Aakash Dalal
SBI# 792652E
215 Burlington Road South
Bridgeton, NJ 08302
Appellant, *pro se*

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-659-23-T2

AAKASH DALAL, Plaintiff-Appellant, Vs. GLOBAL TEL*LINK CORPORATION, Defendant-Respondent.	Civil Action On Appeal From a Judgment of Conviction in the Superior Court of New Jersey, Law Division, Essex County Docket No.: ESX-L-7456-20 Sat Below: Hon. Thomas M. Moore, P.J. Cv., Hon. Cynthia D. Santomauro, J.S.C.

BRIEF ON BEHALF OF APPELLANT AAKASH DALAL

Aakash Dalal,
Appellant, *pro se*

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PRELIMINARY STATEMENT

Plaintiff-Appellant Aakash Dalal ("Mr. Dalal" or "Plaintiff"), a pro se prisoner, brought a class-action opt-out lawsuit against Defendant-Respondent Global Tel*Link Corporation ("GTL" or "Defendant") arising out of the company's violations of the Consumer Fraud Act. After revelations in discovery that GTL unlawfully intercepted and recorded Plaintiff's attorney-client privilege telephone calls, Plaintiff filed a motion for leave to amend his complaint adding claims under the federal and state Wiretap Acts, invasion of privacy, and violations of the United States and New Jersey Constitution.

This case was procedurally derailed as a result of two events: (1) a disruption caused during a Zoom hearing by corrections officer whose shift had ended, resulting in the termination of the hearing; and (2) when the original trial judge was elevated to the Appellate Division and the Presiding Civil Judge failed to properly reassign the case. After the Zoom hearing was terminated in March 2012, for a 17 month period, the trial court failed to act on numerous pending motions, including motions to compel discovery and the aforementioned motion for leave to amend. Thereafter, the Presiding Civil Judge dismissed the complaint with prejudice for failure to appear at trial even as Plaintiff had never received any trial notices. In dismissing the complaint with prejudice in a one sentence order, the trial court failed to consider or document any prejudice suffered by Defendant or consider any lesser sanctions.

The trial court's conduct was in direct contravention of precedent set forth by this court requiring courts to consider prejudice to the other parties prior to imposing the ultimate sanction of dismissal with prejudice. Accordingly, the judgment below should be vacated and the matter should be remanded.

PROCEDURAL HISTORY[1]

On October 16, 2020, Plaintiff, a pro se prisoner, filed a Complaint in the Superior Court of New Jersey, Essex County Vicinage against Defendant Global Tel*Link Corporation ("GTL") for violations of the New Jersey Consumer Fraud Act. (Pa-11). Subsequently, on January 12, 2021, GTL filed an Answer. (Pa-18)

On November 29, 2021, Plaintiff filed a motion for leave to file an amended complaint based on revelations in discovery that Defendant GTL had unlawfully intercepted and recorded dozens of his attorney-client privileged telephone calls at the Bergen County Jail. (Pa-26 to 51)

On March 9, 2022, a hearing was held before the Hon. Stephen L. Petrillo, J.S.C. regarding Plaintiff's motion for leave to amend and motion to compel discovery, but was terminated due to a staffing issue at the South Woods State Prison. (1T 8:13 to 14:6)

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[1] The transcripts are referenced as follows:
1T March 9, 2022 Oral Argument - Motion for Leave to Amend and Motion to Compel Discovery

On August 22, 2022, Plaintiff sent a letter to the Hon. Thomas A. Callahan, J.S.C. requesting that the matter be rescheduled for another hearing. (Pa-52 to 53)

On March 31, 2023, the trial court posted a trial notice for August 14, 2023 to eCourts. (Pa-10)

On July 19, 2023, the trial court posted another trial notice for August 14, 2023 to eCourts. (Pa-54)

On August 14, 2023, the Hon. Thomas M. Moore, P.J.Cv. dismissed the Complaint with prejudice for failure to appear at trial. (Pa-7)

On October 12, 2023, the Hon. Cynthia D. Santomauro, J.S.C. denied Plaintiff's August 23, 2023 R. 4:50-1 motion for relief from the order dismissing the complaint with prejudice. (Pa-8)

On October 19, 2023, Plaintiff filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey. (Pa-1)

STATEMENT OF FACTS

As explained above, on October 16, 2020, Plaintiff brought a class-action opt-out complaint[2] against Defendant GTL for violations of the Consumer Fraud Act arising out of excessive fees telephone fees the company charged Plaintiff while he was a detainee at the Bergen County Jail. Pa-11.

On November 2, 2021, after reviewing documents provided in discovery by Defendant, Plaintiff discovered that Defendant had recorded 37 calls between Plaintiff and his attorneys at the jail. Pa-26. Plaintiff further discovered that Defendant used the recordings as a part of its online content management software and disclosed them to the Bergen County Sheriff's Office. Id. Plaintiff had been explicitly informed that his attorney-client privileged calls would not be recorded or monitored in accordance with state law. N.J.A.C. 10A:31-21.5(b). Pa-27.

Based on these revelations, on November 29, 2021, Plaintiff filed a motion for leave to file an amended complaint containing causes of action for violations of the federal and state Wiretap Acts, invasion of privacy, and various federal and state constitutional provisions, including the Sixth Amendment. Pa-26 to 51.

A Zoom hearing was held on these motions on March 9, 2022 before the Hon. Stephen L. Petrillo, J.A.D. (then J.S.C). 1T. Judge

[2] The original class action lawsuit, James v. GTL, Civil Action No.: 13-4989 (WJM-MF), settled for approximately $34 million. Pa-14.

Petrillo asked Plaintiff to confirm his SBI number and asked, "And mail can be sent to you at your name with that SBI number at 215 Burlington Road South Bridgeton, New Jersey 08302?" 1T3-24 to 4-3. Plaintiff responded, "Yes." 1T4-4. Judge Petrillo then heard the parties with regard to Plaintiff's motion to compel discovery and Defendant's motion to conduct a deposition of Plaintiff. 1T4-11 to 8-10.

The hearing was disrupted by a corrections officer who informed Plaintiff that "their shift is over and then I may or may not have about 10 minutes left" and that he was advised that "the video visitation is over at approximately 3:00."[3] 1T8-20 to 25 to 9-5. Judge Petrillo explained that would not be sufficient time for the hearing. 1T9-13 to 15. He then asked Plaintiff how he booked the Zoom hearing, and Plaintiff explained, "I believe it's booked by Court staff." 1T9-6 to 10. Judge Petrillo also stated that he is "being reassigned temporarily as of Monday to the Appellate Division" and would likely no longer be assigned to the case. 1T16-21. Judge Petrillo asked the parties whether they would consent to disposition on the papers and Plaintiff agreed, but Defendant's counsel disagreed. 1T9-21 to 10-6.

Judge Petrillo then explained that given that defense counsel refused to consent to disposition on the papers, "I'm going to have to talk to the presiding judge about what to do with this. All

[3] According to the transcriber, the hearing was conducted between 2:56 PM and 3:09 PM that day. 1T15.

right? So you'll get word from us, gentlemen, as to what it is that we're going to - what we're going to do and we'll let you know by way of - I may have my law clerk call Mr. Van Nostrand, have him send a letter to Mr. Dalal, but obviously any notice will be shared with, you know, with Mr. - how - how do you normally get communication Mr. Dalal? Regular mail?" 1T10-7 to 17. Plaintiff stated, "Yes, pretty well with that." 1T10-18. Judge Petrillo understood there were problem with mail at the prison stating, "Okay. So there's usually a lag, I guess at the facility. We e-mailed Mr. Van Nostrand and e-mailed him an Order and told him to mail it to you. That's the only way you can get it." Defense counsel agreed to send any court orders or correspondence to Plaintiff. 1T10-23 to 25.

Judge Petrillo finally explained that had the hearing gone forward, he would have granted Plaintiff's motion for leave to amend and to compel discovery stating, "I'm going to say my visceral reaction to the motion to amend is probably grant it. And my visceral reaction to - to discovery is that probably you're going to have to do at least a bit more. … I'm prepared to grant the motion to amend at this -at - at this point in time, but I'm not going to do that without affording you an opportunity to make a record." 1T11-22 to 12-8. At the end, he also stated, "So, we will be back in touch, whether it be me or one of my colleagues." 1T13-25 to 14-2.

Plaintiff then called court staff who indicated that "any hearings or scheduled court dates would be via Zoom due to my incarcerated status and that court staff would arrange them as they did on March 9, 2022 during the only hearing in the case." Pa-56.

After hearing nothing from the court or defense counsel, on August 2, 2022, Plaintiff sent a letter to the Hon. Thomas A. Callahan, J.S.C. advising him of the hearing that had occurred on March 9, 2022 and to schedule the matter for another hearing. Pa-52. Plaintiff continued to intermittently called court staff to determine whether a hearing had been scheduled. Pa-58. For the next 17 months, the trial court failed to take any action with regard to the pending motions. The court failed to hold oral argument or rule Plaintiff's outstanding motions for leave to file an amended complaint and to compel discovery.

Trial notices were apparently issued on March 31, 2023 and July 19, 2023 scheduling the case for trial on August 14, 2023, but Plaintiff never received them because the court's record of his address does not contain his SBI number. Pa-56. The New Jersey Department of Corrections returns all mail that does not contain an inmate's number. Id. (citing N.J.A.C. 10A:18-2.6(c) ("The inmate's name and number shall appear on the outside of the incoming correspondence. Correspondence without either the inmate's name or number shall be returned to the sender."). The trial notices clearly do not contain Plaintiff's SBI number. Pa-54.

On August 14, 2023, the Hon. Thomas M. Moore, P.J.Cv. dismissed the case with prejudice for failure to appear at trial. Pa-7. On August 18, 2023, Plaintiff learned of this order when he called court staff regarding the status of another civil action. Pa-55.

Thereafter, on August 23, 2023, Plaintiff moved to vacate the order dismissing the complaint with prejudice, explaining that: (1) he had never received the trial notices because they did not contain his SBI number, nor did the court's record; (2) he could not physically appear for trial because of his incarceration and that court staff had previously advised him that they would schedule any hearings via Zoom; (3) the case could not proceed to trial without resolution of the pending motions; (4) the defendant had suffered no prejudice; and (5) under R. 4:50-1(a) and (f) all of these facts supported a finding of mistake, inadvertence, surprise, or excusable neglect. Pa-55 to Pa-60.

On October 12, 2023, the Hon. Cynthia D. Santomauro, J.S.C. denied Plaintiff's R. 4:50-1 motion without addressing or considering any of the reasons or facts mentioned above. Pa-8.

LEGAL ARGUMENT

POINT I:

THE TRIAL COURT ERRONEOUS DISMISSED PLAINTIFF'S COMPLAINT FOR FAILURE TO APPEAL AT TRIAL AND IMPROPERLY DENIED HIS R. 4:50-1 MOTION TO REINSTATE THE COMPLAINT (raised below, Pa-7, 8).

After 17 months of inaction and failure to adjudicate Plaintiff's pending motions, the trial court issued trial notices that the incarcerated pro se Plaintiff never received, and dismissed the case with prejudice for Plaintiff's failure to appear at trial. The trial court failed to consider or document any prejudice suffered by Defendant, as is required before imposing the ultimate sanction of dismissal with prejudice. The court below further failed to consider any lesser sanctions. Finally, the trial court failed to consider or address the arguments raised by Plaintiff in an effort to vacate that erroneous order in a motion under R. 4:50-1(a) and (f). Accordingly, in light of this denial of basic due process, the judgment below should be vacated and the case should be remanded.

"The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except … where the refusal to comply [with rules] is deliberate and contumacious." Lang v. Morgan's Home Equipment Corp., 6 N.J. 333, 339 (1951). "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party[.]"

Zaccardi v. Becker, 88 N.J. 245, 253 (1982). Dismissal is not the sole remedy, rather "a range of sanctions is available to the trial court when a party violates a court rule." Id. at 252-253. "Cases should be won or lost on their merits and not because litigants have failed to comply precisely with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available." Connors v. Sexton Studios, Inc., 270 N.J. Super. 390, 395 (App.Div.1994).

In Johnson v. The Mountainside Hospital, where the plaintiff's attorney failed to appear on the trial date, the Appellate Division determined that the trial court improperly dismissed the case with prejudice without considering whether the defendants had suffered any actual prejudice and whether a lesser sanction was available. 199 N.J. Super. 114, 120 (App. Div. 1985) "[W]hen a plaintiff has violated a discovery rule or court order the paramount issue is whether a lesser sanction than dismissal would suffice to erase the prejudice suffered by the non-delinquent party." Id. "The trial court must first determine the prejudice suffered by each defendant and then determine whether dismissal with prejudice is the only reasonable and just remedy available." Id. "If a lesser sanction could erase the prejudice against the non-delinquent party, dismissal of the complaint with prejudice would not be appropriate and would therefore constitute an abuse of discretion." Id.

The trial court failed to consider whether Defendant GTL suffered any prejudice from Plaintiff's failure to appear at trial.

There is simply no evidence of prejudice in the record. In addition, the trial court failed to consider any lesser sanctions and simply dismissed the case with prejudice. As in Johnson, the trial court's order must therefore be reversed.

Moreover, this court has made it abundantly clear that pro se litigants are to be afforded at least as much due process as is afforded to represented litigants:

> We do not intend to suggest that pro se litigants are entitled to greater rights than are litigants who are represented. It is nevertheless fundamental that the court system is obliged to protect the procedural rights of all litigants and to accord procedural due process to all litigants. What constitutes due process varies with the circumstances of each case as well as with the individual situation of particular litigants. It is also axiomatic that pro se litigants are entitled to no less a degree of procedural solicitude than are represented litigants.
>
> Rubin v. Rubin, 188 N.J. Super. 155, 159 (App. Div. 1982)

With regard to Plaintiff's R. 4:50-1 motion, the Judge Santomauro completely failed to consider or address Plaintiff's argument regarding excusable neglect, mistake on the part of court staff, and the failure to properly notify Plaintiff of the trial dates. Pa-55 to -59.

Under Rule 4:50-1, a court may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect . . . or [for] any other reason justifying relief from the operation of the judgment or order." R. 4:50-1(a), (f). The rule "'is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that

courts should have authority to avoid an unjust result in any given case.'" Baumann v. Marinaro, 95 N.J. 380, 392 (1984) (quoting Manning Eng'g, Inc. v. Hudson County Park Comm'n, 74 N.J. 113, 120(1977)).

New Jersey's courts "have long adhered to the view that [R. 4:50-1](f)'s boundaries are as expansive as the need to achieve equity and justice." The Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 98 (App. Div. 2014). In accordance with the rule, "a litigant may, in appropriate circumstances, be relieved of the consequences of his attorney's negligence in the conduct of a case[.]". Id. The Appellate Division has found "this approach equally applicable where a party has negligently represented himself." Id. at 99 (emphasis added). "We merely hold that a pro se litigant is entitled to nothing less than that to which a litigant is entitled when presented by a negligent attorney." Id. (emphasis added).

Judge Santomauro further made a false statement in her order by claiming that "the plaintiff has failed to show he served the defendant with this Motion." Pa-10. The docketed certification of service makes it abundantly clear that Plaintiff did indeed show he served the defendant with the motions. Pa-60. In fact, Judge Santomauro could not have missed this document because it was filed as Pg 3 of 3 to the proposed order she signed. Trans ID: LCV20233102389.

Finally, the trial court's conduct violated Plaintiff's constitutional rights. New Jersey's courts have long recognized "the fundamental right of the public to access to the courts in order to secure adjudication of claims on their merits." D'Amore v. D'Amore, 186 N.J. Super. 525, 530 (App. Div. 1982). Furthermore, it has been well established that prisoners "retain right of access to the courts." Jenkins v. Fauver, 108 N.J. 239, 246 (1987). This right is guaranteed by both the First and Fourteenth Amendments to the United States Constitution and Article 1, Paragraph 1 of the New Jersey Constitution. State in Interest of D.H., 139 N.J. Super. 330, 334 (App. Div. 1976) ("It would appear that even though the right of access to the courts is not specifically guaranteed by the New Jersey Constitution, it is a natural and inalienable right derived from Article 1."); Zehl v. City of Elizabeth Bd. of Educ., 426 N.J. Super. 129, 139 (App. Div. 2012); Wolff v. McDonnell, 418 U.S. 539, 578-79 (1974). Here, the trial court failed to provide Plaintiff adequate notice of the trial dates even as it recognized Plaintiff could not receive them as a represented party or a non-incarcerated person would and refused to adjudicate his pending motions.

By dismissing his complaint with prejudice without even hearing his motion for leave to file an amended complaint, the trial court effectively deprived Plaintiff of the ability to file his claims regarding the unlawful interception and recording of his attorney-client privileged telephone calls. This clearly violated

Plaintiff's right of access to the courts[4]. Rosenblum v. Borough of Closter, 333 N.J. Super. 385, 390, 755 A.2d 1184 (App.Div.2000) ("the complete denial of the filing of a claim without judicial review of its merits would violate the constitutional right to access [to] the courts[.]")

The trial court's dismissal of Plaintiff's complaint, decision to ignore arguments in his R. 4:50-1 motion, and blatant lies regarding service of the motion "constituted a denial of fundamental procedural due process which can only serve to bring the court system into disrepute, to cast doubt on the legitimacy of the judicial process and ultimately to disserve the litigating public." Rubin, 188 N.J. Super. at 159.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's orders and remand for further proceedings.

Respectfully submitted:

Aakash Dalal
Appellant, *pro se*

Dated: February 6, 2024

[4] Absent the reversal of the trial court's orders, these claims would now be barred by the statute of limitations.

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SBI# 792652E
215 Burlington Road South
Bridgeton, NJ 08302
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000659-23T2

AAKASH DALAL, Plaintiff-Appellant, Vs. GLOBAL TEL*LINK CORPORATION, Defendant-Respondent.	Civil Action On Appeal From a Judgment of Conviction in the Superior Court of New Jersey, Law Division, Essex County Docket No.: ESX-L-7456-20 Sat Below: Hon. Thomas M. Moore, P.J. Cv., Hon. Cynthia D. Santomauro, J.S.C.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT AAKASH DALAL

Aakash Dalal,
Appellant, *pro se*

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PRELIMINARY STATEMENT

In accordance with the August 13, 2024 Order of the Court ordering the filing of a supplemental brief in this matter addressing the arguments in the consolidated case (A-1498-23), please accept this brief. Plaintiff-Appellant Aakash Dalal ("Mr. Dalal" or "Plaintiff") brought suit against Defendants-Respondents ViaPath Technologies, Inc. ("ViaPath"), Global Tel*Link Corporation ("GTL"), John Does 1-25 (collectively "Defendants") arising out of the Defendants' interception, recording, and disclosure of at least 37 attorney-client privileged telephone calls between Plaintiff and his criminal defense attorneys while he was a pretrial detainee at the Bergen County Jail. The trial court dismissed the action on res judicata grounds because another court had dismissed (for failure to appear at trial) a separate class action opt-out consumer fraud case Plaintiff had brought against Defendant GTL for charging him excessive telephone fees.

It is submitted that the trial court erroneously interpreted and applied the doctrine of res judicata because (1) the separate dismissal order was not an adjudication on the merits and (2) the claims in the two lawsuits are completely different. In addition, the dismissal order in the consumer fraud act lawsuit is presently before this Court on appeal and a reversal of that decision would eliminate the basis for the res judicata dismissal here. For the reasons that follow, the trial court's order dismissing the lawsuit should be vacated.

PROCEDURAL HISTORY[1]

On June 22, 2023, Plaintiff, filed a Complaint in the Superior Court of New Jersey, Essex County Vicinage against Defendants ViaPath, GTL, and John Does 1-25 for violations of the Federal Wiretap Act, 18 U.S.C. § 2510 *et seq.*, the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S. 2A:156-1 *et seq.*, 42 U.S.C. § 1983, based on violations of the First, Fourth, and Sixth Amendments, the New Jersey Civil Rights Act, based on violations of Article 1, Paragraphs 6, 7, and 10 of the New Jersey Constitution, invasion of privacy, negligence, civil conspiracy, the New Jersey Consumer Fraud Act, N.J.S. 56:8-2, and unjust enrichment. Pa-14.

Subsequently, Defendants ViaPath and GTL moved to dismiss the Complaint with prejudice. Pa-10.

On October 6, 2023, the Hon. Richard T. Sules, J.S.C. granted the Defendants' motion to dismiss the complaint with prejudice. Pa-10.

On October 19, 2023, Plaintiff filed a R. 4:50-1 motion for relief from Judge Sules' Order dismissing the complaint. Pa-35[2].

On December 15, 2023, Judge Sules denied Plaintiff's R. 4:50-1 motion. Pa-8.

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[1] There are no transcripts in this matter, as there were no hearings conducted below.

[2] Plaintiff's September 8, 2023 Brief in Opposition to the Defendants' Motion to Dismiss is included in the Appendix because it was attached to the Certification and it is used to show that Plaintiff objected to and opposed the Defendants' motion.

On December 28, 2023, Plaintiff filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey. Pa-1.

STATEMENT OF FACTS

Plaintiff filed a lawsuit (ESX-L-7456-20) against Defendant GTL for violations of the Consumer Fraud Act and unjust enrichment after opting out of a class action settlement based on excessive fees the company charged pretrial detainees at the Bergen County Jail for telephone calls. Pa-68. Through discovery disclosures in that case, Plaintiff discovered that Defendant GTL intercepted, recorded, and disclosed to law enforcement at least 37 telephone calls between Plaintiff and his criminal defense attorneys. Pa-17. As a result, he filed a separate lawsuit (ESX-L-4260-23)—the lawsuit underlying this appeal—against Defendants ViaPath[3] and GTL for violations of the Wiretap Act, 18 U.S.C. § 2510, et seq., the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S. 2A:156-1 et seq., violations of the First, Fourth, and Sixth Amendments under 42 U.S.C. § 1983, violations of Article 1, Paragraphs 6, 7, and 10 of the New Jersey Constitution under the New Jersey Civil Rights Act, N.J.S. 10:6-2, invasion of privacy, and negligence. Pa-14 to -33.

While this matter was pending, on August 14, 2023, the Hon. Thomas M. Moore, P.J.Cv. dismissed the original case with prejudice, ESX-L-7456-20, for failure to appear at trial. Pa-95. The Defendants then moved to dismiss this action based on the doctrine of res judicata. Pa-10. Despite the reality that the facts and the claims in this matter, ESX-L-4260-23, are completely

[3] GTL changed its corporate name to ViaPath Technologies, Inc.

distinct from those in the dismissed matter, Judge Sules determined that res judicata barred the instant claims. Pa-10 to -13.

Plaintiff subsequently filed an appeal of both Judge Moore's decision dismissing ESX-L-7456-20 which is docketed at A-659-23T2 and an appeal of Judge Sules' order which is the focus of the appeal here. Both appeals were consolidated.

LEGAL ARGUMENT

POINT I:

THE TRIAL COURT ERRONEOUSLY DISMISSED THE COMPLAINT WITH PREJUDICE ON RES JUDICATA GROUNDS (raised below, Pa-8, 10, 35)

The trial court's order dismissing the case with prejudice on res judicata grounds should be reversed for three reasons: (1) the dismissal upon which the res judicata ruling is premised was not a determination on the merits; (2) the causes of action in the instant case are not identical to those in the dismissed case; and (3) reversal in A-659-23T2 requires reversal of the res judicata determination here. In addition, to the extent the trial court believed Plaintiff did not oppose the Defendants' motion to dismiss because court staff failed to docket his opposition brief, the trial court should have granted Plaintiff's R. 4:50-1 motion for relief from the order.

"The application of res judicata is a question of law[]" that appellate courts review "de novo." Walker v. Choudhary, 425 N.J. Super. 135, 151 (App.Div.), certif. denied, 211 N.J. 274 (2012). The doctrine of res judicata precludes the re-litigation of substantially the same cause of action once it is finally determined on the merits by a court of competent jurisdiction. Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 606 (2015). Res judicata serves the purpose of providing "'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination

of conflicts, confusion and uncertainty; and basic fairness[.]'" Id.

A. A R. 4:37-2(d) dismissal for failure to appear at trial is not an adjudication on the merits.

In dismissing the instant action, the trial court relied on the August 14, 2023 Order of the Hon. Thomas M. Moore, P.J.Cv. dismissing the Complaint in ESX-L-7456-20 with prejudice for failure to appear at trial[4]. Pa-95. This dismissal, however, was not an adjudication on the merits. Plaintiff has never had an opportunity to fairly litigate these serious claims and obtain a judicial determination. Lubliner v. Bd. of Alcoholic Beverage Control, 33 N.J. 428, 435 (1960) (res judicata "contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation.")

The Appellate Division has previously rejected the exact erroneous res judicata ruling premised on the notion that R. 4:37-2(d) renders a dismissal with prejudice an adjudication on the merits. Walker, 425 N.J. Super. at 151-154. The defendants there argued that the dismissal with prejudice in that case was an adjudication on the merits pursuant to R. 4:37-2(d). The Appellate

[4] In appeal A-659-23T2, Plaintiff has argued that the trial court in that matter erred by dismissing the matter with prejudice for failure to appear at trial. "Generally stated, a dismissal with prejudice is regarded as "on the merits" of the claim, but a dismissal "based on a court's procedural inability to consider a case" is entered without prejudice." A.T. v. Cohen, 231 N.J. 337, 351 (2017) (quoting Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 415-16 (1991))

Division rejected the argument, holding, "Rule 4:37-2 applies to trials, and subsections (b) and (c) concern dismissals after the presentation of evidence and for claims related to contribution. This case was not tried; therefore, Rule 4:37-2 has no bearing on the issues presented." Id. at 151-152.

The Appellate Division acknowledged that "a literal reading of New Jersey precedents arguably indicates that a dismissal with prejudice constitutes an adjudication on the merits, which bars subsequent actions under res judicata", but "decline[d] to apply that rationale" because the plaintiff's claims "were never adjudicated on the merits." Id. at 153-154.

Similarly, here, the merits of Plaintiff's claims were never examined. More importantly, Plaintiff's claims that Defendants unlawfully recorded and intercepted his attorney-client privileged phone calls were never raised in the previous matter and therefore could not have been adjudicated on there merits. The dismissal order in ESX-L-7456-20 simply is not an adjudication on the merits. As the Appellate Division noted in Walker, "to label such an order as an adjudication on the merits would be the embodiment of promoting form over substance." Walker, 425 N.J. Super. at 154.

B. The causes of action are not identical to those in the dismissed case.

The trial court erroneously held that, "Plaintiff previously filed a case in Essex County alleging the same claims he brings

here under Docket No. ESX-L-7456-20." Pa-12. This is demonstrably incorrect, as a comparison of the complaints in both actions shows they raise completely different claims. The civil action underlying this appeal concerns the Defendants' unlawful interception, recording, and disclosure of attorney-client privileged telephone calls and brings claims for violations of the United States Constitution, the New Jersey Constitution, federal and state anti-wiretapping laws, invasion of privacy and negligence. Pa-14 to Pa-34. The previously dismissed action was limited to Plaintiff's Consumer Fraud Act and unjust enrichment claim based on allegations that Defendant GTL charged pretrial detainees excessive amounts of money for telephone calls. Pa-68 to Pa-74.

To decide if two causes of action are the same, the court must determine:

> "(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same."
>
> Wadeer, 220 N.J. at 606-607.

The acts complained of in the instant matter are clearly distinct from those in the previous matter as previously noted. This matter is premised upon the Defendants' unlawful recording, interception, and disclosure of Plaintiff's attorney-client privilege phone calls. And while this civil action also brings

claims under the New Jersey Consumer Fraud Act and for unjust enrichment, these claims are based on Defendants' failure to use the fees it charged to implement features in its software to ensure that attorney-client privileged telephone calls would not be intercepted, recorded, and disclosed. *Pa-23* ("ViaPath and GTL had an obligation to implement features in the OCS system that would separate detainees' attorney-client phone calls from other phone calls. ViaPath and GTL declined to implemental such a feature in order to maximize their profits by saving the costs of designing and utilizing such a function.").

Simply put, the 21-page complaint in this matter which contains 15 different causes of action is completely different from the 6-page complaint contain two causes of action in ESX-L-7456-20. The trial court's clearly erred in ruling that the claims in both cases were identical and its ruling should be reversed on this basis alone.

C. Reversal in A-659-23T2 necessitates a reversal in this appeal.

If the dismissal order in A-659-23T2, which was consolidated with this matter, is vacated, the dismissal order here, which is premised on the order there, must also be vacated. The Defendants' conceded as much in their motion to consolidate the two matters, stating, "Moreover, the outcome of the First Appeal impacts the outcome of the Second Appeal, i.e., if the Court reverses the Trial

Court in the First Appeal, that decision would impact the application of res judicata in the Second Appeal". Appellate Division Motion Nos.: M-002999-23 at 3-4, M-003000-23 at 3-4.

D. The trial court erred by denying Plaintiff's R. 4:50-1 motion.

The trial court granted the Defendants' motion to dismiss as unopposed because of the failure of Essex County Superior Court staff to upload Plaintiff's opposition brief. Pa-35 to Pa-94. The trial court denied Plaintiff's R. 4:50-1 (a) and (f) motion "for the reasons set forth in the order of this Court dated October 6, 2023." Pa-8 to Pa-9. Because the trial court's October 6, 2023 order dismissing the matter on res judicata grounds was patently erroneous in the first instance, Plaintiff's R. 4:50-1(a) and (f) motion should have been granted.

Under Rule 4:50-1, a court may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect . . . or [for] any other reason justifying relief from the operation of the judgment or order." R. 4:50-1(a), (f). The rule "'is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" Baumann v. Marinaro, 95 N.J. 380, 392 (1984) (quoting Manning Eng'g, Inc. v. Hudson County Park Comm'n, 74 N.J. 113, 120(1977)).

New Jersey's courts "have long adhered to the view that [R. 4:50-1](f)'s boundaries are as expansive as the need to achieve equity and justice." The Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 98 (App. Div. 2014). In accordance with the rule, "a litigant may, in appropriate circumstances, be relieved of the consequences of his attorney's negligence in the conduct of a case[.]". Id. The Appellate Division has found "this approach equally applicable where a party has negligently represented himself." Id. at 99 (emphasis added). "We merely hold that a pro se litigant is entitled to nothing less than that to which a litigant is entitled when presented by a negligent attorney." Id. (emphasis added).

To the extent court staffs' failure to upload Plaintiff's motion to eCourts can be deemed a mistake or inadvertence, Plaintiff's motion should have been granted and the order should have been vacated. Plaintiff repeatedly mailed his opposition brief for filing, called court staff and the judge's chambers to determine whether it had been uploaded, and called opposing counsel. Pa-35 to Pa-37. Given that as a pro se prisoner, Plaintiff has no internet access, there was nothing more he could have done to ensure that the trial court received his opposition. Accordingly, the trial court, having received Plaintiff's R. 4:50-1 motion, should have considered the arguments in the attached opposition brief to the Defendants' original motion, and vacated its dismissal order.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's orders and remand for further proceedings.

Respectfully submitted:

Aakash Dalal
Appellant, *pro se*

Dated: August 19, 2024

AAKASH DALAL, Plaintiff-Appellate, v. GLOBAL TEL*LINK CORPORATION, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000659-23 On appeal from the Judgment in the Superior Court of New Jersey, Law Division, Essex County Docket No.: ESX-L-7456-20 Sat Below: Hon. Thomas Moore, P.J.C.
AAKASH DALAL, Plaintiff-Appellate, v. VIAPATH TECHNOLOGIES, INC., GLOBAL TEL*LINK CORPORATION and JOHN DOES 1-25, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001498-23 On appeal from the Judgment in the Superior Court of New Jersey, Law Division, Essex County Docket No.: ESX-L-4260-23 Sat Below: Hon. Richard T. Sules, J.S.C.

DEFENDANTS'-RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION

Aaron Van Nostrand, Esq. (027472002)
GREENBERG TRAURIG, LLP
500 Campus Drive, Suite 400
Florham Park, NJ 07932-0677
T: (973) 360-7900
F: (973) 301-8410
aaron.vannostrand@gtlaw.com
*Attorneys for Defendants-Respondents Global Tel*Link Corporation and ViaPath Technologies, Inc.*

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PRELIMINARY STATEMENT

This is an opt-out case from a long-pending class action in the District of New Jersey. *James v. Global Tel*Link Corp.*, Civil Action No. 13-cv-4989 (WJM) (MF) (filed on August 20, 2013). The class action and this case challenged the rates charged by GTL for inmate calling services ("ICS") at correctional facilities in New Jersey from 2006 through 2016. Plaintiff allegedly used ICS while at the Bergen County correctional facility from 2012-2017. The *James* case was settled on a class basis on October 22, 2020. Plaintiff was not satisfied with the benefits that he was entitled to under the class settlement and decided to pursue his claims against GTL in state court.

Plaintiff filed two separate cases in Essex County against GTL, each of which was properly dismissed with prejudice. The first action was properly dismissed because Plaintiff did not appear at trial. That decision was not an abuse of discretion because, given Plaintiff's incarcerated status, dismissal was the only enumerated sanction available under Rule 1:2-4 for Plaintiff's failure to appeal. Plaintiff's only excuse for his failure to appear is that he did not receive the trial notice because the Trial Court did not include his SBI number on the trial notices. That excuse rings hollow as the regulation that Plaintiff relies upon does require the prison to return mail without an SBI number as long as it includes Plaintiff's name, which the trial notices indisputably did.

The second action asserted the identical claims as in the first action and was properly dismissed on res judicata grounds. The Trial Court correctly found that all of the requirements for res judicata were met. Moreover, there was no abuse of discretion in the denial of Plaintiff's motion for reconsideration because (a) the motion was untimely, and (b) Plaintiff presented no new evidence in his motion. In addition, there were numerous additional grounds besides res judicata for the dismissal of the Complaint in the second action.

Accordingly, the dismissal of both of the actions subject to this consolidated appeal should be affirmed.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND[1]

A. *James v. GTL* Class Action

Between 2013 and 2020, GTL defended a putative class action lawsuit pending before Judge Martini in the District of New Jersey captioned *James v. Global Tel*Link Corp.* in which the plaintiffs challenged the rates and certain fees charged by GTL for ICS pursuant to GTL's contracts with the State of New Jersey and certain counties. Da3. [2] The *James* plaintiffs asserted that the rates and certain fees charged by GTL prior to 2016 (when the legislature capped

[1] The factual background and procedural history of this matter are intertwined and thus presented together.

[2] "Da" refers to Defendants' Appendix. "Pa" refers to Plaintiff's Appendix filed on February 29, 2024. "PSa" refers to Plaintiff's Supplemental Appendix filed on August 22, 2024.

rates) were unconscionable commercial practices under the New Jersey Consumer Fraud Act ("NJCFA") and were a taking under the Fifth Amended of the United States Constitution. Id.

Ultimately, a class of inmates and other GTL account holders was certified and the case was scheduled for trial in March 2020. On the eve of trial, with the assistance of two private mediators and Magistrate Judge Falk, GTL and the *James* plaintiffs agreed to a class action settlement, pursuant to which (i) all current GTL customers would receive credits equal to a percentage of the amounts they paid GTL for calls during the class period; and (ii) former GTL customers who submitted a valid claim would receive a cash award equal to a percentage of the amounts they paid GTL for calls during the class period. Id.

Judge Martini preliminarily approved the class action settlement on July 15, 2020, and issued final approval of the settlement on October 22, 2020. Id.

Plaintiff is currently incarcerated in South Woods State Prison in Bridgeton, NJ, but during the relevant time period alleged in this case was incarcerated in the Bergen County correctional facility. PSa15. Although plaintiff was part of the class certified in the *James* case, plaintiff decided to opt-out of the class settlement and pursue his own action against GTL. PSa16.

B. First Essex County Action

On October 30, 2020, Plaintiff filed a Complaint against Global Tel*Link Corporation ("GTL") in Essex County ("First Action"). Pa11. The Complaint asserted claims for violation of the NJCFA and unjust enrichment based on the rates that Plaintiff was charged for ICS between 2012 and 2017. Id. GTL answered the Complaint (Da26), and the parties engaged in discovery.

On December 2, 2021, Plaintiff filed a motion to amend the Complaint. Pa26. The Amended Complaint asserted numerous claims based upon an unfounded allegation that GTL improperly recorded calls with Plaintiff's attorneys between 2012 and 2017 and asserted causes of action under the Federal Wiretap Act, the New Jersey Wiretapping and Electronic Surveillance Control Act, the First, Fourth and Sixth Amendments to the United States Constitution and their corresponding sections of the New Jersey Constitution, invasion of privacy, conspiracy to violate civil rights, civil conspiracy and negligence. Id. GTL opposed the motion for leave to amend, Plaintiff filed a reply, and the Court heard oral argument on March 9, 2022. 1T. The case was reassigned to a different judge, and the motion was not decided.

On March 24, 2022, the parties submitted a proposed Consent Order extending the discovery end date until December 31, 2022, which Consent Order

was entered on April 8, 2022. Da34. Plaintiff did not seek any further extensions of discovery.

On March 30, 2023, the Court issued a trial notice for August 14, 2023. On July 19, 2023, the Court issued another trial notice for August 14, 2023. Pa54. Plaintiff did not seek an adjournment of the trial date.

Plaintiff did not appear for trial, and on August 14, 2023, the Court dismissed the complaint with prejudice for failure to appear at trial. Pa7. On October 12, 2023, the Trial Court denied Plaintiff's motion to reinstate the case. Pa8.

On October 19, 2023, Plaintiff filed a Notice of Appeal of the dismissal of the First Action. Pa1.

C. Second Essex County Action

On July 19, 2023, in a blatant attempt to circumvent the motion to amend that was still pending at the time, Plaintiff filed a second Complaint against GTL and ViaPath Technologies, Inc. ("ViaPath") in Essex County ("Section Action"). PSa14. The Complaint asserts the exact claims that were sought in the Amended Complaint, which was ultimately dismissed with prejudice in the First Action. Compare PSa14 with Pa30. The only difference is that the new Complaint named ViaPath as a defendant, and Plaintiff alleges that "ViaPath was formerly known as" GTL. PSa14.

Plaintiff included a certification pursuant to Rule 4:5-1(b)(2) with the new Complaint (PSa34), but that certification was false. Plaintiff certified that he had not initiated any other action against Defendants and was not engaged in any other proceeding against Defendants. Plaintiff disingenuously did not disclose that the First Action was pending against GTL asserting the same exact claims and allegations.[3]

On October 6, 2023, GTL filed a motion to dismiss the Complaint on res judicata as well as other grounds. PSa10. Plaintiff did not file an opposition to the motion to dismiss. On October 6, 2023, finding that all of the elements for res judicata were satisfied, the Trial Court dismissed Plaintiff's Complaint with prejudice. PSa10.

On October 19, 2023, Plaintiff filed a motion for reconsideration of the October 6 Order. PSa35. Plaintiff did not contend that any aspect of the Order or Statement of Reasons was palpably incorrect or irrational. Rather, Plaintiff's only argument was that the Court did not consider his opposition brief that he supposedly filed.[4] PSa35. On December 15, 2023, the Trial Court denied Plaintiff's motion for reconsideration. PSa8.

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[3] Plaintiff did reference the First Action in the body of the Complaint. PSa17.

[4] Defendants never received the opposition brief that Plaintiff says he filed. It was not served on counsel for Defendants, as required by the Court Rules, nor was it uploaded to eCourts by the Clerk's office. Da77.

On December 28, 2023, Plaintiff filed a Notice of Appeal of the dismissal of the Second Action. PSa1.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE FIRST ACTION (Pa7, Pa8)

Plaintiff entirely ignores the standard of review that applies to his appeal of the dismissal of the First Action. "The decision to dismiss a case or sanction parties for failure to appear for trial falls within the discretion of the trial judge." Kornbleuth v. Westover, 241 N.J. 289, 300 (2020). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Here, the Trial Court did not abuse its discretion in dismissing the First Action for Plaintiff's failure to appeal at, or seek an adjournment of, trial. Plaintiff does not dispute that he did not appear or seek an adjournment of the trial. Plaintiff instead tries to shift the blame for the dismissal to the Trial Court, claiming that he did not receive the two trial notices because Plaintiff's SBI number was not included on the notices. Pb7. That argument does not withstand scrutiny.

In support of his argument, Plaintiff cites to NJAC 10A:18-2.6(c), which states: "The inmate's name and number shall appear on the outside of the incoming correspondence. Correspondence without ***either*** the inmate's name or number shall be returned to the sender." (Emphasis added). Plaintiff contends that regulation requires the corrections institution to return mail that does not include both the inmates name and SBI number. But that is not what the regulation says. Rather, the regulation states that mail shall be returned if it does not include ***either*** the inmate's name ***or*** SBI number. There is no dispute that, here, the trial notices included Plaintiff's name. Pa54. Thus, the regulation cited by Plaintiff did not require prison staff to return the trial notices to the Court.

Plaintiff also criticizes the Trial Court for not considering the prejudice to Plaintiff prior to dismissal of the case. Pb10-11. However, that criticism is just an assumption on Plaintiff's part: there is no evidence in the record that the Trial Court failed to consider prejudice on Plaintiff. Instead, there was ample evidence in the record of self-induced behaviors that resulted in harm to Plaintiff for the Trial Court to consider in arriving at its decision to dismiss the case. For example, Plaintiff rejected settlement benefits in the *James* class action, in which the class was represented by highly-sophisticated counsel – Carella Byrne Cecchi Brody Agnello, P.C. and Pashman Stein Walder Hayden P.C.-- and decided to file his

own lawsuit against GTL. Further, Plaintiff sought to expand the claims and the discovery that he sought against GTL, causing GTL to serve legitimate objections to much of Plaintiff's discovery requests. Da35-67. Then, Plaintiff failed to prosecute his case, sitting back for months while taking no action beyond agreeing to extensions of the discovery end date – the last of which caused discovery to expire in December 2022 without Plaintiff taking any steps to secure a further discovery extension. Da34. Following still, Plaintiff ignored the Trial Court's trial notices – claiming that he did not receive them and blamed the Trial Court for not including his SBI number even though he never advised the Court that his SBI number must appear on all notices. Pa55.

By contrast, the prejudice to GTL in permitting this baseless case to proceed is significant. GTL has already spent enormous resources defending and ultimately settling claims pursued by a class of which Plaintiff was a member and that sought the same relief pursued by Plaintiff. Da3. The claims asserted by Plaintiff in this action cover a time period spanning seven to twelve years ago (Pa13), with the concomitant difficulties of securing documentary evidence and testimony from so long ago. This case is the last – and, indeed, the one and only – case filed by an opt-out member of the *James* class, and GTL has the legitimate desire to finally put these claims behind them. Thus, permitting Plaintiff's claims to survive in the face of Plaintiff's lack of diligence

and missed trial date would cause GTL severe prejudice. With these facts in mind, the Trial Court did not abuse its discretion in dismissing the First Action with prejudice.

Plaintiff also contends that the Trial Court should have imposed a lesser sanction than dismissal, but given Plaintiff's incarcerated status, the lesser sanctions outlined in Rule 1:2-4(a) were not available. Rule 1:2-4 governs the sanctions for failure to appear at trial. The first two outlined sanctions are monetary in nature, which are not meaningful under these facts because Plaintiff is incarcerated. The only other sanction set forth in the Rule is dismissal of the offending party's complaint, which is the sanction the Trial Court rightly imposed here. Given that dismissal was the only suitable sanction outlined in the Court Rules for Plaintiff's failure to appear, dismissal was not an abuse of discretion. See Ochoa v. Okasha, No. A-3008-16T12018, N.J. Super. Unpub. LEXIS 1100, *8 (App. Div. May 11, 2018) (affirming dismissal for failure to appear at trial in light of prejudice to defendant and unavailability of lesser sanction); Meza-Role v. Partyka, No. A-5015-15T2, 2018 N.J. Super. Unpub. LEXIS 658, at *18 (App. Div. Mar. 23, 2018) (same).[5]

[5] The cases cited by Plaintiff (Pb9-10) are inapplicable, as those cases address dismissal of cases for discovery violations. Ochoa, 2018 N.J. Super. Unpub. LEXIS 1100, at *6 (rejecting reliance on Johnson v. Mountainside Hosp., 199 N.J. Super. 114 (App. Div. 1985), because it dealt with discovery sanctions, not a failure to appear at trial).

Plaintiff further criticizes the Trial Court's denial of his motion to reinstate his case, claiming that he did in fact serve his motion to reinstate on GTL. While Plaintiff cites to his certification of service, that certification is not accurate. Plaintiff did not serve his motion on GTL. Morevoer, Plaintiff has repeatedly stated in various certifications of service that he has served court filings on GTL, including his appellate filings, but those statements are simply inaccurate: GTL has not received any court filings allegedly served by Plaintiff. Instead, GTL only has received filings when the court clerks upload filings on the electronic docket. Thus, Plaintiff's reliance on his certification of service is unpersuasive.

Accordingly, because the Trial Court's decision to dismiss the First Action was not "made without a rational explanation, [did not] inexplicably depart[] from established policies, or rest[] on an impermissible basis" (Chavies, 247 N.J. at 257), there is no grounds to reverse that decision.

POINT II

THE TRIAL COURT PROPERLY DISMISSED THE SECOND ACTION ON RES JUDICATA GROUNDS (PSa10)

A trial court's application of res judicata is reviewed on a de novo standard. Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000)

Res judicata has three essential elements: (1) a final judgment on the merits; (2) the prior suit involved the same parties or their privies; and (3) the subsequent suit is based on the same transaction or occurrence. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991). A claim barred by res judicata is appropriately dismissed under Rule 4:6-2. "Res judicata is grounds for dismissal under Rule 4:6-2." Ergowerx Int'l LLC v. Maxell Corp. of Am., 2017 N.J. Super. Unpub. LEXIS 1889, at *7 (App. Div. July 26, 2017) (citing Velasquez v. Franz, 123 N.J. 498, 515 (1991)). Here the elements of res judicata are easily met. Plaintiff does not dispute that the second element (same parties) was met here, but contends that the first and third elements were not met. Plaintiff's arguments are unpersuasive.

A. The First Action Was Dismissed on the Merits

Here, the First Action was involuntarily dismissed pursuant to Rule 1:2-4 for Plaintiff's failure to appear at trial. "A judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.'" Velasquez v. Franz, 123 N.J. 498, 507 (1991) (quoting Gambocz v. Yelencsics, 468 F.2d 837 (3d Cir. 1972), and citing Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327 (1955) (dismissal of complaint with prejudice bars subsequent suit on same issue, where operative facts of subsequent suit were identical)). An involuntary

dismissal "operate[s] as an adjudication on the merits for res judicata purposes." Id. at 508; see also Citizens Voices Ass'n v. Collings Lakes Civic Ass'n, 396 N.J. Super. 432, 445 (App. Div. 2007) (stating that dismissal with prejudice "would normally be considered res judicata as to the issues addressed").

Plaintiff ignores these cases, and instead argues that a dismiss pursuant to Rule 4:37-2(b) is not a dismissal on the merits, citing to Walker v. Choudhary, 425 N.J. Super. 135 (App. Div. 2012). But the First Action was not dismissed for discovery violations, which is the subject that Rule 4:37-2 addresses. Rather, the First Action was dismissed for failure to appear at trial, which is addressed by Rule 1:2-4, and a dismissal with prejudice is permitted under Rule 1:2-4. In re Estate of Liu, No. A-5063-18T1, 2020 N.J. Super. Unpub. LEXIS 1288, at *4 (App. Div. June 30, 2020) (affirming dismissal of case with prejudice pursuant to Rule 1:2-4). Thus, Rule 4:37-2 and cases addressing dismissals under that rule are not applicable.

B. The Second Action is Based on the Same Transaction or Occurrence

The claims in the Second Action are the same as those asserted in the First Action. Counts XIV and XV were part of the original Complaint in the First Action, and Counts I-XIII were part of the proposed Amended Complaint in the First Action. By definition, the dismissal of the First Action with prejudice was

a denial of the motion for leave to amend, and Plaintiff should not be able to circumvent that denial by bringing Counts I-XIII in a new action.

Whether or not the causes of action are the same, res judicata still applies because both the First Action and the Second Action arise out of the same transaction or occurrence; GTL's provision of ICS to Plaintiff. Thusly, all of Plaintiff's claims could have been asserted in the First Action. "Claim preclusion applies not only to matters actually determined in an earlier action, but to all relevant matters that could have been so determined." Watkins, 124 N.J. at 413. Moreover, "[f]or the purposes of res judicata, causes of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence. If, under various theories, a litigant seeks to remedy a single wrong, then that litigant should present all theories in the first action. Otherwise, theories not raised will be precluded in a later action." Watkins, 124 N.J. at 413 (citing Restatement (Second) of Judgments, § 24).

Accordingly, pursuant to this binding precedent, res judicata barred the Second Action.

POINT III

THERE WERE MULTIPLE ALTERNATIVE BASES FOR DISMISSING THE SECOND ACTION (PSa10)

Even if the Court does not believe the Trial Court correctly applied res judicata, there are multiple alternative bases for dismissing the Second Action. All of these arguments were presented to the Trial Court, and this Court is within

its discretion to sustain the dismissal on any of these bases. Cardinale Trucking Corp. v. Motor-Rail Co., 56 N.J. Super. 150, 155 (App. Div. 1959); Bianchi v. City of Newark, 53 N.J. Super. 66, 74 (App. Div. 1958).

A. Counts I Through XIII of the Second Action Fail to State a Claim

1. Plaintiff's Claims Lack Any Factual Basis

The key allegation in Counts I through XIII of the Complaint is that during the discovery phase of the First Action Plaintiff first learned that GTL and Bergen County "intercepted and recorded at least 37 telephone calls between Plaintiff and his attorneys, during which Plaintiff sought legal advice." PSa__. Plaintiff appears to rely on two sources of information to support the allegation: (a) the call log that was produced, and (b) GTL's Response to Bergen County's Request for Proposal. However, neither of these sources of information supports that assertion.

The call log (Da70) does not state whether calls were recorded. Rather, the call log simply provides information such as the destination phone number, date, time and duration of the call, and the amount paid by Plaintiff. Nothing in the call log supports Plaintiff's allegation that his calls with his attorneys were recorded.

Additionally, GTL's response to the Bergen County RFP (Da72)[6] does not support the allegation that GTL recorded Plaintiff's phone calls with his attorneys. While Plaintiff cites portions of that Response that discuss call recording capabilities at the facility (PSa19-20) he omits that GTL advised that recording would be done in a way that "all the while protect[s] attorney-client privileges." Da72-76 (Responses 41(a), 41(b), 41(c), 41(e), 42); *see also id.* at 47. Thus, GTL maintained that its system was designed in a way to protect inmates' attorney-client privilege. Plaintiff's failure to disclose these aspects of the Response – while at the same time quoting other aspects of it – is disingenuous and deceptive.

Given the lack of any evidence this his attorney phone calls were recorded and the evidence that GTL's call recording system was designed in a way to protect inmates' attorney-client privilege, Plaintiff's claims are legally deficient, and Counts I through XIII are subject to dismissal.

2. Plaintiff' Consented to the Call Recording

Counts I through XIII proceed from the flawed assumptions that Plaintiff's prison telephone calls were private and unmonitored. Neither assumption is warranted. "Prisoners ordinarily have no legitimate expectation

[6] The Response originally was submitted by, and the contract with Bergen County originally was awarded to, DSI-ITI, LLC. DSI-ITI LLC was acquired by GTL in 2010.

of privacy." Young v. Department of Public Safety & Corr. Svcs., No. DKC-14-1493, 2015 WL 3932433, at *5 (D. Md. June 24, 2015) (citations omitted). Moreover, as demonstrated herein, inmates at the Bergen County facilities consented to the monitoring, recording, and divulging of prison calls.

The Electronic Communications Privacy Act ("ECPA") (Count I of the Complaint) generally prohibits the interception of "any wire, oral, or electronic communication," including telephone conversations, in the absence of judicial authorization. 18 U.S.C. §§ 2511(1), 2516; see also United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002); United States v. Lanoue, 71 F.3d 966, 980 (1st Cir. 1995); United States v. Horr, 963 F.2d 1124, 1125–26 (8th Cir. 1992); United States v. Willoughby, 860 F.2d 15, 19 (2d Cir. 1988). Despite that broad prohibition, telephone communications may be intercepted without prior judicial authorization in two contexts: (1) when the conversation is intercepted "by an investigative law enforcement officer in the ordinary course of his duties," 18 U.S.C. § 2510(5)(a)(ii), and (2) when "one of the parties to the communication has given prior consent to such interception," 18 U.S.C. § 2511(2)(c). Hammond, 286 F.3d at 192; United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996); Lanoue, 71 F.3d at 980–81; United States v. Feekes, 879 F.2d 1562, 1565 (7th Cir. 1989). Both exceptions apply here. The New

Jersey anti-wiretapping statute (Count II) has similar exceptions. N.J.S.A. § 2A:156A-33(b); N.J.S.A. § 2A:156A-4(c).

The law enforcement exception applies to private calls made by inmates that are recorded by a private entity under contract to provide telephone services in correctional institutions. United States v. Rivera, 292 F. Supp.2d 838, 843 (E.D. Va. 2003) ("Verizon's and Global Tel*Link's recording of Rivera's calls pursuant to their contract with Arlington County comes within the law enforcement exception."); see also 18 U.S.C. § 2518 ("an interception under this chapter may be conducted in whole or in part by Government personnel, *or by an individual operating under a contract with the Government*, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception" (emphasis added)); United States v. Lopez, 300 F.3d 46, 55 (1st Cir. 2002) (interpreting § 2518 as permitting the government to rely on civilian monitors acting pursuant to contract and subject to government supervision); Amati v. City of Woodstock, 176 F.3d 952, 955–56 (7th Cir. 1999) (law enforcement exception applies to detention center's recording of calls to and from police station which captured employees' personal calls); Van Poyck, 77 F.3d 285, 291–92 (9th Cir. 1996) (law enforcement exception applies to detention center's recording of telephone calls by inmates); United States v. Paul, 614 F.2d 115, 116–17 (6th Cir. 1980) (same).

The consent exception applies when "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c); see also United States v. Acklin, 72 F. Appx. 26, 27, 2003 WL 21774015, at *1 (4th Cir. Aug. 1, 2003) (applying the consent exception to telephone calls by a prison inmate); Hammond, 286 F.3d at 192; Lanoue, 71 F.3d at 981; Feekes, 879 F.2d at 1565. "[C]onsent may be express or implied in fact from 'surrounding circumstances indicating that the [defendant] knowingly agreed to the surveillance.'" Van Poyck, 77 F.3d at 292 (citing Griggs–Ryan v. Smith, 904 F.2d 112, 116–17 (1st Cir. 1990)); see also United States v. Horr, 963 F.2d 1124, 1126 (8th Cir. 1992) (finding that the defendant implicitly consented to monitoring by using the telephone after receiving notice of monitoring); United States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987) (same). In the prison context, when a facility has notified an inmate that his telephone calls may be recorded and monitored, the inmate's subsequent use of the telephone implies the requisite statutory consent to the recording and monitoring. See Hammond, 286 F.3d at 192 (finding that the defendant consented to the interception of his conversations because he was notified of recording and nonetheless used the telephone); Willoughby, 860 F.2d at 19–20 (same); Amen, 831 F.2d at 379 (same).

Here, Bergen County inmates, including Plaintiff, were notified that their calls were subject to recording and monitoring in at least two ways. First, GTL "provide[d] appropriate signage at each inmate telephone location in accordance with established Federal, State and Facility guidelines to notify inmates that the system may record all telephone calls for security purposes. Da76. Second, at the beginning of all inmate-initiated calls, "the inmate and called party [were] notified that ALL calls are subject to monitoring and recording." Id.

Plaintiff was aware that, by using the Bergen County inmate telephone system with the foregoing notices, he consented to the monitoring and recording of his calls. Thus, Plaintiff had no expectation that his calls were not being monitored and recorded. Plaintiff was, therefore, owed no duties and suffered no injury from the monitoring or recording of their calls.

Accordingly, Plaintiff's claims for violation of the ECPA and New Jersey anti wire-tapping statute are subject to dismissal.

3. Plaintiff's Statutory and Constitutional Claims Are Barred By the Statute of Limitations

ECPA § 2520(e) states, "[a] civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation." The New Jersey statute also has a two-year statute of limitations. N.J.S.A. § 2A:156A-32. Plaintiff's federal and state constitutional claims (Counts III-VIII of the Complaint), as well as the

claims for conspiracy to violate the constitutions (Counts X-XII of the Complaint), also are subject to the two-year statute of limitations in N.J.S.A. § 2A:14-2. Patyrnk v. Apgar, 511 Fed.Appx. 193, 195 (3d Cir. 2013) (per curiam) (citing Dique v. N.J. State Police, 603 F.3d 181, 185 (3d Cir. 2010)); Hawkins v. Feder, 2012 WL 5512460, at *5 (App. Div. Nov. 15, 2012). The purported illegal wiretapping took place between 2012 and 2017. Since Plaintiff had a reasonable opportunity to discover the alleged violation when it allegedly took place, and had knowledge of the recording, these claims are outside of the two-year statute of limitations, as the present matter was not filed until 2020.

4. Plaintiffs' Other Claims Fail to State a Viable Cause of Action

Plaintiff's remaining claims fail at the most basic level. Plaintiff fails to properly plead the elements of those causes of action, he supports those claims with purely conclusory allegations, and the non-conclusory facts alleged do not satisfy the elements of the cause of action. Those claims should be dismissed.

a. Negligence (Count XIII)

Plaintiff's claim for common law negligence requires the existence of a duty owned to Plaintiff. To successfully state a claim for negligence, a plaintiff must allege "an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable." Kelly v. Gwinnell, 96 N.J. 538, 544 (1984). In the absence

of a particular duty owned by Defendant to Plaintiff, there can be no liability for negligence. Id. "[W]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583 (1962).

Here, no facts are alleged that plausibly give rise to a duty in tort. Plaintiff alleges nothing beyond mere legal conclusions. He asserts nothing regarding foreseeability or actual harm. He alleges no facts to regarding the relationship of the parties or the public interest involved. Accordingly, even if the calls were recorded as alleged in the Complaint, the negligence claim would still fail to state a viable cause of action.

b. Invasion of privacy (Count IX)

The tort of "intrusion upon seclusion" is a variety of invasion of privacy and is defined as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Castro v. NYT Television, 384 N.J. Super. 601, 609 (App. Div. 2006) (quoting 3 Restatement (Second) of Torts § 652B (1977)). Here, the alleged intrusion was the consensual monitoring and recording of Plaintiff's telephone calls. Plaintiff's claim, therefore, is oxymoronic. Plaintiff had no solitude or seclusion

in the telephone calls he consented to have monitored, recorded, and divulged.

5. Plaintiff Violated Rule 4:5-1

Rule 4:5-1(b)(2) requires a party to identify in a certification with their first pleading "whether the matter in controversy is the subject of any other action pending in any court." Here, Plaintiff violated this rule by not disclosing the First Action asserting the exact same claims as those asserted in the Second Action.

Courts have the authority to dismiss a complaint for a party's failure to comply with Rule 4:5-1(b)(2). A court is authorized to dismiss a successive action if the opposing party was prejudiced by the non-disclosure. Kent Motor v. Reynolds & Reynolds, 207 N.J. 428, 447 (2011). Here, had Plaintiff complied with his obligation to disclose the pending First Action, the cases likely would have been consolidated, and this case would have been dismissed when the First Action was dismissed. Plaintiff's failure to disclose the First Action prejudiced GTL by necessitating a motion to dismiss the Second Action. Accordingly, the Second Action Shouldd be dismissed for failure to comply with Rule 4:5-1.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO REINSTATE THE SECOND ACTION (PSa8)

The decision to deny a motion for reinstatement or reconsideration is reviewed for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J.

567, 582 (2021). Here, the Trial Court did not abuse its discretion, as there were at least two grounds for denial of the motion to reinstate.

A. The Motion Was Untimely

Rule 4:49-2 states that "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be ***served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it***." (Emphasis added). Here, the Order dismissing the case was entered on October 6, 2023. On October 6, 2023, counsel for Defendants served the Order by UPS overnight mail on Plaintiff, and it was delivered on October 9, 2023. Da77. Thus, Plaintiff was required to serve the Motion on Defendants no later than October 29, 2023.

Plaintiff allegedly sent out the Motion on October 16, but Plaintiff's motion for reconsideration was not served on Defendant. The motion was not received by the Court until November 3, 2023, and was not received by counsel for Defendants until November 17, 2023, when it was uploaded to eCourts. Da77. Even Plaintiff's Certification of Service for the Motion (PSa94) states that he did not serve a copy of the Motion on Defendants when he mailed it to the Court on October 19, 2023. November 17, which is the date the Motion was served on Defendants, is 39 days after the Order was served on Plaintiff.

A motion for reconsideration was denied under similar circumstances in Murray v. Comcast Corp., 457 N.J. Super. 464, 469 (App. Div. 2019):

> We agree that the twenty-day time frame in Rule 4:49-2 starts from the date of service of the order, not from the date of entry. However, although plaintiff's motion for reconsideration is dated July 20, 2017, the Law Division did not receive and *file* the motion papers until July 26, 2017, twenty-six days after plaintiff's counsel was served with the order compelling arbitration. We also note defendants do not claim their counsel was served with plaintiff's motion papers on July 20, 2017. Pursuant to Rule 1:6-3(c), "service of motion papers is complete only on receipt at the office of adverse counsel or the address of a pro se party. If service is by ordinary mail, receipt will be presumed on the third business day after mailing." The third business day after Thursday July 20, 2017 was Tuesday July 25, 2017. Thus, even assuming plaintiff mailed the notice of motion and supporting papers on July 20, 2017, defendants were not *served* within the twenty-day time frame mandated by Rule 4:49-2.

Accordingly, the Motion to reinstate was untimely and was subject to denial on that basis alone.

B. The Motion Did Not Meet The Strict Standard For Reconsideration

"Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990). A court "will not disturb the trial court's reconsideration decision unless

it represents a clear abuse of discretion. An abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Kornbleuth, 241 N.J. at 301-02.

Plaintiff's Motion did not fall within either of these categories. Plaintiff did not state that any aspect of the dismissal Order or Statement of Reasons was palpably incorrect or irrational. Rather, Plaintiff's only argument was that the Court did not consider his opposition brief that he supposedly filed.[7] But, the opposition brief is not evidence. State v. Culley, 250 N.J. Super. 558, 561 (App. Div. 1991) (noting that a statement in a brief is not evidence). Therefore, the opposition brief that the Court allegedly did not consider does not fit within the second prong of the reconsideration standard. Plaintiff does not cite any case supporting reconsideration here.

Moreover, there is nothing that Plaintiff raises that would change the Court's Order dismissing the case. The Court already considered the cases regarding the preemptive nature of the Order dismissing the First Action. Plaintiff simply attempted to circumvent the effect of that Order by filing a new case, which was entirely improper and is the behavior that Rule 4:5-1 and the

[7] Defendants never received the opposition brief that Plaintiff says he filed. It was not served on counsel for Defendants, as required by the Court Rules, nor was it uploaded to eCourts by the Clerk's office. Da77.

res judicata doctrine are designed to prevent. There is no evidence presented by Plaintiff that would change the Court's decision that the Second Action is preempted. Thus, even if Plaintiff's Motion were timely and did fall under one of the well-established categories for a motion for reconsideration, the Motion does not provide any evidence or grounds for reconsideration of the Court's order dismissing the Second Action.

CONCLUSION

For the foregoing reasons, the Trial Court's dismissal orders should be affirmed.

Dated: October 25, 2024

GREENBERG TRAURIG LLP

BY: /s/ *Aaron Van Nostrand*
Aaron Van Nostrand
Attorneys for Defendants

Aakash Dalal
SBI# 792652E
215 Burlington Road South
Bridgeton, NJ 08302
Appellant, *pro se*

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-659-23-T2

AAKASH DALAL,

Plaintiff-Appellant,

Vs.

GLOBAL TEL*LINK CORPORATION,

Defendant-Respondent.

Civil Action

On Appeal From a Judgment of Conviction in the Superior Court of New Jersey, Law Division, Essex County

Docket No.: ESX-L-7456-20

Sat Below: Hon. Thomas M. Moore, P.J. Cv.

REPLY BRIEF ON BEHALF OF APPELLANT AAKASH DALAL

Aakash Dalal,
Appellant, *pro se*

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LEGAL ARGUMENT

Point I: The Trial Court Abused its Discretion in Dismissing the First Action

Defendants raise a variety of specious justifications for the trial court's erroneous order dismissing the complaint with prejudice for failure to appear at trial. At the outside the Court should consider that in Connor v. Sexton Studios, Inc., 270 N.J. Super. 390 (App. Div. 1994), this Court reversed a trial court's dismissal with prejudice based on a pro se plaintiff's failure to appear at trial and "reiterate[d] to the trial judge that not only are procedural dismissals with prejudice generally unwarranted in situations such as this, but procedural dismissals themselves are not favored." Id. at 395.

First, the Defendants excuse the trial court's failure to properly send the incarcerated Plaintiff trial notices by misinterpreting the administrative regulation regarding inmate mail, N.J.A.C. 10A:18-2.6(c). Db8. The regulation provides: "The inmate's name and number shall appear on the outside of the incoming correspondence. Correspondence without either the inmate's name or number shall be returned to the sender." This means that if either the name or number is missing, the mail is returned; it does not mean that if either the name or number is on the mail, it is provided to a prisoner. This interpretation is the one used by the NJDOC and is readily supported by the preceding sentence, requiring that both the name AND number SHALL appear on the mail.

To confirm this fact, the Court can simply consult its case managers and clerical staff. Any mail without a prisoner's SBI number is stamped "Return to Sender Missing Inmate Number" and mailed back to the Court. This is why Judge Petrillo asked Plaintiff for his SBI number during the hearing. 1T3:24-25. The Defendants also claim Plaintiff "never advised the

Court that his SBI number must appear on all notices", Db9, but he clearly informed the trial judge of this at the hearing. 1T4:1-4.

Second, the Defendants attempt to refute the argument that the trial court failed to consider prejudice to Plaintiff by puzzlingly stating, "there is no evidence in the record that the Trial Court failed to consider prejudice on Plaintiff." Db8. The absence of proof, however, does not constitute proof and the trial court's failure to make any finding of prejudice does not mean it considered prejudice. The trial court's terse order contains no indication that it considered anything other than Plaintiff's failure to appear in dismissing the Complaint with prejudice. The Defendants also misapprehend the standard and then blame any prejudice to Plaintiff on him for failing to accept a paltry settlement in the class action. Db9. Prejudice from an erroneous ruling--particularly one depriving a party of his right to the adjudication of his claims on their merits--cannot be washed away simply because the party did not agree to a settlement. Misleadingly blaming Plaintiff here does not negate the real prejudice Plaintiff has suffered as a result of the trial court's dismissal of his claims with prejudice. Most importantly, the Defendants have failed to show the trial court considered the prejudice and harm to either side.

Third, the Defendants also misleadingly suggest "Plaintiff failed to prosecute his case, sitting back for months while taking no action beyond agreeing to extensions of the discovery end date[.]" Db9. To the contrary, Plaintiff's multiple motions to compel discovery and motion for leave to file an amended complaint were sitting before the trial court for well over a year without any decision. The discovery end date was of no moment, as Plaintiff's discovery motions had been timely filed and were awaiting adjudication.

Fourth, in a conclusory manner, Defendants claim the prejudice to them is significant. Db9. They fail to specifically identify or describe what documentary evidence or testimony has

been lost. According to their own evidence, they continue to utilize the same software that captured Plaintiff's attorney-client privileged calls between 2012 and 2017. Either the software recorded Plaintiff's calls or it didn't. As it relates to the Consumer Fraud Act claims, discovery is nearly complete (with the exception of Plaintiff's pending motions to compel discovery) and largely mirrors that in the James class action. The more important claims here are based on the Defendants unlawful recording of Plaintiff's attorney-client calls--claims that were not the subject of the James class action, which was limited to excessive fees for the calls.

Finally, the Defendants claim that the alterative sanctions set forth in R. 1:2-4(a) should be categorically barred in the case of prisoners because they are monetary in nature. This ignores the reality that trial courts impose discretionary and statutorily mandated fines on criminal defendants with the expectation that they will have a punitive effect.

Point II: Res Judicata Was Not Basis for Dismissing the Second Action

The purpose of res judicata is to preclude relitigation of claims that have been fairly litigated and adjudicated on the merits. Here, there was never an adjudication on the merits in the First Action and yet the trial court improperly dismissed the Second Action on res judicata grounds. The Defendants misrepresent the law in an attempt to ensure Plaintiff's claims that they unlawfully recorded his attorney-client telephone calls are never fairly adjudicated on the merits.

Defendants apparently agree with Plaintiff when they concede "Rule 4:37-2 and cases addressing dismissals under that rule are not applicable." Db13. Plaintiff argued R. 4:37-2(d) was inapplicable because this rule was erroneously relied upon by the trial court in support of its application of res judicata, which requires an adjudication on the merits. Pa-12 (Supplemental Appendix). The rule provides "Unless the order of dismissal otherwise specifies, a dismissal

under R. 4:37-2(b) or (c) and any dismissal not specifically provided for by R. 4:37-2, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits."

The trial court's dismissal of the First Action for failure to appear was not an adjudication on the merits. R. 1:2-4 says nothing about a dismissal pursuant to that rule being construed as an adjudication on the merits. Thus, if R. 4:37-2(d) does not apply, there was no adjudication on the merits to support the application of res judicata to dismiss the Second Action. As noted by this Court in Walker v. Choudhary, R. 4:37-2(d) is inapplicable under the circumstances. 425 N.J. Super. 135 (App. Div. 2012).

Importantly, the unlawful recording claims do not arise out of the same occurrence or transaction. Defendants broadly describe the occurrence and transaction as "GTL's provision of ICS to Plaintiff". Db14, but the First Action is premised upon Defendants' exorbitant fees for the use of these services whereas the Second Action is premised upon Defendants' unlawful recording and disclosure of Plaintiff's attorney-client phone calls. Each action seeks to remedy a different wrong, not a "single wrong" under "various theories". Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 413 (1991).

Point III: There Were No Alternate Grounds for Dismissing the Second Action[1]

A. PLAINTIFF DID NOT VIOLATE R. 4:5-1(b)(2) BECAUSE HE EXPLICITLY INFORMED THE COURT OF WHAT THE DEFENDANTS CLAIM IS A RELATED ACTION

The Defendants frivolously argue that Plaintiff violated R. 4:5-1(b)(2) "by not disclosing the First Action asserting the exact same claims as those asserted here." Clearly, Plaintiff informed the court of the civil action against GTL in the exact same document that Defendants cite to support its frivolous argument:

[1] All references to the Complaint are to the Complaint in the Second Action which can be found at Pa-14 to -34 of the Supplemental Appendix.

> **"19.** On October 16, 2020, after timely opting out of the settlement, Plaintiff file[d] a civil action against GTL in the Superior Court of New Jersey, Essex Vicinage raising violations of the New Jersey Consumer Fraud Act based on the same matter in the class action lawsuit. Aakash Dalal v. Global Tel*Link Corporation, Docket No.: ESX-7456-20."
>
> *Complaint at ¶ 19. (Pa16-17 of Supplemental Appendix)*

More importantly, Plaintiff explicitly informed the court of this action in his Civil Case Information Statement which was filed simultaneously with the Complaint:

> "Related Cases Pending? Yes
> If "Yes," list docket numbers
> ESX-7456-20"

The language near the end of the Complaint (page 21) was an oversight and Plaintiff submitted an amended certification for filing. Pa-87 (Supplemental Appendix)

R. 4:5-1(b)(2) provides that, "A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action." Here, the previous action was in fact disclosed to the court in both the Complaint and the Civil Case Information Statement and the latter document is used by the court to determine whether to consolidate any cases. The Defendants specious argument for dismissal and for attorneys' fees should therefore be rejected.

B. PLAINTIFF'S NEW WIRETAP ACT AND CONSTITUTIONAL CLAIMS ARE FACTUALLY SUPPORTED

Neglecting both the standards that govern R. 4:6-2(e) motions to dismiss and the facts stated in Plaintiff's Complaint, Defendants argue that Plaintiff's claims lack any factual basis. It is submitted that Plaintiff has set forth sufficient facts in his Complaint to support his claims for

violations of the federal and state Wiretap Acts, violations of the United States and New Jersey Constitutions, and tort claims and that consequently, the Defendants' motion should be denied.

R. 4:6-2(e) motions to dismiss "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). In evaluating such motions, courts must "assume the facts as asserted by plaintiff are true and give [him] the benefit of all inferences that may be drawn in [his] favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). "It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165-66, 183 (2005).

The facts set forth in the Complaint show that (1) New Jersey regulations and the Bergen County Sheriff's Office's ("BCSO") policies prohibit the monitoring and recording of attorney-client calls at county jails (Complaint at ¶¶ 22-28); (2) Plaintiff never consented to the monitoring or recording of his attorney-client calls (Complaint at ¶¶ 29-30); (3) Plaintiff discovered on November 2, 2021, through discovery materials, that GTL advised the BCSO that, "All call recording is part of the proposed [Offender Communication System]. The OCS does not make use of external recording devices to perform recording. The recorded conversations, whether inmate calls or visitation calls, are associated to the actual call data." (Complaint at ¶ 20-21); (4) the actual call data, disclosed by GTL in discovery, contains 37 of Plaintiff's calls to his attorneys (Complaint at ¶ 30); (5) GTL boasted that its software allows law enforcement to monitor, listen to, and download all calls (Complaint at ¶ 33); and (6) GTL actually recorded 37 calls between Plaintiff and his attorneys (Complaint at ¶¶ 41-42).

Defendants ignore the R. 4:6-2(e) standard and surmise that "Plaintiff appears to rely on two sources of information…", present the Court with selected excerpts and pages from

discovery materials, ask the Court to assume that Plaintiff relied on these particular items, and then claim these excerpts do not support Plaintiff's claims. This is the epitome of a strawman argument and should be rejected by the Court. The facts in the Complaint in the Second Action are the only material the Court should consider in its determination of this motion.

Defendants' statement that "recorded conversations ... are associated to actual call data" and the call data itself, which includes attorney-client calls, gave Plaintiff sufficient reason to believe that such calls were recorded. Defendants provide the Court with only the first page of the call detail records it disclosed to Plaintiff and claims, "Nothing in the call log supports Plaintiff's allegation that his calls with his attorneys were recorded." Plaintiff has provided the Court with the first three pages of the call detail records and marked the attorney-client calls with arrows. *Pa-63-66.* What the call detail records demonstrate is that Defendants ViaPath and GTL could not differentiate between those attorney-client calls and regular calls made by Plaintiff further indicating that such calls were recorded by the Defendants.

Defendants finally argue that they made a statement in their response to a request for proposal to Bergen County indicating that they would protect the attorney-client privilege[2]. There is no evidence indicating that Defendants ViaPath and GTL actually did anything to separate attorney-client calls from any other calls. In reality, the call detail records demonstrate that Defendants' software did not have any functions that would segregate attorney-client calls from regular calls or determine which phone numbers were associated with attorneys or friends

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[2] GTL's response to the RFP states as follows:
"41. Vendor must have the capability to provide digital call recording that can meet the following requirements: a. Record all inmate placed calls. VENDOR RESPONSE: We offer you the flexibility to record calls for a specific inmate, a specific phone number, a specific phone, a specific group of phones, all calls in progress, selected calls in progress, groups of inmates, groups of phone numbers or each and every call, all the while protecting attorney-client privileges."

and family members of a detainee. *(Complaint at ¶¶ 35-36)*. Had Defendants implemented such functionality in their software, they would not have hesitated to bring it to the Court's attention.

C. PLAINTIFF'S CLAIMS ARE NOT BARRED BY CONSENT OR LAW ENFORCEMENT EXCEPTIONS TO THE WIRETAP ACT

Relying on mischaracterizations of a series of inapposite federal criminal cases, Defendants argue that Plaintiff's proposed claims are futile because (1) the law enforcement exception to the Wiretap Act applies and (2) Plaintiff purportedly consented to the recording of his attorney-client privileged phone calls. Both arguments are meritless. Every single case Defendants ViaPath and GTL rely on concerns the recording of prisoners calls with friends, codefendants, or coconspirators[3]. None concern the recording of calls between prisoners or pretrial detainees and their attorneys and many of the decisions indicate that such calls are in fact protected by the Constitution and the Wiretap Act.

Given Defendants' suggestion that pretrial detainees have no reasonable expectation of privacy in their calls with their attorneys, Plaintiff first addresses his Fourth Amendment and

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[3] Defendants cites a series of irrelevant decisions, which held that inmates had no reasonable expectation of privacy in their jailhouse calls to their friends, codefendants, and coconspirators, and that such calls fell within the law enforcement and consent exceptions to the Wiretap Act. None of the decisions concern calls between inmates and their attorneys and some of the decisions explicitly note that their analyses do not cover such calls. United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (calls between defendant and his friends; "This analysis does not apply to properly placed telephone calls between a defendant his attorney."); United States v. Feekes, 879 F.2d 1562, 1566 (7th Cir. 1989) ("The regulations of the Bureau of Prisons authorized the tape recording of all prisoner calls except to prisoners' lawyers, and Baltazar Lopez's calls to his son were recorded in accordance with this routine, which was the "ordinary course" for the officers."); United States v. Willoughby, 860 F.2d 15, (2nd Cir. 1988) (calls between defendant and his co-defendant; ruling prisoners "had no reasonable expectation of privacy in their calls to nonattorneys on institutional telephones."); United States v. Horr, 963 F.2d 1124, 1126 (8th Cir. 1992) (calls between defendant and undercover FBI agent); United States v. Hammond, 286 F.3d 189 (4th Cir. 2002) (calls between defendant and witness); United States v. Lanoue, 71 F.3d 966, 971 (1st Cir. 1995) (calls between criminal defendant and co-conspirator were suppressed, noting, "Deficient notice will almost always defeat a claim of implied consent.").

Article 1, Paragraph 7 claims. Plaintiff then addresses the law enforcement exception to the Wiretap Act and Defendants' claims that Plaintiff somehow consented to the recording and disclosure of 37 calls between himself and his attorneys. It should be noted that Defendants have failed to address Plaintiff's claims under the First and Sixth Amendments to the United States Constitution (Counts III and IV) and claims under corresponding provisions of the New Jersey Constitution brought pursuant to the New Jersey Civil Rights Act (Counts VII and VIII).

1. Fourth Amendment and Article 1, Paragraph 7 (Counts V and VI)

Defendants ViaPath and GTL never reference the Fourth Amendment or Article 1, Paragraph 7 in their brief, but suggest that pretrial detainees lack a reasonable expectation of privacy in their telephone calls with their attorneys[4]. Just recently, the New Jersey Supreme Court confirmed that, "Monitoring of an arrestee's call to a lawyer is constitutionally forbidden, regardless of notice." State v. McQueen, 248 N.J. 26, 50 n. 12 (2021) (citing State v. Sugar, 84 N.J. 1, 13 (1980)). "An arrestee cannot be given the unpalatable choice of speaking with an attorney in the unwelcome presence of a police officer or on a recorded line, or not speaking with an attorney at all." Id. Here, Plaintiff was not a prisoner at the timeframe set forth in the Complaint, but rather, a pretrial detainee, who was presumed to be innocent and had a constitutionally guaranteed right and necessity to consult with his attorneys regarding his impending trial. "The warrantless and surreptitious monitoring or recording of calls of an

[4] At the outset, Defendants misrepresent the decision in Young v. Department of Public Safety & Correctional Services, 2015 U.S. Dist. LEXIS 82526 (D. Md. June 24, 2015), which had nothing to do with the recording of attorney-client calls, and where an inmate filed suit over the disclosure of his disciplinary status to his own attorney. The Court ruled, "Plaintiff's complaint regarding the release of information regarding his disciplinary segregation sentence is in essence a claim that his constitutional right to privacy has been violated. Prisoners ordinarily have no legitimate expectation of privacy." Id. at *12 (emphasis added).

arrestee who is presumed innocent does not comport with the values of privacy that are prized in our free society." Id. at 50-51.

To demonstrate a Fourth Amendment violation, an individual must demonstrate that he had a "reasonable expectation of privacy" in his communications. Id. at 41-42. Where GTL inadvertently recorded attorney-client calls at a jail in California, a District Court determined the Fourth Amendment had been violated and held, "[I]t is clearly established that pretrial detainees have a reasonable expectation of privacy in phone calls to their attorneys, especially when a prison has an actual policy of not recording or listening to such calls." Jayne v. Bosenko, 2014 U.S. Dist. LEXIS 84431 *69 (E.D. Cal. 2014). Under similar circumstances as here, where GTL's competitor Securus Technologies, Inc. recorded attorney-client phone calls at another jail, a District Court found the Fourth Amendment had been violated and held, "Plaintiffs have therefore properly alleged that attorneys and detainee clients have a reasonable expectation of privacy in their confidential communications." Austin Lawyers Guild v. Securus Technologies, Inc., 2015 U.S. Dist. LEXIS 178047 *36 (W.D. Tex. 2015). See also Lonegan v. Hasty, 436 F. Supp. 2d 419, 434-36 (E.D.N.Y. 2006) (9/11 detainees had reasonable expectation of privacy in their attorney-client communications at federal jail)

New Jersey's Supreme Court has "construed Article I, Paragraph 7 of our State Constitution more broadly than its Fourth Amendment counterpart in ensuring a person's reasonable expectation of privacy from untoward government intrusion, particularly within the sphere of telecommunications." McQueen, *supra*, 248 N.J. at 42. Therefore, where a reasonable expectation of privacy has been found under the Fourth Amendment, it certainly exists under Article 1, Paragraph 7. Here, Plaintiff was led to believe that his attorney-client phone calls would not be recorded by both the Bergen County Sheriff's Office's Inmate Handbook and state

regulations. Given this information and the sacrosanct nature of the attorney-client privilege, Plaintiff had a reasonable expectation of privacy in his communications with his attorneys, as every Court that has considered this particular issue under these circumstances has found. Lanza v. State of New York, 370 U.S. 139, 143-44 (1962) ("[I]t may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.")

2. The law enforcement exception to the Wiretap Act is inapplicable because law enforcement officers do not ordinarily record and monitor attorney-client calls.

Defendants ViaPath and GTL argue that the law enforcement exception to the federal and state Wiretap Acts bars Plaintiff's claims under those laws. 18 U.S.C. § 2510(5)(a)(ii) exempts interceptions "by an investigative or law enforcement officer in the ordinary course of his duties." Given the Bergen County Sheriff's Office's regulations and New Jersey state law, it is apparent that law enforcement officials in this state and particularly at the Bergen County Jail cannot monitor or record attorney-client calls in the ordinary course of their duties. In fact, the Bergen County Sheriff's Office explicitly stated in its inmate handbook that, in accordance with New Jersey law, it does not record or monitor attorney-client calls.

Confronted with the exact same fact pattern here—the recording of attorney-client calls at a jail, Via Path's and GTL's competitor Securus Technologies argued that the law enforcement exception to the Wiretap applied. Austin Lawyers Guild v. Securus Technologies, Inc., 2015 U.S. Dist. LEXIS 178047 *27-28 (W.D. Tex. 2015). The District Court there rejected that argument. Id. at * 30-31. The Court noted that "Plaintiffs allege that [Travis County Sheriff's Office]'s policies bar recording of confidential attorney-client telephone conversations," and therefore "recording confidential attorney-client telephone conversations is not ... within the

Travis County Defendants' law enforcement duties." Id. at *31; Lonegan v. Hasty, 436 F. Supp. 2d 419, 432 (E.D.N.Y. 2006) ("[I]n the prison setting, attorney-client communications generally are distinguished from other kinds of communications and exempted from routine monitoring.")

Every decision cited by Defendants ViaPath and GTL applying this exemption to jailhouse calls is limited to calls between inmates and their friends, codefendants, and coconspirators. None of the decisions concern attorney-client calls. For example, Defendants cite United States v. Rivera, 292 F. Supp. 2d 838 (E.D. Va. 2003) for the proposition that its recordings fell under the law enforcement exception, however, there, the Court was careful to note that "The government does not seek to admit any calls made to an attorney. Thus, the evidence does not raise any issue regarding the attorney-client privilege." Id. at 841 n.6. GTL also cites Van Poyck, but as previously noted, there, "Van Poyck called a number of his friends and made more incriminating statements." Van Poyck, *supra*, 77 F.3d at 287. The 9th Circuit expressly noted, "This analysis does not apply to properly placed telephone calls between a defendant an his attorney, which the MDC does not record or monitor." Id. at 291 n. 9.

3. Plaintiff did not consent to the recording of his attorney-client calls.

Without any competent evidence and contrary to the facts stated in the Complaint, Defendants ViaPath and GTL preposterously claim that Plaintiff consented to the interception, recording, and disclosure of 37 calls between himself and his attorneys while he was awaiting trial on serious charges. The Complaint explicitly states, "Plaintiff never consented to the monitoring, recording, or disclosure of his attorney-client communications and calls." *Complaint at ¶ 30.* The facts also show that not only did Plaintiff not have notice that his attorney-client calls were recorded, he was repeatedly informed by the Bergen County Sheriff's Office that his

attorney-client calls would not be monitored or recorded. *Id. at ¶ 25-27.* Furthermore, ViaPath and GTL publicly maintain that they do not record attorney-client calls. *Id. at ¶ 28.*

In the face of these facts, Defendants claim, "Bergen County inmates, including Plaintiff, were notified that their calls were recorded and monitored in at least two ways." The New Jersey Supreme Court's decision in McQueen forecloses the argument that implied consent based on notice bars Plaintiff's claims here. McQueen, *supra*, 248 N.J. at 50 n. 12 ("Monitoring of an arrestee's call to a lawyer is constitutionally forbidden, regardless of notice."). Defendants cite no evidence that Plaintiff provided explicit consent in any form or that it required such consent for the use of its telephone system.

First, by misleadingly quoting a requirement in Bergen County's Request for Proposal, Defendants claim they "provide[d] appropriate signage at each inmate telephone location in accordance with established Federal, State, and Facility guidelines to notify inmates that the system may recorded all telephone calls for security purposes." Initially, there is no evidence that ViaPath and GTL actually provided any signage. Most importantly, however, State and Facility guidelines explicitly prohibit the recording of attorney-client calls. See Complaint at ¶ 10-15; N.J.A.C. 10A:31-21.5(b) ("All inmate telephone calls may be monitored and recorded except calls to the Internal Affairs Unit and legal telephone calls."). Therefore, any signs, if they actually existed, would have informed Plaintiff that his attorney-client calls would not be recorded.

Defendants also claim, citing a requirement in the RFP, that "at the beginning of all inmate-initiated calls, 'the inmate and called party [were] notified that ALL calls are subject to monitoring and recording.'". There is no evidence that such notice was actually provided to Plaintiff with regard to his attorney-client calls. Defendants merely informed Bergen County that

they would provide such a message in its response to the RFP. Regardless, any such message would contradict the statements made by the Bergen County Sheriff's Office, GTL itself, and New Jersey regulations, which made it clear that attorney-client calls cannot be lawfully monitored or recorded. Finally, McQueen made it clear the recording of attorney-client calls is unlawful even where such notice is provided.

It is worth noting that a federal judge determined that GTL fabricated discovery responses and evidence regarding interactive voice responses at the beginning of telephone calls. Githieya v. Global Tel*Link Corporation, Civ. No.: 15-cv-986-AT, 2020 U.S. Dist. LEXIS 222628 (N.D. Ga. November 30, 2020) ("GTL intentionally provided false information in the course discovery, falsely verified interrogatory answers, and provided false testimony via the vehicle of [a] deposition...").

D. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

Defendants argue that Plaintiff's claims are barred by the statute of limitations because he purportedly "had a reasonable opportunity to discover the alleged violation when it allegedly took place." Here, Defendants ViaPath and GTL surreptitiously recorded Plaintiff's attorney-client calls. Plaintiff reasonably believed and was led to believe, based on New Jersey regulations and the BCSO's written policies, that his attorney-client calls would not be recorded. Plaintiff's claims were filed with two years after he discovered that these calls were recorded through discovery disclosures in in ESX-L-7456-20 in November 2021. *Complaint at ¶ 20-21.* Therefore, New Jersey's discovery rule and the discovery language set forth in the federal and state Wiretap Acts make it clear that Plaintiff's claims are timely.

"The discovery rule prevents the statute of limitations from running when injured parties reasonable are unaware that they have been injured[.]" Caravaggio v. D'Agostini, 166 N.J. 237,

245-46 (2001). The federal and state Wiretap Acts have built-in discovery rules. 18 U.S.C. § 2520(e) ("A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discovery the violation."); N.J.S. 2A:156A-32(d) ("A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or has a reasonable opportunity to discover the violation."). Plaintiff's civil rights claims and tort claims are subject to a two-year statute of limitations. N.J.S. 2A:14-2.

Plaintiff had no reasonable opportunity to discover that ViaPath and GTL recorded Plaintiff's attorney-client calls prior to disclosure in this case. Given the clandestine nature of ViaPath's and GTL's recordings and the fact that the BCSO's policies and state regulations prohibit such monitoring and recording of attorney-client calls, Plaintiff had no reason to believe such calls were recorded. Defendants ViaPath and GTL even bragged to law enforcement, "No one knows you are listening!" *Complaint at ¶ 33.* New Jersey's courts have repeatedly found that where a plaintiff is alerted to a cause of action through discovery in a civil case, the discovery rule applies. Gallagher v. Burdette-Tomlin Mem'l Hosp., 163 N.J. 38, 43-44 (2000) (plaintiff discovered cause of action against after-care physicians in discovery in case against physician); Mancuso v. Neckles, 163 N.J. 26, 36-37 (2000) (plaintiff discovered malpractice cause of action against radiologist in discovery in malpractice case against surgeon).

E. PLAINTIFF'S NEGLIGENCE AND INVASION OF PRIVACY CLAIMS ARE VALID

Defendants argue that Plaintiff has failed to properly plead claims for negligence and invasion of privacy. It is submitted that Plaintiff has alleged more than sufficient facts to support such claims under the R. 4:6-2(e) standard.

1. Negligence

Defendants argue that Plaintiff has failed to state a claim for negligence suggesting that Plaintiff has not established any duty, foreseeability of harm, or the public interest involved. *MTD at 12.* As explained in the Complaint, under New Jersey law, ViaPath and GTL had a clear duty to refrain from recording Plaintiff's attorney-client calls. Defendants ViaPath and GTL were well aware that if their software did not separate attorney-client calls from other calls, Plaintiff would suffer harm, including the exposure of his confidential legal communications. Furthermore, the public interest in the protection of attorney-client privileged communications is immense.

"The fundamental elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages." Robinson v. Vivirito, 217 N.J. 199, 208 (2014). "A duty is an obligation imposed by law requiring one party 'to conform to a particular standard of conduct toward another.'" Acuna v. Turkish, 192 N.J. 399, 413 (2007) (quoting Prosser & Keeton on Torts: Lawyer's Edition § 53, at 356 (5th ed. 1984)). Whether, in a given context, "a duty to exercise reasonable care to avoid the risk of harm to another exists is [a question] of fairness and policy that implicates many factors." Carvalho v. Toll Bros. & Devs., 143 N.J. 565, 572 (1996).

N.J.A.C. 10A:31-21.5(b) plainly states that "All inmate telephone calls may be monitored and recorded except calls to the Internal Affairs Unit and legal telephone calls." N.J.A.C. 10A:31-8.13(b) provides that, "Electronic surveillance should be utilized in such a manner as to avoid interference with the privacy of inmates, wherever possible." As public contractors, ViaPath and GTL had an obligation and a duty to Plaintiff based on these regulations. By

recording Plaintiff's calls to his attorneys in contravention of these regulations, Defendants ViaPath and GTL breached their duty of care, and as such should be held liable for negligence.

2. Invasion of Privacy

Defendants argue, without any competent evidence and contrary to the facts in the Complaint, that Plaintiff consented to the monitoring and recording of his telephone calls to his attorneys. Aside from this baseless claim, it is apparent that Plaintiff has set forth enough facts to state a claim for invasion of privacy under New Jersey law.

Our Supreme Court has made it abundantly clear that intrusion into a person's attorney-client privileged communications constitutes an invasion of privacy. Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 323 (2009) (There is a "close correlation between the objectively reasonable expectation of privacy and the objective reasonableness of the intent that a communication between a lawyer and a client was given in confidence."). "The right of privacy has been defined as 'the right of an individual to be ... protected from any wrongful intrusion into his private life." Villanova v. Innovative Investigations, Inc., 420 N.J. Super. 353, 359-60 (App. Div. 2011). This right encompasses "intrusion on plaintiff's physical solitude or seclusion, as by invading his or her home, illegally searching, eavesdropping, or prying into personal affairs." Id.

Here, Plaintiff was explicitly informed that his attorney-client calls would not be recorded or monitored under the Bergen County Sheriff's Office's policies and such recording or monitoring is prohibited under state law. Furthermore, the attorney-client privilege "is the oldest of the privileges for confidential communications and though its early origins involved consideration for the oath and honor of the attorney it is now universally recognized as resting upon the policy in favor of affording to the client freedom from apprehension in consulting his

legal adviser." State v. Toscano, 13 N.J. 418, 424 (1953). Under the attorney-client privilege, Plaintiff certainly had reason to believe his communications with his lawyers would remain confidential and private. ViaPath and GTL trampled upon the historically rooted attorney-client privilege and are therefore liable for invasion of privacy.

Point IV: The Trial Court Abused its Discretion in Denying the Motion to Reinstate the Second Action

The Defendants argue that Plaintiff's motion for reconsideration was untimely by five days. Db24-25. The Defendants rely on a UPS Proof of Delivery to show they sent the order to Plaintiff on October 6, 2023 and that it was purportedly received by Plaintiff on October 9, 2023. Da80. The document however shows it was "Received by GOLDBOURGH" that day, but Plaintiff is Dalal, not GOLDBOURGH. Id. The reality is that prisoners do not directly receive mail. It travels through the byzantine prison system, including contraband scanners, before it reaches a particular facility mailroom, the prison unit, and finally, a prisoner.

They further ignore the reality that it takes time for court staff to upload paper documents. Plaintiff's motion and brief were likely received days before they were uploaded to eCourts by staff. The Defendants cite Murray v. Comcast Corp., 457 N.J. Super. 464, 469 (App. Div. 2019), but that case did not involve a pro se prisoner. They also ignore the prisoner mailbox rule, which provides that a document is considered filed when it is mailed by a prisoner. Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988). The Defendants also blatantly lie about the content of a document in Plaintiff's appendix. They say, "[e]ven Plaintiff's Certification of Service for the Motion (PSa94) states that he did not serve a copy of the Motion on Defendants when he mailed it to the Court on October 19, 2023." Db24. But the document actually does say that Plaintiff served them. It specifically states, "Pursuant to R. 1:5-3, I served the enclosed

documents along with this document, via regular United States mail, on the Clerk of the Essex County Vicinage of the Superior Court of New Jersey and all counsel of record." PSa94.

CONCLUSION

For the foregoing reasons, the matter should be reversed and remanded.

Respectfully submitted:

Aakash Dalal
Appellant, *pro se*

Dated: January 9, 2025