See id. at 111:20-113:9. As if this indignity was not enough, after she returned from FMLA leave, Plaintiff was confronted by several part-time staff working for Berkley, who told her she was only good for taking FMLA leave. See Id. at 118:5-119:12. Plaintiff further testified that she received constant harassment regarding her FMLA leave after returning and complained about it many times. See id. at 147:14-148:2.

In short, it cannot be reasonably stated that Plaintiff's pleadings, answers to interrogatories, and deposition testimony failed to put Defendants on notice to the fact that Plaintiff was making claims for Disability discrimination. There is simply no good faith basis for Defendants to claim that they were somehow surprised by Plaintiff's testimony at trial to the point that they were significantly prejudiced. More importantly, as set forth below, even **if** Plaintiff's trial testimony constituted a material deviation, the Defendants have failed to articulate, let alone prove, the kind of prejudice that would warrant a new trial under McKenney.

### D. Application: Even if Plaintiff's Testimony Did Materially Deviate from Prior Pleadings and/or Discovery, the Defendants have Failed to Articulate, Let Alone Prove Prejudice Sufficient to Justify Finding a McKenney Violation
**(Raised Below: Pa38-Pa40)**

However, even if one were to presume for the sake of argument that Plaintiff's testimony **did** materially deviate from her prior pleadings/discovery

(which it does not), the Defendants utterly fail to articulate, let alone prove, the kind of prejudice that would result in a McKenney violation necessitating a new trial. In their brief, the Defendants claim in conclusory fashion (again, **without citation to any legal authority**) that they are prejudiced because Plaintiff's testimony had the potential to "mislead the jury" regarding certain allegations. See Defendants' Brief at p. 16. However, it was Defense Counsel's job to cross examine plaintiff at the time of trial expose any alleged inconsistencies from her prior testimony. More importantly, a "potential to mislead the jury" is simply the not the "prejudice" that McKenney was looking to rectify. Rather, it was the prejudice of a party being unable to properly prepare their case/defense for trial. See McKenney, 167 N.J. at 373-76. In the absence of such prejudice, there can be no McKenney violation, and the Defendants' Motion must fail. See T.L., 238 N.J. at 231.

Examining the record of this case, Defendants plainly cannot articulate, let alone prove, prejudice to their ability to prepare a defense resulting from Plaintiff's alleged "surprise" testimony because there was none. See Argument Point I.C, supra. In fact, Defendants failure to object to Plaintiff's testimony and/or move for a mistrial belies any claim that they were somehow prejudiced in the presentation of their case, since a reasonably prudent counsel would object if that were so. See Argument Point I.B, supra. More importantly, unlike the Plaintiffs in McKenney,

who had already completed their factual presentation and thus were prevented from challenging the surprise evidence with their own presentation (see id.), Plaintiff's alleged "surprise" testimony came **before the Defendants presented their defense**. See Defendants' Motion at Exhibit F4, 110:9-201:11 (Plaintiff's testimony); see also, Defendants Brief at Exhibits F5-F6 (Defendants' Factual presentation, coming **after** Plaintiff's testimony). In other words, Defendants could, and **did**, put on a vigorous defense consisting of six fact witnesses and one expert, all specifically designed to counteract the evidence and allegations Plaintiff presented at trial. See generally 5T and 6T. They also had the opportunity to, and did, vigorously cross-examine Plaintiff. See 4T at 158:17-191:25; 199:201:1-3.

One witness' testimony stands out as a stark example of the lack of prejudice suffered by the Defendants because of any "surprise" testimony by the Plaintiff, namely the testimony of Defendant's psychiatric expert, Dr. Charles Dackis. See Defendants' Brief at Exhibit F6, 29:16-84:25. Dr. Dackis testified extensively as to where he agreed/disagreed with Plaintiff's psychological expert concerning his diagnosis. See id. at 36:1-8; 38:8-39:4; 40:4-15; 41:1-42:16. More importantly, he described his alleged conversation with Plaintiff, and how he concluded that she was suffering from psychosis. See id. at 44:8-47:22. This is critical because he opined that plaintiff's psychosis could not be produced by any stressor at work but was rather a biological condition. Id. at 50:6-11; 51:19-52:5. In other words,

Plaintiff's allegations concerning the reasons for and/or sources of mistreatment/stress—and any supposed "changes" thereto at trial—were **entirely irrelevant to his opinion**. This is in stark contrast to the extreme prejudice faced by the Plaintiff in McKenney, who's entire expert report presented at trial turned on the timing testified to by the offending doctors which was suddenly changed at trial. See McKenney, 167 N.J. at 373-76.

In short, even **if** Plaintiff's testimony materially deviated from prior pleadings/discovery (which again, it did not), the Defendants have not established the kind of prejudice which would warrant a new trial under McKenney and its progeny. In the absence of said prejudice, the Defendants' argument for reversal on this ground must be disregarded, and the verdict affirmed. See T.L., 238 N.J. at 231.

## POINT II:
## The Defendants Have Not Preserved or Presented a Valid Challenge to the Jury Charge as Read
## (RAISED BELOW Pa40-Pa43)

The Defendants also contend that the Court's jury charge **as read** "conflated Plaintiff's four separate claims of religious discrimination, disability discrimination, retaliation for making complaints and retaliation for seeking legal advice." Db at p. 22. However, what the Defendants fail to mention is that they did not object to the Charge as read. Furthermore, the Defendants do not specifically identify the supposedly offending language **anywhere** in their brief.

Considering these clear failures, Defendants' appeal on the grounds of an improper jury charge must be disregarded, and the Jury's verdict affirmed.

The Supreme Court has summarized a Reviewing Court's role concerning issues with a jury charge as follows:

> Preliminarily, it is fundamental that the jury charge should set forth in clear understandable language the law that applies to the issues in the case. Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 464, 744 A.2d 1186 (2000). The jury charge is a road map that explains the applicable legal principles, outlines the jury's function, and spells out "how the jury should apply the legal principles charged to the facts of the case at hand." Viscik v. Fowler Equip. Co., 173 N.J. 1, 18, 800 A.2d 826 (2002).
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> In construing a jury charge, a reviewing court must consider the charge as a whole to determine whether the charge was correct. Ibid. When a party objects at trial, a reviewing court should reverse on the basis of that challenged error unless the error is harmless. R. 2:10-2. **However, when the party fails to object, the reviewing court must determine whether any error in the charge was "of such a nature as to have been clearly capable of producing an unjust result."** Mogull, supra, 162 N.J. at 464, 744 A.2d 1186 (quoting R. 2:10-2). If not, the error is deemed harmless and disregarded.

Toto v. Ensuar, 196 N.J. 134, 144 (2008) (emphasis added). In other words, if a party fails to object to a charge at the time of trial, it is judged under the "plain error" standard, under which a charge is reversible error **only** "if the jury could have come to a different result had it been correctly instructed." Gonzalez v. Silver, 407 N.J. Super. 576, 586 (App. Div. 2009) (citing Velazquez v. Portadin, 163 N.J. 677, 688 (2000)). The Plain Error standard is a high bar to clear, and as such, "[i]t ought to be an unusual case where a court will set aside a verdict for an

error in the charge, if it exists, which is not called to the attention of the trial judge by a proper exception." Wolek v. Pub. S. R. Co., 2 N.J. Misc. 431, 433 (1924).

More importantly, a party seeking relief from the Court based on some supposed error **must actually identify said error.** A party cannot force the Court and/or opposing Counsel to go combing through the record to find factual support for relief they are seeking. See State v. Rambo, 401 N.J. Super. 506, 527 (App. Div. 2008) ("Defendant makes a generalized complaint, without any specific references, that the trial court placed improper restrictions on stand-by counsel. We decline to comb the record searching for any examples, indeed if any exist.") (emphasis added). **It is the Defendants' "responsibility to refer [the Court] to specific parts of the record to support their argument."** Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 474 (App. Div. 2008) (emphasis added). "They may not discharge that duty by inviting [the Court] to search through the record [themselves]." Id. (citing State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977)). Along these same lines, "[a]n issue not [properly] briefed . . . is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (internal citations omitted). In other words, it is not incumbent upon the Court or opposing counsel to read a party's mind as to where a supposed error is, the Party seeking relief must identify said error and **cite to where in the record it may be found**.

At trial, the Defendants never objected to the Trial Court's jury charge on the ground that it "conflated Plaintiff's four separate claims of religious discrimination, disability discrimination, retaliation for making complaints and retaliation for seeking legal advice." Db at p. 22. Rather, during the charge conference, the Defendants only raised three specific objections to the charge: 1) an objection to the presentation of the retaliation charge (see 6T at 96:21-22); 2) an objection to the inclusion of the aggravation of disability charge (see id. at 97:12-18); and 3) an objection to the inclusion of the discriminatory firing charge (see 7T at 14:6-12).[5] More importantly, after the Court completed its ***75-page jury charge*** (see 8T at 16:18-91:5), Defense Counsel ***offered no additional objections to the charge as read***. See id. at 91:7-14. As the objections raised in Defendants' Appeal were not preserved via a proper objection, that means the issue must be examined under the demanding "plain error" standard. See Gonzalez, 407 N.J. Super. at 586.

However, in their brief, the Defendants have made applying this standard functionally impossible, because they have ***failed to specifically identify the language in the charge that is supposedly erroneous***. To explain, in their brief, the Defendants argue in general terms that the Court's charge conflated Plaintiff's causes of action, and potentially created confusion, **but offer no citations to, or**

[5] It bears noting that none of these objections are raised in Defendants brief, so they are not addressed here. See Db at pp. 21-24 (setting forth Defendants' arguments concerning allegedly improper charge).

**quotations of, the supposedly offending language in the charge**. Db at 21-24. In fact, this information is nowhere to be found in Defendants 49-page brief. Specifically, this information is not contained in: 1) the brief's preliminary statement (which doesn't even address the question of a supposedly improper jury charge) (see id at pp. 1-3-5); 2) the brief's statement of procedural history (see id. at pp. 3-5), 3) the brief's statement of facts (see id. at pp. 5-7), or 4) the brief's description of the governing legal standards. See id. at pp. 7-9. The closest the Defendants come to specifically citing what language of the charge is incorrect is the Defendants' R. 2:6-2(a)(6) statement of where their argument was raised below, citing to 8T 30:20-91:12.[6] See Db at p. 21. In short, the Defendants have left it to the Court and opposing counsel to comb through the ***75-page charge*** (or, if one is being generous, 60 pages based on their "citation") to determine just what language contained therein is somehow erroneous. Such a result is plainly unjust, and under these circumstances, the law of this state requires the Court to treat this issue as waived. See Rambo, 401 N.J. Super. at 527.

To the extent the Defendants attempt to address this deficiency in reply, the Court should reject any such attempt as plainly unfair to Plaintiff. It is well established in this State that "[i]t is improper to introduce new issues in

[6] This is a material misrepresentation by Defense Counsel, as they are essentially claiming to have raised this issue during trial, when in fact they did not raise this issue until their post trial motion. See Pa10-Pa11

a reply brief." BIS LP, Inc. v. Dir., Div. of Taxation, 26 N.J. Tax 489, 581 (App. Div. 2011) (citing Randolph Town Ctr., L.P. v. Cnty. of Morris, 374 N.J. Super. 448, 452 n.2 (App. Div. 2005)). Typically, such new issues/arguments/evidence "will not be recognized." A.D. v. Morris Cty. Bd. of Soc. Servs., 353 N.J. Super. 26, 30 (App. Div. 2002) (internal citations omitted). The logic behind this principal is simple: by introducing new issues/arguments/evidence on reply, Appealing party functionally denies the responding party the opportunity to respond to said issues/arguments/evidence. Such logic would plainly be applicable here, where the Plaintiff would be at a severe disadvantage in terms of responding to an argument that the Defendants have not properly presented to the Court. As such, the Plaintiff respectfully requests that the Defendants arguments concerning the jury charge be disregarded as improperly raised, and the Jury Verdict affirmed.

## POINT III:
## Plaintiff's Counsel's Summation was Proper Under the Plain Error Standard
## (RAISED BELOW: Pa43-Pa49)

Defendants spend nearly **one third** of their brief arguing that supposedly improper comments made by Plaintiff's counsel during her summation warrant the granting of a new trial. See Db at pp. 33-49. However, once again, the Defendants raise arguments were not preserved via a timely objection, and as such, Plaintiff's Counsel's comments must be viewed under the plain error standard. Under this standard, it is clear Plaintiff's Counsel's comments were all proper, and

Defendants' motion for a new trial on the basis of improper comments by Plaintiff's counsel during summation must be denied.

As explained by the Supreme Court:

> . . . . As a general matter, "**counsel is allowed broad latitude in summation [and] counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd**." Colucci v. Oppenheim, 326 N.J. Super. 166, 177, 740 A.2d 1101 (App. Div. 1999), certif. denied, 163 N.J. 395, 749 A.2d 369 (2000) (citations omitted). Summation commentary, however, must be based in truth, and counsel may not "misstate the evidence nor distort the factual picture." Ibid. (internal quotation marks and citation omitted); see also Wimberly v. City of Paterson, 75 N.J. Super. 584, 604, 183 A.2d 691 (App. Div.), certif. denied, 38 N.J. 340, 184 A.2d 652 (1962) (stating that counsel may not draw inferences during summation if "there are no grounds for [such inferences] in the evidence") (citations omitted). When summation commentary transgresses the boundaries of the broad latitude otherwise afforded to counsel, a trial court must grant a party's motion for a new trial if the comments are so prejudicial that "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a).

Bender v. Adelson, 187 N.J. 411, 431 (2006) (emphasis added).

However, in order to challenge opposing counsel's comments during summation, it is vital that a timely objection be interposed **at the time said comments are made**. The Courts of this State "presume that when a lawyer observes an adversary's summation, and concludes that the gist of the evidence has been unfairly characterized, an objection will be advanced." Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 495 (2001). As such,

> . . . **if no objection was made to the improper remarks, the remarks will not be deemed prejudicial**. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made. Failure to object also deprives the court of the opportunity to take curative action.

State v. Timmendequas, 161 N.J. 515, 576 (1999) (emphasis added). Put another way, if no timely objection is made at trial, the standard by which a counsel's statements in summation are judged is "plain error". See Fertile, 169 N.J. at 493. (internal citations omitted). Under this standard, the test is whether "under the circumstances of this case the error possessed a clear capacity for producing an unjust result." State v. Melvin, 65 N.J. 1, 18 (1974). In fact, under this standard, Courts "must **disregard any unchallenged errors or omissions** unless they are 'clearly capable of producing an unjust result.'" State v. Santamaria, 236 N.J. 390, 404 (2019) (quoting R. 2:10-2). The Plain error standard is a "high standard [which] provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." State v. Bueso, 225 N.J. 193, 203 (2016). In fact, under the plain error standard, "'**[i]t [is] fair to infer from the failure to object below that in the context of the trial the error was actually of no moment**.'" State v. Nelson, 173 N.J. 417, 471 (2002) (quoting State v. Macon, 57 N.J. 325, 333 (1971)). To be clear, raising objections during a post-trial motion because you are unhappy with the verdict does not render them timely. Rather, such objections are treated as untimely and judged under the plain error

standard. See Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 97 (App. Div. 1999).

Turning to the facts of this case, during and after Plaintiff's counsel's summation (see 7T at 57:20-86:25), Defense Counsel **only offered two objections, neither of which is raised in the instant motion**. First, Defense Counsel objected to Plaintiff's counsel describing an investigation that Plaintiff underwent after the letter of representation, on the grounds that there was no testimony regarding said investigation. See id. at 64:10-66:5.[7] Second, Defense Counsel objected to Plaintiff's counsel referencing the fact that Defendant Camera reviewed Plaintiff's FMLA paperwork as not being an accurate description of his testimony. See id. at 73:12-19.[8] Since Defendants raised their objections to Plaintiff's Counsel's summation for the first time in a post-trial motion, said objections must be judged under the high "plain error" standard. See Bell Atl. Network Servs., 322 N.J. Super. at 97.

Certain categories of Defendants untimely objections can be dealt with in short order. For example, the Defendants claim that Plaintiff's counsel made

[7] Defendants clearly did not include this argument their brief because it is entirely without merit. Plaintiff testified extensively to said investigation during trial. See 4T at 145:19-147:20.

[8]Again, this is another argument not included Defendants' brief because it is entirely without merit. Camera plainly admitted during his testimony that he reviewed Plaintiff's FMLA paperwork. See 5T at 84:4-10.

inaccurate statements concerning her burden and/or the law regarding Plaintiff's hostile work environment and retaliation claims. See Db at pp. 35-41. Even assuming for the moment that Plaintiff's Counsel's statements constituted truly inaccurate description of the law/burden rather than simply inartful descriptions of same (a dubious proposition), the Defendants arguments in this regard must clearly fail because **any prejudice they may have suffered was plainly alleviated immediately thereafter when the court provided the model jury charges on the law in question, and the specific charge instructing them only to accept his instructions on what the law of the case is**. See Model Jury Charge 2.25 (model jury charge for hostile work environment under the LAD); 8T at 30:25-46:6 (the Court providing the model instruction on the law for hostile work environment); Model Jury Charge 2.22 (Model Jury Charge for LAD Retaliation), 8T at 47:23-54:4 (the Court providing the Model Jury Charge on the law for retaliation); Model Jury Charge 1.12(a) (purpose of the charge); 8T at 17:14-20 (Court providing the model jury charge instructing them to obey only his instructions on the law). In addition, Defendants fault Plaintiff's counsel for making "disparaging" remarks during summation, including: 1) calling one defense witness "cocky" and that "she just can't help herself", 2) calling defendants "Bad people." See Db at pp. 47-49. This argument is at best laughable, because these comments plainly fall under category of "forceful and graphic" language that attorneys are entitled to use

during summation. See State v. Michaels, 264 N.J. Super. 579, 638 (App. Div. 1993) (finding that a prosecutor's **analogizing a Defendants' conduct to that of the Nazis was not unduly prejudicial**).

Defendants' assertion that Plaintiff's counsel misrepresented/distorted certain evidence (see Db at pp. 41-47), can be disposed of without lengthy argument, because each of the "offending" statements are nothing more than fair comments on evidence contained in the record. For example, Defendants' claim that Plaintiff's counsel stated that a hostile work environment existed without pointing to evidence is essentially a repetition of their cursory arguments that Plaintiffs hostile work environment claims are unsupported by any evidence. Compare Db at p. 44 with Db at pp. 18-21. As set forth in argument Point IV.A.ii, infra, this claim is flatly contradicted by the record. As for the Defendants' claim that Plaintiff's counsel misrepresented the evidence concerning Gina Russo receiving emails containing Plaintiff's complaints of a hostile work environment (See Db at pp. 44-45), this argument amounts to little more than splitting hairs over the definition of an email being "directed" at Mrs. Russo versus her just being "copied" on it. In the end, even Defendants' Counsel **admitted Mrs. Russo received the emails in question**. See 6T at 25:23-26:10. Considering Mrs. Russo's outright denial that Plaintiff made any complaints regarding a hostile work environment based on religion and/or disability (see 5T at 16:5-12), it was entirely

appropriate to comment on her receiving those emails (regardless of whether they were directed to her or merely CC'ed) as calling that assertion into question. Similarly, Plaintiff's Counsel's comments regarding the Municipal Alliance Stipend (see Db at p. 46) were a fair comment on Camera's testimony that while the stipend was originally stopped in early January, that stoppage was only "temporary" at that time and became permanent **after she retained counsel** was potentially a sign of retaliation. See 5T, 73:22-74:5. In fact, Defense Counsel's assertion that this is distorting the evidence is ridiculous since she essentially admitted during Plaintiff's cross-examination that the Alliance grant was permanently cut off because Plaintiff filed a law-suit:

> Q. In January of 2018 do you recall receiving an email from Mr. Camera, the business administrator about the stipend for the municipal alliance?
>
> A. The email said for me to stop working on municipal alliance.
>
> Q. Okay. Is that all it said?
>
> A. He said -- it did. It said -- I don't remember all the details, but I do remember that he asked me to stop working on municipal alliance **until further notice**.
>
> Q. Until further notice.
>
> A. Yes.
>
> Q. Okay. What did you take that to be permanent?
>
> A. I never got further notice.
>
> Q. ***Well because you instituted a lawsuit --***

4T at 176:22-177:12 (emphases added). As for Plaintiff's Counsel's comments regarding Winogracki's logging into Plaintiff's computer while her mother was sick (see Db at p. 35), this was a fair comment on Plaintiff's testimony about how for a period of time, she was well known for being fastidious about germ transmission, and during this time, Winogracki chose to log into her computer and use her phone. See 4T at 152:17-153:7. Finally, Plaintiff's Counsel's comments regarding the effects of medication (see Db at p. 36) are more than fair comments on Plaintiff's own testimony regarding her use of medications and the effect they had on her. See 4T at 150:22-151:9; 198:9-17.

In sum, the Defendants failed to preserve any of the above-referenced objections to Plaintiff's counsel's summation at the time of said summation. As such, the claimed errors must be judged under the plain error standard. When judged against this extremely high standard, it is clear the Defendants' claimed errors in Plaintiff's Counsel's summation do not rise to the level of plain error. As such, Defendants arguments in favor of reversal based on Plaintiff's Counsel's summation must be disregarded, and the verdict affirmed.

## POINT IV:
## The Jury's Verdict was Not Against the Weight of the Evidence
## (RAISED BELOW: Pa49-Pa61)

Finally, the Defendants contend (in conclusory fashion) that the Jury's liability and damages findings are against the weight of the evidence. See Db at pp.

18-21; 24-33. As will be set forth below, these arguments largely repeat the same process over and over: 1) state in conclusory fashion that the record contains no evidence to support the jury's findings, 2) occasionally cite to some self-serving and out of context testimony, and then 3) hope the Court doesn't actually examine the record. As will be set forth below, the Defendants arguments concerning the weight of the evidence in this matter are flatly contradicted by the record, and as such, the Jury Verdict must be affirmed.

## A. The Jury's Liability Findings Were Not Against the Weight of the Evidence
**(RAISED BELOW: Pa50-Pa55)**

### *i. Legal Analysis: The Standard on Appeal for Setting Aside Verdicts as Against the Weight of the Evidence*
**(RAISED BELOW: Pa50-Pa51)**

The Appellate standard for reviewing a jury verdict as against the weight of the evidence is governed by R. 2:10-1, which states:

> In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

Under this standard, Appellate Courts "apply a narrow scope of review to civil jury verdicts. [They] ordinarily do not set them aside and order a new trial unless there has been a proven manifest injustice." Jacobs v. Jersey Cent. Power & Light Co., 452 N.J. Super. 494, 502 (App. Div. 2017) (internal citations omitted). Under this

narrow scope of review, a jury verdict "is impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice." Carrino v. Novotny, 78 N.J. 355, 360 (1979) (citing Baxter v. Fairmont Food Co., 74 N.J. 588 (1977)) (emphasis added).

When determining whether a jury verdict is against the weight of the evidence, "**all evidence supporting the verdict must be accepted as true, and all reasonable inferences must be drawn in favor of upholding the verdict**." Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005) (citing Harper-Lawrence, Inc.v. United Merchants & Mfrs., Inc., 261 N.J. Super. 554, 559 (App.Div.1993)) (emphasis added). "[B]ecause reasonable people may disagree about inferences which may be drawn from common facts, **neither a trial judge nor an appellate court may reweigh the evidence and impose a new verdict simply because they disagree with the jury's decision**." Crego v. Carp, 295 N.J. Super. 565, 578 (App. Div. 1996) (internal citations omitted) (emphasis added) "Only when upon examination the verdict is found to be so contrary to the weight of the evidence as to give rise to the inescapable conclusion that it is the result of mistake, passion, prejudice or partiality, may it be disturbed." Aiello v. Myzie, 88 N.J. Super. 187, 194 (App. Div. 1965) (citing Hager v. Weber, 7 N.J. 201, 210 (1951)). In the end, "**[j]ury verdicts should be set aside in favor of new trials**

**only with great reluctance**, and only in cases of clear injustice." Boryszewski, 380 N.J. Super. at 391 (citing Crego, 295 N.J. Super. at 577) (emphasis added).

*ii. Application: The Jury's Findings Concerning Plaintiff's Disability Hostile Work Environment Claims are Not Against the Weight of the Evidence*
(**RAISED BELOW: Pa51-Pa54**)

Defendants spend a grand total of **4 pages** in their 49-page brief discussing how the Jury's verdict with regards to Plaintiff's disability hostile work environment claims is supposedly against the weight of the evidence. See Db at pp. 18-21. This "argument" consists of asserting in conclusory fashion (and with no citations to the record) that there was no evidence of Plaintiff being subjected to a hostile working environment because of her disability and citing to their clients' self-serving testimony that they had no idea plaintiff even suffered from a disability. See id. As set forth at length below, these arguments are contradicted by extensive evidence in the record which the jury clearly believed was more compelling than that of the Defendants, and as such, their motion for a new trial must be denied.

The Law Against Discrimination ("LAD") bars work-place discrimination "because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, or nationality." N.J.S.A. 10:5-3. Among the acts of discrimination barred by the LAD is the creation of a hostile work environment

based on a protected characteristic. Taylor, 152 N.J. at 498. A claim for hostile work environment has four elements, namely:

> the complained-of conduct (1) would not have occurred *but for* the employee's [race]; and it was (2) *severe* ***or*** *pervasive* enough to make a (3) *reasonable [person]* believe that (4) the conditions of employment are altered and the *working environment is hostile or abusive*.

Lehmann v. Toys 'R' Us, 132 N.J. 587, 603-04 (1993) (italics in original) (bold emphasis added). This four-pronged standard applies to *all* hostile work environment claims. Cutler v. Dorn, 196 N.J. 419, 430 (2008) (citing Taylor, 152 N.J. at 497).

The first element of a hostile work environment claim (i.e., the "but for" requirement) is "discrete" from the latter three elements, which are often viewed in tandem. Lehman, 132 N.J. at 604. **Because "[t]he Lad is not a fault- or intent-based statute," a Plaintiff is not required to prove intent or fault on the part of the employer to satisfy the "but for" requirement.** Id. This is because "the perpetrator's intent is simply not an element of the cause of action", and a "Plaintiff need show only that the harassment would not have occurred but for" their race. Id. at 605. This element "will automatically" be satisfied if the "harassing conduct is [racial] or [racist] in nature" on its face. Id.

Turning to the facts of this case Plaintiff testified during trial at great length about how she was mistreated because of her disability, namely anxiety and

depression. She stated at length how she eventually took FMLA leave the first time after the culmination of a long period of extended mistreatment by the Defendants, including, but not limited to, antisemitic comments made by Defendant Winogracki and others. See 4T at 133:8-135:21. Plaintiff also testified that after returning from FMLA leave, Defendant Wingracki and others in the office made fun of her for taking FMLA leave and made fun of her **by saying she needed to be on medication**. See id. at 129:1-13; 155:14-22. Plaintiff testified that these insults were a constant and at least **weekly** occurrence. See id. at 129:16-130:1. In addition to the constant insults, Plaintiff further testified how Winogracki engaged in a campaign against her to harass her based on her disability. She testified how while she was on FMLA leave, Defendant Winogracki had her things from her office dumped in her driveway without warning. See id. at 139:12-17. Furthermore, Plaintiff testified about how on her return from FMLA leave, she was shocked to find that Winogracki (a person she had previously made numerous complaints about) **had taken over her office and had been promoted above her**. See id. at 124:17-20. More importantly, she testified immediately after she returned from FMLA leave, Winogracki, as her new direct supervisor, made significant changes to her job responsibilities. See id. at 123:22-124:1. Specifically, she testified how Winogracki made her perform menial tasks such as

folding t-shirts, and took away her responsibilities for running recreation programs that she had before. See id. at 141:7-18.

In addition to the forgoing, Plaintiff further testified to additional slights that Defendant Winogracki engaged in to spite her and further aggravate her anxiety issues. For example, Plaintiff testified how Winogracki would log into her computer and using her phone at a time when she was publicly dealing with her mother's cancer treatment was being fastidious about germ transmission. See id. at 152:17-153:7. She further testified how when she was physically threatened by another staff member and the police were called, she heard Winogracki laughing about it and treating the whole incident like a joke. See id. at 145:22-146:11. This would result in her requiring to take a second FMLA leave. See id.

As for the Defendants' purported lack of knowledge regarding Plaintiff's disability and/or mistreatment, the record contains more than sufficient evidence to contradict any such claim. For example, Plaintiff testified that her anxiety issues were well known around the office based on the very public symptoms she displayed. See id. at 147:21-148:7. It should also go without saying that Winogracki's and other's insults towards her indicating that she **needed to be on medication** would inherently imply that they knew about her disability condition. See id. at 129:1-13; 155:14-22. More importantly, Plaintiff repeatedly testified that she complained to numerous people about her mistreatment, including her

supervisor Tim Jurcisin, her union, and Defendant Camera. See id. at 130:5-7; 141:19-22. While Defendant Camera disputed the **nature** of the complaints concerning Winogracki's conduct, he nonetheless conceded that he received multiple complaints from Plaintiffs and others about her. See id at 33:11-16; 50:8-12.

The Defendants knowledge of her condition can also be inferred from portions of their own testimony. For example, Defendant Camera admitted during his testimony that it was his normal procedure to find out the reasons they were out on FMLA leave. See id. at 19:23-25. While he claimed not remember **specifically** when he learned of Plaintiff's reasons for FMLA leave, he admitted that he had specifically reviewed Plaintiff's FMLA file. See 5T at 84:4-10. In fact, he claimed to that he would obtain this information from Gina Russo who was **both the Township's head of HR and Carmen Amato's Secretary**. See 4T at 11:10-12; 25:6-26:5. As for Defendant Winogracki, while she claimed at times not to know why Plaintiff was on FMLA leave, she also specifically testified that she "knew why [plaintiff] wasn't there." 3T at 153:24-25.

In short, when the above referenced evidence is considered **as a whole,** with all reasonable inferences being held in favor of upholding the verdict (as the court is required to do on this motion), it cannot seriously be stated that there was "no evidence" of Plaintiff facing discrimination/hostile work environment because of

her disability. As that is the sole basis upon which Defendants base their claim that the Jury's verdict with regards to Plaintiff's Disability Hostile Work environment claim is against the weight of the evidence, their appeal on this ground must be rejected, and the jury verdict affirmed.

*iii. Application: Defendants Have Made No Argument Concerning the Jury's Verdict on Plaintiff's Claims, and as that Portion of the Jury's Verdict Must Be Affirmed as Unchallenged*
**(RAISED BELOW: Pa54-Pa55)**

In the Point heading for Point III of their brief and in a **single** conclusory sentence in the first paragraph, Defendants claim that the Jury's verdict on her LAD Retaliation claims is against the weight of the evidence. See Db at p. 18. However, despite ostensibly claiming that they are entitled to a new trial on Plaintiff's retaliation claims, the Defendants **do not spend a single word of their 49-page brief on any argument that the Jury's verdict on the retaliation claims was against the weight of the evidence**. See generally, Db. Rather, the entirety of argument in this regard is dedicated solely to arguing that there was no evidence to support Plaintiff's claims for hostile work environment based on disability. See Db at pp 18-21. As "[a]n issue not [properly] briefed . . . is deemed waived" (Sklodowsky, 417 N.J. Super. 657 ), the Defendants have clearly waived any argument that the jury's verdict with regards to Plaintiff's retaliation claims are against the weight of the evidence. Furthermore, Plaintiff's counsel cannot be forced to respond to a phantom argument that is not properly presented. See e.g.,

Dougherty v. N.J. State Parole Bd., 325 N.J. Super. 549, 553 (App. Div. 1999) (refusing to address an inmates claims for damages which were not properly briefed, and holding that respondent "should not be require to respond to a claim for damages" that has been improperly raised). Furthermore, similar to their faultily presented argument on the jury charge, the Defendants should not be permitted to raise these arguments for the first time in reply, as that would be prejudicial to the Plaintiffs, who would have no opportunity to respond to a properly raised argument. See BIS LP, Inc., 26 N.J. Tax at 581. In fact, the Defendants' defective argument in this regard is particularly unforgivable as they **also failed to support this claim with any argument before the trial court**. See Pa54-Pa55. In short, based on their utter failure to support their argument that Plaintiff's retaliation claims are against the weight of the evidence with any sort of factual or legal argument, the Defendants must be deemed to have waived that argument irretrievably. As such, the Defendants appeal on the grounds that Plaintiff's claims for LAD retaliation are against the weight of the evidence must be rejected, and the verdict affirmed.

## B. The Jury's Damages Findings Were Supported by the Weight of the Evidence
## (**RAISED BELOW: Pa55-Pa61**)

### *i. The Compensatory/Economic Loss Damage Awards are Supported by the Weight of the Evidence*
### (**RAISED BELOW: Pa55-Pa57**)

Moving onto the Defendants' arguments concerning Plaintiff's compensatory (i.e., Pain and suffering) and economic damages, the Defendants argue that these damages are against the weight of the evidence by simply repeating their prior arguments that there was no proof plaintiff was discriminated against because of her disability. See Db at pp. 20-21.[9] As these arguments are not sufficient to warrant overturning the Jury's damages decision with regards to Plaintiff's economic and/or compensatory damages, their motion to set aside the Jury's verdict for a new trial must be denied.

This is Court has previously described the limited scope of a courts review of compensatory/economic damages as follows:

> The scope of our review on this issue is somewhat narrow. Damage verdicts "should not be disturbed unless they are so excessive in

[9] As with their arguments regarding liability, the Defendants make no real attempt to argue that the Jury's conclusions regarding Plaintiff's **retaliation** claims are against the weight of the evidence. See Defendants Brief at pp. 20-21. As noted in Point IV.A.iii, supra, the Defendants have waived any such argument by failing to address it in their brief. As such, as a practical matter, even if the Defendants were correct with regards to their arguments concerning Plaintiff's hostile work environment damages (which, per this point, they are not), they have nonetheless waived the right to challenge damages that were issued because of the Jury's findings on retaliation.

> amount as 'inevitably to give rise to the inference of mistake, passion, prejudice or partiality, and by that standard to be **palpably against the weight of the evidence**.'" Carlucci v. Stichman, 50 N.J. Super. 96, 98 (App. Div. 1958); Wytupeck v. City of Camden, 25 *N.J.* 450, 466 (1957). We may not invade the constitutional function of the jury and substitute our judgment for that of the jury as to the amount of plaintiff's damages in a personal injury action, unless the verdict is found excessive by the foregoing standard. Cabakov v. Thatcher, 37 N.J. Super. 249, 258 (App. Div. 1955). We are not authorized on appeal "to substitute our admeasurement of damages for that which appears to be a different but conscientious appraisement of the jury." Lukasiewicz v. Haddad, 24 N.J. Super. 399, 406 (App. Div. 1953). We may set aside a verdict as excessive if "the jury, from some cause, have done the defendants gross injustice. **We cannot exercise this power rudely because we may think the verdict is high; we cannot convert ourselves into a tribunal of fact; the law has not invested us with that power**." Somerville Easton R.R. ads. Doughty, 22 N.J.L. 495, 497 (Sup. Ct. 1850), cited in Moore v. Public Service Coord. Transport, 15 N.J. Super. 499, 505 (App. Div. 1951).

Massotto v. Pub. Serv. Coordinated Transp., 71 N.J. Super. 39, 54 (App. Div. 1961) (emphases added). In other words, a "jury's constitutional duty to render a verdict should not be interfered with unless the overall amount is 'against the weight of the evidence so as to constitute a miscarriage of justice .'" Horn, 260 N.J. Super. at 178 (quoting Dolson v. Anastasia, 55 N.J. 2, 12 (1969)). Under these high standards, "[v]erdicts should be upset for excessiveness only in clear cases." Fritsche v. Westinghouse Elec. Corp., 55 N.J. 322, 330 (1970).

Turning to the facts of this case, in arguing for that the Jury's Economic/Compensatory Damages award was against the weight the evidence, the Defendants simply repeat their unsupported allegations that there was no evidence

that Plaintiff was subjected to a hostile work environment because of her disability. See Db at pp. 24-25. As set forth at length in Argument Point IV.A.ii, supra, this argument is flatly contradicted by the record. As the Defendants have failed to reasonably articulate any other basis to hold that Plaintiff's Economic/Compensatory damages award was against the weight of the evidence, their Appeal of the compensatory damages must be rejected, and the Jury's verdict affirmed.

*ii. The Punitive Damages Award is Not Against the Weight of the Evidence, Nor is it Excessive*
**(RAISED BELOW: Pa57-Pa61)**

Finally, the Defendants contend that the Jury's punitive damages award is excessive and against the weight of the evidence because there is no proof of intentional/willfully ignorant conduct by the upper management of the Defendants to satisfy such an award. See Db at pp. 26-32. Again, the Defendants arguments are belied by the factual record at trial in this matter, and as such, appeal on this ground should be rejected, and the Jury's punitive damages award affirmed.

Admittedly, a Court's leeway in examining a jury's punitive damages award is more significant than in any other post-trial review previously mentioned here. When a Court is tasked with reviewing a punitive damages award, it is required to consider certain "guideposts" as to the reasonableness of the damages, including: 1) the degree of reprehensibility of the conduct that formed the basis of the civil

suit;(2) the disparity between the harm or potential harm suffered by the plaintiff and the plaintiff's punitive damages award; and 3) the difference between this remedy and other penalties authorized or imposed in comparable cases of misconduct. Baker v. Nat'l State Bank, 353 N.J. Super. 145, 153-54 (App. Div. 2002) (internal citations omitted). This scrutiny is heightened when punitive damages against a public entity. See Lockley v. Dep't of Corr., 177 N.J. 413, 433 (2003). In terms of the **amount** of appropriate punitive sanctions, the Courts have held that while the Punitive Damages Act's cap of damages at a Ratio of **5 to 1** when compared to compensatory damages awarded is not applicable to LAD cases, that limitation can nonetheless inform a courts decision as to whether a ratio decided by a jury is reasonable. See Baker, 353 N.J. Super. at 157.

As to the **factual** conditions which warrant an award of punitive damages under the lad, a reward requires a showing of "actual participation in or willful indifference to" the complained of conduct by "upper management." Lockley, 177 NJ at 421. As to whether a particular employee constitutes "upper management" whose conduct would justify a punitive damages award, the Courts have eschewed a bright line rule, instead holding that upper management consists of "managerial executives those who have 'significant power, discretion and influence within their own departments,' capable of furthering the mission of the organization and of selecting courses of action from available alternatives." Cavuoti v. N.J. Transit

Corp., 161 N.J. 107, 123 (1999) (quoting New Jersey Tpke. Auth. v. American Federation of State, County and Municipal Employees, Council 73, 150 N.J. 331, 356 (1997)). "Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his function and responsibilities; and (3) the extent of discretion he exercises." Id.

Turning to the facts of this case, the primary argument that Defendants raise concerning the propriety of these damages is the claim that Plaintiff has provided no proof that the complained of conduct was the result of actual participation of and/or willful indifference of upper management. See Db at pp. 30-32. Like the other claims Defendants have made in this motion, this argument is belied by the record, as evidence in this matter demonstrates both: 1) the actual participation in discrimination by Defendant Camera, the Town's Business Administrator, and 2) willful indifference by Defendant Amato, the Town's Mayor.

As for Defendant Camera's involvement, one need look no further than the testimony of Plaintiff's longtime supervisor, Tim Yurcisin, who testified as to how Camera actively prevented complaints against Winogracki from being heard. See 3T at 79:22-80:1. Yurcisn is a nonparty in this matter, and as such had no interest in the outcome. See id. at 95:5-7. Yurcisin testified to receiving a memo from Camera when Winogracki was promoted, **specifically instructing him not to**

**interfere with any personnel decisions she was involved with**, even though she was supposed to technically still be under him. See id. 83:19-84:2. **This bypassed the normal complaint procedure**, where issues were supposed to pass to him in that department. See id. at 93:2-19. When Plaintiff complained to him about her treatment at the hands of Winogracki, he went to Camera, who again told him not to interfere. See id. at 99:3-7. As such, when Plaintiff reported numerous instances of mistreatment by Winogracki to him, he did nothing to report these issues further up the chain of command because he felt that he had been specifically directed to stay out. See id. at 86:5-22. Yurcisin stated that it was his opinion that Plaintiff was being targeted by the administration through Winogracki because in practice, Camera answered only to the mayor. Id. at 85:17-86:3. He further stated that he was the opinion that Plaintiff was being retaliated against for retaining counsel because soon after the township received a letter of representation from Plaintiff's counsel, Winogracki (Plaintiff's primary antagonist) was immediately promoted above her. See id. at 93:25-94:10.

As for Mayor Amato's willful indifference, one needn't search hard through his testimony to find examples of such indifference. In fact, he admitted it proudly. Defendant Amato admitted that he received numerous complaints, and that he did not respond to them, he simply directed them back to the supervisors and human resources. See 4T 92:3-13. He claimed it was not his responsibility to

follow up with complaints, even those addressed to discrimination issues. See id. at 93:18-23. Rather, he would simply send issues on occasion to a "labor counsel", or otherwise back to the supervisor who brought the issue to him. See id. at 93:18-23. In the end, Amato admitted to being aware of the complaints regarding Winogracki's conduct (though he disputed what he thought the nature of those complaints were), and the limit of his involvement was to simply tell Camera to "make it better" and take no other concrete steps. See id. at 104:1-8.

When all this conduct is considered in conjunction with the extensive evidence that Plaintiff suffered discrimination based on disability (see Argument Point IV.A.ii, supra) and the essentially uncontested charges of retaliation (See Argument Point IV.A.iii, supra), the Defendants' contention that there is no evidence of egregious conduct warranting punitive damages falls apart. Clearly, the conduct complained of in this matter (and in which the jury found to exist) happened not simply because of negligent supervision but based on actual participation and/or deliberate indifference on the part of Camera and Amato. In light of Defendants' concession that these two positions constitute upper management (see Db at p. 31), there can be little doubt that there is sufficient evidence of egregious upper management conduct to justify an award for punitive damages.

As to the **amount** of punitive damages, the Defendants do little more than offer the same tired arguments that there was no evidence of discrimination based on disability, and thus no evidence supporting claims for **any** compensatory damages. See Db at pp. 30-32. They then argue in conclusory fashion that this means by definition, the punitive damages must be excessive. See id. Plaintiff has already disposed of the Defendants' arguments concerning compensatory/economic damages previously in Points IV.A.ii, and Point IV.B.i, and will not repeat those arguments again here. In short, the claim that the punitive damages award in this case is excessive simply does not line up with the facts of the case. In this case, the jury awarded the Plaintiff a total of $610,001 in total compensatory damages, including pain and suffering and economic damages. See DA-079-DA-082. In contrast, the Jury awarded the Plaintiff $1,000,2.00 in punitive damages, making for a ratio for punitive to compensatory damages of approximately 1.6. In light of the severity of the conduct described above, and in light of the clearly small ratio involved here, it cannot be reasonably argued that the Jury's punitive damages award was excessive.

In sum, the Defendants arguments concerning both the propriety and the amount of punitive damages in this matter is clearly belied by the record. Considering the Defendants' failure to meet their burden to demonstrate an error

on punitive damages, their appeal on this ground must be rejected, and the Jury's punitive damages award affirmed in its entirety.

## CONCLUSION

For the reasons set forth at length above, the Jury's Verdict in this matter should be affirmed in its entirety.

DATE: June 12, 2024

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DEBRA REUTER,

Plaintiff/Respondent,

v.

BERKELEY TOWNSHIP, its agents, servants, employees, CARMEN F. AMATO, JR., TED MCFADDEN, DEBBI WINOGRACKI, JOHN A. CAMERA, "ABC CORP. 1-5" and/or "JOHN DOE" 1-5 and/or "JANE DOE 1-5" (the last three being fictitious designations),

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CIVIL ACTION

DOCKET NO.: A-000138-23

On Appeal from Jury Verdict May 25, 2023

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO.: OCN-L-2806-18
Sat Below:
Honorable James Den Uyl, J.S.C.

# AMENDED REPLY BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS BERKELEY TOWNSHIP, CARMEN R. AMATO, JR., TED MCFADDEN, DEBBI WINOGRACKI AND JOHN A. CAMERA

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Submitted on: July 1, 2024

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

## PRELIMINARY STATEMENT

Defendant/Appellants Berkeley Township ("the Township"), Carmen F. Amato, Jr. ("Amato"), Debbi Winogracki ("Winogracki"), Ted McFadden ("McFadden"), and John Camera ("Camera")(collectively, "Appellants") respectfully submit this Reply Brief in connection with this appeal.

Plaintiff/Respondent's ("Respondent") Brief demonstrates a fundamental misreading of Appellants' Brief-in-Chief. To be clear, Appellants **do not** contend that Respondent did not plead disability discrimination.

Appellants contend that Respondent's trial testimony materially deviated by testifying that the taking away of her Municipal Alliance Grant (hereinafter "the Grant") salary was due to disability discrimination and/or retaliation for Respondent retaining legal counsel in January 2018.

Respondent's testimony at trial in this regard constitutes a material deviation that rigorous cross-examination **could not remedy**, and which resulted in significant prejudice to Appellants' ability to establish a coherent factual timeline to the jury.

This surprise testimony also created a misleading factual narrative and timeline for the jury, which had the effect of bolstering the

credibility of otherwise flimsy allegations of disability discrimination and retaliation. Respondent's surprise testimony fostered a misleading narrative to the jury, which resulted in a verdict that stands against the weight of the evidence.

From commencement of this action until she testified at trial, Respondent claimed consistently that the Township took away her Grant salary based on religious discrimination. Yet suddenly, at trial, Respondent sought to tie her allegations of disability discrimination and retaliation to the Township's decision to stop the Grant salary.

Respondent's cross-examination testimony established that she first notified the Township about her anxiety disability by submitting her initial Family Medical Leave Act ("FMLA") paperwork in February 2018. 4T at 180:19-25—182:1-16.

Based on the undisputed chronology of events, the jury **could not** reasonably conclude that the Township knew Respondent had an anxiety disability prior to February 2018, over a month after the Grant salary was stopped, or retaliated against Respondent for retaining legal counsel.

Another misleading narrative was fashioned in Respondent's trial counsel's summative comments to the jury. More specifically, Respondent's trial counsel connected the decision to stop the Grant

salary to disability discrimination and retaliation. 5T, 73:22-74:5. Trial counsel's summative comments reiterated Respondent's surprise testimony and reinforced in the jury's collective mind the misleading narrative that Respondent suffered direct economic harm due to disability discrimination and retaliation.

Without linking the Grant salary decision to disability discrimination and retaliation, Respondent **does not** have any evidence of economic harm. Thus, the jury's award of compensatory and punitive damages does not square with the weight of evidence presented at trial.

Lastly, Respondent's counsel argues erroneously that Appellants waived the weight of the evidence issue with respect to her retaliation claim. Appellants' Brief-in-chief at Legal Argument, Points III and VI, discuss Respondent's claims for disability discrimination and retaliation in the context of trial testimony and trial counsel's summative comments, both of which had the prejudicial effect of misleading the jury based on Respondent's surprise trial testimony.

Accordingly, the trial court's ruling should be reversed, this matter should be remanded for a new trial, and this appeal should be granted for the reasons set forth in Appellants' Brief-in-chief and further supported herewith.

## LEGAL ARGUMENT

### POINT I

**RESPONDENT MISREADS MCKENNEY'S CORE PRINCIPLES AND MISINTERPRETS APPELLANTS' MATERIAL DEVIATION ARGUMENT (DA001-DA006; DA020-DA046; Pltf. T:133:12-25-134:1-25; 147:14-25;148:1-25; 151:22-25—152:1-7)**

As a threshold matter, Appellants' material deviation argument **is not** that Respondent failed to plead disability discrimination in her pleadings and throughout discovery.

Contrary to Respondent's Counsel's Brief, McKenney v. Jersey City Med. Ctr., 167 N.J. 359 (2001) does not foreclose the grounds for a mistrial based on material deviation of testimony because rigorous cross-examination is available to the other party. Material deviation can result in significant prejudice to a party's ability to present their case to the jury notwithstanding the availability or efficacy of rigorous cross-examination as a tool to counteract such prejudicial effects.

Appellants' material deviation argument is much more specific than Respondent leads this Court to believe. It contends that Respondent's pleadings and discovery up until her trial testimony never alleged that the stopping of the Grant salary was due to disability discrimination or retaliation. The factual timeline developed during

discovery based on Plaintiffs' desultory pleading was that the Grant salary was stopped in approximately December 2017, that a letter of legal representation was sent to the Township in late January 2018, regarding claims of religious discrimination only, and that the Township was first made aware of Respondent's disability in February 2018, when she submitted her initial FMLA paperwork.

***Respondent Reads McKenney Too Narrowly***

Respondent's brief contends that McKenney v. Jersey City Med. Ctr., 167 N.J. 359 (2001) only provides grounds for mistrial based on surprise testimony if the timing of the surprise testimony precludes remedy by vigorous cross-examination. Put another way, even if a witness provides surprise testimony, if the aggrieved party can utilize cross-examination, then no prejudicial effect or grounds for mistrial will occur.

The particular facts of McKenney regarding the timing of the surprise testimony does not foreclose Appellants' grounds for mistrial based on surprise testimony in this case. McKenney dealt with a particular context of surprise testimony—an attorney's failure to disclose the material change in testimony to opposing counsel prior to trial.

In this case, however, the surprise testimony arose during Respondent's trial counsel's direct examination of Respondent, when she testified that action taken by the Township in 2017, prior to her allegations of disability discrimination and harassment, (which arose in 2018), were in fact taken after those allegations were made:

> Q. When the municipal alliance job was taken from you did think that was another thing being done to trigger your anxiety and your depression and to retaliate against you for getting counsel?
>
> A. Yes, I felt that after the events that took place in September on the 29th, after that I felt that, you know, they were just doing all sorts of things. I felt like they were trying to come up with any reason to fire me and I—you know, anything at all and to make me miserable…
>
> (4T:148:25-149:1-10).

Although Appellants' trial counsel effectively cross-examined Respondent, getting her to admit that she did not notify the Township of her disability until February 2018 (4T at 180:19-25—182:1-16), which was well after both the date of the stoppage of the Grant salary and the date the letter of legal representation was sent to the Township, and Respondent admitted during re-direct examination that she first began to experience harassment regarding disability only after she submitted her initial FMLA paperwork to the Township in February 2018 (4T at 193:4-

12, 195:22-25) ,the prejudicial effect on the jury is undeniable and evident from the jury's award of compensatory damages for the loss of the Grant salary.

For the sake of judicial economy, Appellants will rely on its their brief-in-chief in response to Respondent's contention that no McKenney violation took place. The only point this brief will add in that regard is that Respondent's brief essentially argues that the religious discrimination allegations in her pleading are interwoven with her disability discrimination claim—a fact which overlooks a critical distinction. Respondent argues out of both sides of the issue: in one breath, the religious discrimination and disability discrimination claims are discrete and in the same breath they are interdependent—that is, the alleged religious discrimination caused her anxiety.

This sophistry does not stand against the weight of the evidence presented at trial. Either the claims of religious discrimination and disability discrimination go hand-in-hand, or they are separate. Respondent may argue that both can be true—the claims are interwoven and separately pleaded.

Even if this cognitive dissonance is accepted by the court, the evidence presented at trial does not support the jury's verdict in either scenario. The jury's verdict found that Respondent did not suffer

religious discrimination, which leaves only viewing the claims as separately pleaded, not interwoven.

If the claims are viewed as separately pleaded, then the jury's verdict collapses under the weight of the evidence, especially in light of Respondent's surprise testimony regarding disability discrimination and retaliation. Accordingly, the ground is ripe for mistrial based on the occurrence of surprise testimony in this case.

## POINT II

**APPELLANTS RELY ON THEIR BRIEF-IN-CHIEF IN RESPONSE TO ARGUMENTS ABOUT THE JURY'S VERDICT AGAINST THE WEIGHT OF THE EVIDENCE (DA001-DA082; 4T:133:1-25—159:1-25;4T:110-199; 7T:57:1-25—86:1-25).**

For the sake of judicial economy, Appellants rely on the arguments made in their brief-in-chief regarding the jury's verdict against the weight of the evidence.

The only additional point in this regard is that Respondent's counsel mischaracterizes and takes out of context Respondent's testimony about the stoppage of the Grant salary and her retaliation claim.

Accordingly, this Court should reverse the trial court's ruling on the motion for new trial and remand this matter for a new trial limited to the issues of disability discrimination and retaliation. The jury's verdict

regarding religious discrimination is not the subject of this appeal and should not be disturbed.

## POINT III

**APPELLANTS DID NOT WAIVE THEIR ARGUMENT REGARDING RESPONDENT'S RETALIATION CLAIM (DA001-DA082; 4T:133:1-25—159:1-25;4T:110-199; 7T:57:1-25—86:1-25).**

Appellants never waived their argument about the jury's verdict against the weight of the evidence with respect to Respondent's retaliation claim.

Appellants' brief-in-chief at Legal Argument, Points III and VI, raised the issue of Respondent's claims for disability discrimination and retaliation in the context of surprise trial testimony and trial counsel's summative comments, which are interrelated to the jury's verdict on retaliation. See Db. Br. at pp. 18-21;33-41.

For the sake of judicial economy, Appellants rely on the arguments made in their brief-in-chief regarding the jury's verdict against the weight of the evidence on Respondent's retaliation claim.

## POINT IV

**THE JURY'S AWARDS OF COMPENSATORY AND PUNITIVE DAMAGES ARE AGAINST THE WEIGHT OF THE EVIDENCE AND THE UNJUST PRODUCT OF RESPONDENT'S SURPRISE TESTIMONY (DA079-DA082; 2T-8T).**

***Compensatory Damage Award***

The only evidence offered to support Respondent's claims of economic loss was the Township's decision to stop her Municipal Alliance salary in December 2017. Respondent presented **no** evidence of economic loss post-dating February 2018, when she admittedly first notified the Township of her disability by submitting her FLMA paperwork.

Clearly, the jury's award of compensatory damages for economic loss is a result of the unjust and prejudicial effect of Respondent's surprise testimony linking her claims of disability discrimination and retaliation with the stoppage of the Grant salary, even though these claims post-date the salary stoppage. Without that misleading link, the jury could not have reasonably concluded that Respondent suffered any economic loss in this case. As such, the award of compensatory damages is against the weight of the evidence presented.

***Punitive Damage Award***

The Punitive damages awarded by the jury in this matter are not just excessive, they are not warranted. Respondent presented no evidence at trial that Mayor Amato, John Camera or any of her supervisors participated or were willfully indifferent to acts of discrimination or harassment, never mind evidence that any conduct was

especially egregious. Further, Respondent presented no evidence that these Defendants were aware of any complaints of discriminatory or harassing conduct. Finally, by her own admission, she never complained to any of the individual Defendants that she believed action was taken against her for a discriminatory or harassing reason (4T at 193:4-12, 195:22-25).

## POINT V

### PLAINTIFF'S COUNSEL MADE STATEMENTS MANIFESTLY CAPABLE OF CONFUSING AND MISLEADING THE JURY PRODUCING AN UNJUST RESULT THAT DEPRIVED APPELLANTS A FAIR TRIAL (7T:57:1-25—86:1-25)

The conduct of Plaintiff's counsel during summation was clearly capable of producing an unjust result and deprived Defendants of a fair trial. As such, the verdict must be set aside and a new trial granted.

The comments made by Respondent's trial counsel during summation reiterated and reinforced the surprise testimony linking the stoppage of the Grant salary to Respondent's claims for disability discrimination and retaliation, which is not factually consistent with the chronology of the record developed during discovery or the evidence presented at trial.

As discussed above, the instant matter is distinguishable from **McKenney** in that the first time Appellants were aware of Respondent's

surprise testimony alleging that the stopping of the Grant salary was connected to claims of disability discrimination or retaliation **was during Respondent's testimony**. Despite a rigorous and thorough cross-examination, Appellants were not able to address the jury following Respondent's summation. Thus, the last thing the jury heard was the reiteration of a revised, inaccurate and prejudicial version of events that was contrary to the evidence presented and the record developed during Discovery.

## CONCLUSION

For the reasons set forth in Appellants' Brief-in-Chief and herein, the trial court's ruling denying Appellants' Motion for New Trial should be reversed, and this court should remand this matter to the trial court for a new trial limited to the matters raised on Appeal.

Respectfully submitted,

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Dated: July 1, 2024

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