CAROL MORRIS STAHLBERG, Executrix for the ESTATE OF BERTRAM J. STAHLBERG and CAROL MORRIS STAHLBERG, Individually, Plaintiffs/Appellees, v. WALTER R. EARL TRANSIT, LLC, EARLE ASPHALT COMPANY, and JEFFREY L. EVANS, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No: A-002373-23 TRIAL DOCKET NO: MON-L-2517-22 Sat Below: Hon. Mara Zazzali-Hogan, J.S.C. CIVIL ACTION

REVISED BRIEF IN SUPPORT OF DEFENDANTS'/APPELLANTS' APPEAL OF TRIAL COURT'S ORDER OF FEBRUARY 28, 2024, DISQUALIFYING COUNSEL

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PRELIMINARY STATEMENT

The trial court erred in disqualifying the law firm of Ahmuty Demers & McManus ("ADM") from its representation of Defendants, Jeffrey Evans, Walter R. Earle Transit, LLC, and Earle Asphalt Company, pursuant to Rule of Professional Conduct ("RPC") 1.7 because there is no direct, concurrent conflict of interest between the parties.

This matter results from an automobile accident involving a vehicle operated by Bertram J. Stahlberg ("the Decedent"), and a truck owned by Defendant, Walter R. Earle Transit, LLC ("Earle") that occurred on July 22, 2022, on the Garden State Parkway ("the Accident"). At the time of the Accident, the truck owned by Earle was being operated by Earle employee, Defendant, Jeffrey L. Evans ("Evans"). Earle and Evans shall collectively be referred to herein as "Defendants". The Accident resulted in the Decedent's death. Thereafter, this matter was instituted by Plaintiffs, Carol Morris Stahlberg, Executrix for the Estate of Bertram J. Stahlberg, and Carol Morris Stalhberg, individually (collectively "Plaintiffs") against Defendants. Both Earle and Evans were previously represented by Jeffrey M. Kadish, Esq. ("Kadish") of ADM. By way of Order dated February 28, 2024, the trial court disqualified ADM from their representation of Defendants pursuant to RPC 1.7.

The decision below was incorrectly premised upon a presumed conflict between Evans and Earle due to a miscommunication between Evans and his Earle

supervisor, Michael Morrow, about which cut-through Evans was to utilize while travelling on the Garden State Parkway immediately prior to the Accident. Morrow testified that he advised all Earle drivers that day, including Evans, that they were to utilize a grass cut-through that was marked by cones and lane closures. Evans testified that he mis-heard Morrow's instructions about the appropriate cut-through to use, and learned subsequently that he had made a mistake and used an improper macadam cut-through, which immediately preceded the crash between Evans and the Plaintiffs.

The fact that Morrow advised Evans of the appropriate cut-through to use, and Evans mis-heard those instructions and mistakenly used a different cut-through prior to the Accident, does not create a direct, concurrent conflict of interest between Evans and his employer, Earle. It is undisputed that Evans was within the scope of his employment with Earle at the time that the Accident occurred. Earle has not taken any position which attempts to place Evans outside of his employment with the company, nor any position that rebuts its vicarious liability for Evans' actions. Thus, should Evans be found liable in this matter, such liability will flow through to Earle vicariously. Likewise, should Evans not be found liable, Earle too will bear no responsibility for the happening of the Accident.

Furthermore, neither Evans, nor Earle, have attempted to cast blame for the Accident upon the other. In fact, both of their interests in this litigation are identical,

that is, to minimize Evans' apportionment of liability for the Accident. Thus, the positions of Evans' and Earle are not directly adverse, and therefore no concurrent conflict of interest exists between the two. As such, the trial court erred in finding such a conflict and improperly disqualifying ADM from its representation of Defendants in this matter.

STATEMENT OF FACTS

At the time of the Accident, Evans was employed as a driver for Earle, and had been with the company since approximately April 2022. Da282. Prior to the Accident occurring, Evans had just dropped off a load of asphalt for construction work on the Parkway, and had picked up used asphalt millings, which were to be deposited at a facility to the south of his location. Da282-283. As such, Evans utilized a paved cut-through on the Parkway near milepost 87.5 (Da283-284) and in doing so, bypassed other "grassy" (i.e., unpaved) cut-throughs, which he had believed were not to be used. Da283.

Upon using the paved cut-through, and thereafter pulling his truck into the Southbound lanes of the Parkway, the Accident occurred when Evans' truck was struck from behind by the vehicle being operated by the Decedent. Da284.

At his deposition, Evans explained that, subsequent to the Accident, he became aware of a miscommunication regarding which specific Parkway cut-through he was supposed to utilize on the day of the Accident. Due to that

miscommunication, Evans believed that he was supposed to use the paved cut-through, rather than the unpaved "grassy" cut through:

> Q: Why did you use the emergency vehicle turnaround at 87.5?
>
> A: Because I was instructed to use the turnaround by the foreman on the job. It was a miscommunication, I thought that that was the one I was supposed to use when there was one further back over the grass that he was talking about.
>
> Q: Who was this person that instructed you?
>
> A: Michael Morrow.[1]
>
> Q: Michael Morrow told you to use a turnaround, but you made a mistake and you used the emergency vehicle turnaround at 87.5 instead of the grass covered turnaround which is closer to 84 and 85, yes?
>
> MR. KADISH: Object to the form. He can answer it.
>
> A: Yes.
>
> [Da46, 27:10-25.]

Evans' supervisor, Michael Morrow ("Morrow"), testified that he specified over CB radio to the drivers, including Evans, that they were to use a grass cut-through marked by cones:

> Q: So it was clear to you that when you got the information from Mr. DeFelice on 7/20/22 at 10:00, approximately 10:00 p.m., that it was okay to go through a cut-through. You limit it to – it was okay to go through the grass covered cut-through with the lanes closed and the cones. Is that what you said?

[1] The Evans transcript incorrectly spells "Morrow" as "Mauro." We therefore substitute the correct spelling herein.

MR. KADISH: Objection. The question has been asked and answered. He can answer it again. Is that what Mr. DeFelice told you?

A: To use the designated cut-through.

MS. DeCARLO: That's not the question.

Q: That wasn't the question I asked. The question I asked was, did Mr. DeFelice tell you that it was a grass covered cut-through that had both lanes closed and cones present? Did he tell you that when he corresponded with you or communicated to you at 10:00 on 7/20/22?

A: Yes.

Q: And when you relayed that message to your drivers that you own (sp) a responsibility to for safety and security, what exact words did you tell them?

MR. KADISH: Objection to the form. Asked three or four times. He can answer it again. What words did you convey to your truck drivers?

A: To use the grass cut-through where the cones are, where the grass is torn up in between the cones. That you must go into the closure on the southbound side, stay in the closure and ride the closure out back to Brickwell.

[Da249, 181:24 – 183:5.]

Importantly, however, neither Evans nor Morrow has cast blame upon the other for the miscommunication, or the happening of the Accident. Evans has not contradicted Morrow's testimony, nor has he testified that Morrow did not relay instructions about what specific cut-through to use. Instead, Evans explained that, over the CB radio, he only heard the word "cutoff," and consequently used his

judgment to use the paved cut-through instead of the unpaved, grassy cut-through. Da46-47, 29:15-30:3.

Also of significance, Earle has never disputed the fact that Evans was acting within the scope of his employment with Earle when the Accident occurred. In fact, Earle has admitted that Evans was an agent under its control at the time the accident occurred. Da292.

PROCEDURAL HISTORY

This personal-injury/wrongful death matter arises from the above-referenced motor-vehicle accident that occurred on July 20, 2022, on the Garden State Parkway in Galloway, New Jersey. Da24-26.

On September 15, 2022, Plaintiffs filed suit against Defendants seeking compensatory and economic damages. Da260-279. At that time, both Plaintiffs were represented the law firm of Hobby & DeCarlo. Ibid. After ADM advised Hobby & DeCarlo that it could not ethically represent both Plaintiff, Carol Morris Stahlberg ("Stahlberg"), and Plaintiff, Carol Morris Stahlberg, Executrix for the Estate of Bertram J. Stahlberg ("the Estate") due to the facts of this case, the Fuggi Law Firm substituted into this case as counsel for the Estate on December 8, 2022.

On December 21, 2023, Stalhberg filed a motion seeking ADM's disqualification pursuant to RPC 1.7. Da4-5. The Estate thereafter joined in that

application. The trial court heard oral argument on the application on February 16, 2024. See 1T, passim.

At the conclusion of argument, the trial court granted the application, therein disqualifying ADM from its representation of Evans and Earle in this litigation. 1T38:24-39:1. Within its oral opinion, the trial court found that a concurrent conflict of interest existed within ADM's dual representation:

> Here, representation of all these defendants would directly conflict with one another and already do conflict with each other. In terms of the basic rudimentary concept of whether or not Evans did the cut through on his own accord or whether he was told by his employer.
>
> Again, representation for Evans, the driver, relies on the theory that he was told to make the illegal cut through and did not do so on his own.
>
> Conversely, defendants Earle Asphalt and Walter Earle Transit rely on the notion that the supervisor explicitly instructed the drivers to refrain from the cut through.
>
> Those theories are directly adverse to each other under the rule and a conflict has arisen.
>
> [1T35:15 – 36:4.]

The trial court went on to hold that:

> [T]here are more things that are indicating that there is a significant risk at the very least of there being a conflict.
>
> Here, there is a significant risk that the representation of both Evans and the other defendants will be limited. Not only do the defendants rely on different theories, but the

> ability for each party to settle without impacting the other is virtually impossible.
>
> [1T36:10-20.]

In accordance with the oral opinion, the trial court issued an order disqualifying ADM on February 28, 2024. Da1-2.

On March 19, 2024, Defendants filed a Motion for Leave to File an Interlocutory Appeal with this Court. That application was granted by way of Order of Motion dated April 9, 2024.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISQUALIFYING ADM FROM ITS REPRESENTATION OF DEFENDANTS PURSUANT TO RPC 1.7 BECAUSE NO CONCURRENT CONFLICT OF INTEREST EXISTS (Raised Below Da001-002, 1T35:10-38:20)

A. Disqualification of Counsel Pursuant to RPC 1.7 (Raised Below Da001-002, 1T35:10-38:20)

"The review of a motion for disqualification requires a court 'to balance competing interests, weighing the 'need to maintain the highest standards of the profession' against 'a client's right to freely choose his [or her] counsel.'" Comando v. Nugiel, 436 N.J. Super. 203, 213 (App. Div. 2014) (alteration in original) (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). A client's "right to retain counsel of his or her choice is limited in that 'there is no right to demand to

be represented by an attorney disqualified because of an ethical requirement.'" Ibid (quoting Dewey, supra, 109 N.J. at 218).

However, "[d]isqualification of counsel is a harsh discretionary remedy which must be used sparingly." Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000). "Generally, motions to disqualify are disfavored because they 'can have such drastic consequences.'" Twenty-First Century Rail Corp. v. N.J. Transit Corp., 419 N.J. Super. 343, 357 (App. Div.), certif. granted, 206 N.J. 37 (2011) (quoting Rohm & Haas Co. v. Am. Cyanamid Co., 187 F.Supp.2d 221, 226 (D.N.J. 2001)). "To be resolved in favor of disqualification, the party seeking disqualification must carry a 'heavy burden' and must meet a 'high standard of proof' before a lawyer is disqualified." Carlyle Towers Condominium Ass'n, Inc. v. Crossland Sav., 944 F. Supp. 341, 345 (D.N.J. 1996) (quoting Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1114 (D.N.J. 1993)).

When examining a motion to disqualify counsel, the court must engage in a "painstaking analysis of the facts." Dewey, supra, 109 N.J. at 205 (quoting Reardon v. Marlayne, Inc., 83 N.J. 460, 469 (1980)). To succeed on a claim brought under RPC 1.7, an articulable conflict must be shown; mere speculation is insufficient. See Essex County Jail Annex Inmates v. Treffinger, 18 F.Supp.2d 418, 431-432 (D.N.J. 1998) (a conflict pursuant to RPC 1.7(a)(2) must be supported with something more than a theoretical possibility and cannot be based on speculation or conjecture); see

also, State v. Davis, 366 N.J. Super. 30, 40-42 (App. Div. 2004) (conflicts based on speculation, conjecture, and hypothesis are non-actionable).

The court must also be cognizant that disqualification motions can be misused as a litigation tactic that can delay an examination of the merits of the claims and can undermine the judicial process. Dewey, supra, 109 N.J. at 218. Thus, "close judicial scrutiny of the facts of each case is 'required to prevent unjust results.'" Carlyle Towers Condominium Ass'n, Inc., supra, 944 F. Supp. at 345 (quoting Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1126 (N.D. Ohio 1990)).

In this matter, ADM was disqualified pursuant to RPC 1.7(a), which provides in relevant part:

> (a) Except as otherwise provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> [RPC 1.7(a).]

RPC 1.7(a) expressly prohibits two types of concurrent representations: (1) direct adversarial representations, and (2) representations that pose a significant risk of material limitation in the lawyer's responsibilities to a client.

The prohibition contained within RPC 1.7(a) against certain concurrent representations "arises out of the fundamental proposition that an attorney owes a duty of undivided loyalty to his or her client." Manoir-Electroalloys Corp. v. Ammalloy Corp., 711 F. Supp. 188, 192 (D.N.J. 1989). Further, RPC 1.7(a) "reflects 'the fundamental understanding that an attorney will give complete and undivided loyalty to the client' [and] 'should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost.'" J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 223 (App. Div. 2006) (alteration in original) (quoting State ex rel. S.G., 175 N.J. 132, 139 (2003)).

As it pertains to a direct adversarial representation, RPC 1.7(a)(1) is clear and unambiguous in its prohibition: an attorney shall not represent a client in a litigation when representation of another client in that litigation will be directly adverse to the other client. Comando, supra, 436 N.J. Super. at 214; McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 497 (App. Div. 2011).

Further, in adopting RPC 1.7(a)(2), the New Jersey Supreme Court employed language requiring consideration of whether, based on an objective evaluation of

facts presently know, a significant risk "will" exist in the future, materially impacting a lawyer's responsibilities to another client. The intended goal in adopting RPC 1.7(a)(2) was for attorneys to avoid "placing themselves in the position of serving two masters with incompatible interest." In re Op. 682 of the Advisory Comm. On Prof'l Ethics, 147 N.J. 360, 368 (1997).

In identifying whether a significant risk will exist, it is critical to determine "'the likelihood that a difference in interests' will arise, and 'if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.'" In re Opinion No. 17-2012 of Advisory Committee on Professional Ethics, 220 N.J. 468, 469 (2014).

As such, "the problem of multiple representation is best addressed by an evaluation by the individual attorney of the circumstances of each case, so that he or she may determine whether the common representation of the prospective clients can be undertaken. In every such case the attorney will have to be satisfied based on objective reasonableness that there is no direct adversity between the defendants and that joint representation will not adversely affect the relationship of either class of defendants, RPC 1.7(a), nor materially limit his or her professional responsibilities towards any such client-defendant, RPC 1.7(b)." In re Petition for Review of

Opinion 552 of Advisory Committee on Professional Ethics, 102 N.J. 194, 206 (1986).

This Court's "evaluation of an appeal from an order granting or denying a disqualification motion invokes [its] de novo plenary review in light of the fact that a decision on such a motion is made as a matter of law." Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264 (2012).

B. There Is No Direct, Concurrent Conflict of Interest In ADM's Representation of Both Earle and Evans Within This Litigation (Raised Below Da001-002, 1T35:10-38:20)

In disqualifying ADM pursuant to RPC 1.7, the trial court held as follows:

> Here, representation of all these defendants would directly conflict with one another and already do conflict with each other. In terms of the basic rudimentary concept of whether or not Evans did the cut through on his own accord or whether he was told by his employer.
>
> Again, representation for Evans, the driver, relies on the theory that he was told to make the illegal cut through and did not do so on his own.
>
> Conversely, defendants Earle Asphalt and Walter Earle Transit rely on the notion that the supervisor explicitly instructed the drivers to refrain from the cut through.
>
> Those theories are directly adverse to each other under the rule and a conflict has arisen.
>
> [1T35:15 – 36:4.]

The trial court erred, however, in finding that Evans and Earle have adverse theories of liability, which therefore creates a conflict between them. Rather than having conflicting theories of liability, Evans and his Earle supervisor, Michael Morrow, had a miscommunication about which cut-through was to be utilized.

Morrow testified that he specified in calls over CB radio to the drivers, including Evans, that they were to use a grass cut-through marked by cones:

> Q: So it was clear to you that when you got the information from Mr. DeFelice on 7/20/22 at 10:00, approximately 10:00 p.m., that it was okay to go through a cut-through. You limit it to – it was okay to go through the grass covered cut-through with the lanes closed and the cones. Is that what you said?
>
> MR. KADISH: Objection. The question has been asked and answered. He can answer it again. Is that what Mr. DeFelice told you?
>
> A: To use the designated cut-through.
>
> MS. DeCARLO: That's not the question.
>
> Q: That wasn't the question I asked. The question I asked was, did Mr. DeFelice tell you that it was a grass covered cut-through that had both lanes closed and cones present? Did he tell you that when he corresponded with you or communicated to you at 10:00 on 7/20/22?
>
> A: Yes.
>
> Q: And when you relayed that message to your drivers that you own (sp) a responsibility to for safety and security, what exact words did you tell them?
>
> MR. KADISH: Objection to the form. Asked three or four times. He can answer it again. What words did you convey to your truck drivers?

A: To use the grass cut-through where the cones are, where the grass is torn up in between the cones. That you must go into the closure on the southbound side, stay in the closure and ride the closure out back to Brickwell.

[Da249, 181:24 – 183:5.]

At his deposition, Evans testified that he only heard Morrow say "cutoff":

Q: How do you know it was a miscommunication, when you say it was a miscommunication between you and Michael Morrow who also works for Earle?

A: Because when all the information was gathered after the crash then I came to that conclusion from the information.

Q: Okay, what information are you talking about? When you come to say anything about your lawyer, do not tell us what your lawyer said. When did you formulate this determination that this was a miscommunication?

A: Like I said when all – when all of the information was gathered it come to my attention that Michael Morrow said he was talking about the grass and I heard him say just a cutoff.

[Da46-47, 29:15-30:3.]

Subsequent to the accident, Evans became aware of this miscommunication regarding which specific cut-through he was supposed to use. Due to that miscommunication, Evans believed that he was supposed to use the paved cut-through, rather than the unpaved "grass" cut through:

Q: Why did you use the emergency vehicle turnaround at 87.5?

A: Because I was instructed to use the turnaround by the foreman on the job. It was a miscommunication, I thought that that was

the one I was supposed to use when there was one further back over the grass that he was talking about.

Q: Who was this person that instructed you?

A: Michael Morrow.[2]

Q: Michael Morrow told you to use a turnaround, but you made a mistake and you used the emergency vehicle turnaround at 87.5 instead of the grass covered turnaround which is closer to 84 and 85, yes?

MR. KADISH: Object to the form. He can answer it.

A: Yes.

[Da46, 27:10-25.]

Thus, Evans admits that he made a mistake about which cut-through to use, and makes no attempt to blame Morrow, or Earle, for the happening of the Accident. Likewise, Earle has made no attempt to shield itself of liability by throwing Evans under the proverbial bus. In fact, when questioned at his deposition about Evans' actions on the day of the Accident, and whether Morrow advised his supervisor, Joseph DeFeLice, about what Evans had done, Morrow simply stated that "[i]t was an accident:"

Q: Did you tell Mr. DeFelice that Mr. Evans admitted to you that he went through an illegal cut-through?

A: No.

[2] The Evans transcript incorrectly spells "Morrow" as "Mauro." We therefore substitute the correct spelling herein.

Q: Did you tell him that he disobeyed your instruction and didn't go through the legitimate cut-through and went through an illegal one?

A: No.

Q: Why not?

A: It was an accident. I just told him it was an accident.

[Da251-252, 192:20-193:7.]

While Evans and Morrow had a miscommunication about which cut-through Evans was told to utilize, neither has blamed the other for the miscommunication or, more importantly, for the happening of the Accident.

The record before this Court is quite clear: Evans was within the course of his employment with Earle when the Accident occurred. That fact is not disputed by anyone. The miscommunication between Evans and Morrow about which cut-through to utilize does not amount to "different theories of liability." Liability for the happening of the Accident that is attributed to Evans will also be attributed to Earle, vicariously. Likewise, if Evans is not found liable, then Earle will not be held liable. Thus, both Evans' and Earle's defense strategies in this litigation are very much aligned - that is - to minimize the apportionment of liability attributed to Evans, which, in turn, would minimize Earle's vicarious liability as his employer. Neither Evans, nor Earle, is attempting to shield itself from liability by casting blame upon the other. In fact, as his employer, and vicariously liable for his actions within

the scope of his employment, it is very much within Earle's interests to *minimize* Evans' liability. Thus, Evans and Earle do not have different theories of liability, and therefore there is no direct, concurrent conflict of interest existing between them that would warrant the disqualification of ADM's representation of both in this litigation.

This Court's decision in Alam v. Ameribuilt Contractors, 474 N.J. Super. 30 (App. Div. 2022) is instructive here. That case resulted from an automobile accident involving an employee of Ameribuilt Contractors ("Ameribuilt"), who was also its president and fifty-percent shareholder. 474 N.J. Super. at 33. As a result of the accident, the employee filed a worker's compensation claim against Ameribuilt. Ibid. Ameribuilt's worker's compensation carrier, Travelers, then assigned defense counsel. Ibid. Within the matter, the question arose as to whether or not the employee was within the scope of his employment at the time that the accident occurred, a question that would impact compensability of the claim by Travelers as thew worker's compensation carrier. Id. at 34.

At some point, the parties engaged in settlement negotiations, which included discussions about whether or not the employee's claim would survive a motion to dismiss. Ibid. Because of the disputed liability, the parties agreed that a lump sum settlement for a dollar figure under N.J.S.A. 34:15-20 ("Section 20") was appropriate. Ibid. In order for a Section 20 lump-sum settlement to be effective, the statute requires that the settlement be approved by the judge of compensation as "fair

and just under all the circumstances," and that the settling petitioner, the employee, be represented by counsel. Ibid. In accordance with the statute, the assigned defense counsel for Ameribuilt sent the judge of compensation a request for approval, along with a signed settlement affidavit (the Section 20 Order) and a copy of the employee's injury permanency exam. Id. at 34-35.

In response to the request for approval, the judge of compensation found that the assigned defense counsel had a conflict because the employee was also a part owner of Ameribuilt, and that defense counsel was therefore taking a position adverse to the employee because the employee, as an owner, stated that he was in the course of his employment at the time the accident occurred. Id. at 35. The court therein rejected the proposed settlement and removed the assigned defense counsel due to the "inherent conflict" between Ameribuilt and Travelers. Ibid. The court held further that since Travelers was denying compensability for the accident, which position is against the interests of Ameribuilt, that Travelers had to assign counsel for itself and different counsel for Ameribuilt. Ibid. Ameribuilt thereafter moved for leave to appeal the RPC 1.7 disqualification of defense counsel, which leave was granted by the Appellate Division. Ibid.

In reversing the judge of compensation's disqualification order, this Court noted that a judge may remove counsel where there is a violation of the Rules of Professional Conduct. Id. at 36. However, this Court noted further that corporations

are regarded in law as entities distinct from their individual officers, directors, and agents, and that, in being guided by such a principle, the judge of compensation erred in finding a conflict between Travelers and the employee because the judge failed to distinguish Ameribuilt, the company, from the employee, who is an owner. Id. at 37. Furthermore, the Court recognized that the sole named insured under the policy was Ameribuilt, and that neither Travelers nor defense counsel took any position *adverse* to the company. Ibid (emphasis added). To the contrary, the joint pursuit of a viable liability defense between Ameribuilt and Travelers "clearly inured to the company's benefit." Ibid. Moreover, the Court noted, if unsuccessful, it was undisputed that Travelers would cover the loss. Ibid.

Likewise here, neither Earle nor Evans have taken any position *adverse* to the other. In fact, just as in Alam, Earle and Evans are aligned in their joint pursuit of a viable liability defense. And further, just as in Alam, if Evans is found liable, Earle will likewise be vicariously liable, as Evans was indisputably within the course of his employment with Earle when the subject accident occurred.

Similarly, in Colon v. World Mission Soc'y, 2023 N.J. Super. Unpub. LEXIS 1420* (App. Div., August 17, 2023), Da315-318, no concurrent conflict was found in a counsel's dual representation of both a plaintiff and a third-party defendant. In that matter, the Plaintiff, Michele Colon, was a member of the World Mission Society, Church of God from 2009 to 2011. Id. at *1. Raymond Gonzlez was a

member of the Church from 2005 to 2012. Ibid. During his time as a member, Gonzalez created several websites in order to attract critical posts about the Church. Id. at *1-2. His goal was to spy on former members of the Church who were now critical of the Church and its actions. Id. at *2. The websites that Gonzalez created required users to supply an email address and password to post content. Ibid. The Church then maintained a list of the passwords that Gonzlez had collected from each of its critics. Ibid. At some point, Gonzalez determined that Colon was posting critical content about the Church. Ibid. He then used Colon's credentials to gain access to her accounts on other websites. Ibid. Gonzalez admitted to his role in hacking Colon's accounts, but maintained that he did so at the express direction of the Church. Ibid.

Colon filed suit against the Church and some of its individual members alleging that they engaged in wrongful conduct that caused her harm. Ibid. Colon did not name Gonzalez as a defendant in her action against the Church, and took the position that she would not seek to prove at trial that Gonzalez caused her any damage. Id. at *2-3. The Church filed a third-party claim against Gonzalez, denying any knowledge of or involvement in Gonzalez's hacking schemes, and arguing that if the Church is found liable, it had a claim against Gonzalez for contribution and indemnification. Id. at *3. Gonzalez retained the same counsel as Colon to represent him against the Church's third-party claims.

The Church subsequently moved to disqualify counsel for Colon and Gonzalez, arguing that his representation of both amounted to a conflict of interest. Ibid. That motion was denied by the trial court. Ibid. The Church then appealed that decision on the grounds that counsel's representation of Colon and Gonzalez violated RPC 1.7 because it constituted a concurrent conflict of interest. Id. at *4-5. The Church contended that counsel's representation of Colon was directly adverse to his representation of Gonzalez. Id. at *5.

In affirming the decision of the trial court, this Court found that the record before it established that the positions of Colon and Gonzalez were not "directly adverse" to each other as is required to find a conflict under RPC 1.7(a)(1). This Court reasoned that Colon's position was that the Church was liable for the damages she suffered when it created the websites to obtain information regarding her and other critics of the Church, and then hacking into her email accounts. Id. at *7. And that Gonzalez's position was that the Church, through coercive tactics, effectively forced him to participate in the hacking. Ibid. In holding that no conflict existed, this Court specifically noted that Colon did not *assign fault* to Gonzalez. Ibid (emphasis added).

The Court held further that there was also no "significant risk" that Colon's or Gonzalez's representation would be "materially limited" by counsel's responsibility to the other. Id. at *8.

Similarly in this case, neither Evans, nor Earle, is assigning fault to the other. Furthermore, there is nothing in the record before this Court that establishes that the positions of Evans and Earle are "directly adverse." To the contrary, both Evans' and Earle's positions, and legal strategies, are directly aligned, that being to limit the apportionment of liability attributed to Evans, and to establish the comparative negligence of the Decedent. A miscommunication, or factual discrepancy, between two employees of the company, about which cut-through was to be utilized prior to the crash, does not establish a conflict between the company and one of the employees.

Likewise, there is nothing in the record before this Court which establishes that there is a "significant risk" that Evan's or Earle's dual representation by ADM will be "materially limited" by ADM's responsibility to one client over the other. When identifying whether a "significant risk" will exist, the court must determine the likelihood that a difference in interests will arise, and if it does, whether such a difference will materially interfere with counsel's independent professional judgment in considering alternatives, or whether courses of action that reasonably should be pursued on behalf of one client will be foreclosed upon due to the interests of another client. In re Opinion No. 17-2012, supra, 220 N.J. at 469.

In this matter, the trial court has failed to identify any "significant risk" of a difference in interests definitively arising between Evans and Earle, or how such a

difference would hinder ADM's ability to effectively represent both parties. And that is because no such significant risk exists.

Accordingly, no direct, concurrent conflict exists between Earle and Evans which would warrant the disqualification of ADM from the joint representation of each. Without such a conflict, Earle and Evans are entitled to their counsel of choice, that being ADM, to represent them in this litigation. Accordingly, the trial court's Order of February 28, 2024, disqualifying ADM should be reversed.

CONCLUSION

Based upon the foregoing, the trial court's Order of February 28, 2024, disqualifying ADM from its representation of Defendants under RPC 1.7 should be reversed.

TRIF & MODUGNO, LLC
Attorneys for Defendants/Appellants,
Walter R. Earle Transit, LLC, Earle
Asphalt Company, and Jeffrey L. Evans

By: *Scott Palatucci*
Scott M. Palatucci, Esq.

By: *Anthony Fredella*
Anthony J. Fredella, Esq.

Dated: June 18, 2024

CAROL MORRIS STAHLBERG, Executrix for the ESTATE OF BERTRAM J. STAHLBERG, and CAROL MORRIS STAHLBERG, Individually, Plaintiffs/Appellees, v. WALTER R. EARLE TRANSIT, LLC, EARLE ASPHALT COMPANY, and JEFFREY L. EVANS, Defendants/Appellants.	**Superior Court of New Jersey, Appellate Division** **Docket No. A-002373-23** On Appeal from the February 28, 2024 Interlocutory Order of the Superior Court of New Jersey, Law Division, Monmouth Vicinage Trial Court Docket No: Docket No. MON-L-2517-22 Sat Below (Trial Court): Hon. Mara Zazzali-Hogan, J.S.C.

BRIEF AND APPENDIX (Pa1-Pa57) OF PLAINTIFF/APPELLEE CAROL MORRIS STAHLBERG (IN HER INDIVIDUAL CAPACITY) IN OPPOSITION TO DEFENDANTS' APPEAL

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PRELIMINARY STATEMENT

In this tragic matter arising from a fatal motor vehicle crash, the Honorable Mara Zazzali-Hogan, J.S.C., correctly disqualified the law firm of Ahmuty, Demers & McManus (ADM) from jointly representing the defendants herein due to an actual, concurrent conflict of interest. Defendants Walter R. Earle Transit, LLC and Earle Asphalt Company (the Earle Defendants) and Defendant Jeffrey Evans have taken adverse factual and legal positions regarding their liability for the subject fatal crash. The Earle Defendants claim that they repeatedly and specifically instructed their driver, Evans, to use a grass-covered "turnaround" to make a U-turn on the Garden State Parkway, but that Evans disobeyed Earle's instructions and made an illegal U-turn using a paved police turnaround in a different area, resulting in the crash. In contrast, Evans testified that Earle simply told him to use "the turnaround", without any further detail, and Earle never told him that using the police turnaround was unauthorized. Plaintiffs have asserted direct claims against the Earle Defendants for negligent training, supervision, hiring, and retention, as well as negligence claims against Evans, and vicarious liability claims against the Earle Defendants.

Throughout this litigation, ADM appeared to use its joint representation to throw its client Evans under the bus for the benefit of its other clients, the Earle Defendants. Under ADM's representation in municipal court, Evans pled guilty to committing an illegal U-turn that resulted in the subject fatal crash, despite Evans's

belief that his conduct was defensible because the Earle Defendants had instructed him to use "the turnaround", which Earle never told him was unauthorized. Later, in response to testimony by Evans that appeared to blame Earle for failing to provide him with detailed instructions, an ADM attorney submitted a certification in which he contradicted Evans, his own client, and promoted the version of his other clients, the Earle Defendants, that specific instructions had been given to Evans.

ADM has argued that there was a mere "miscommunication" between Evans and the Earle Defendants and, thus, there is no conflict between their positions. Disturbingly, an ADM attorney appeared to attempt to influence Evans's deposition testimony by telling him that a "miscommunication" had occurred when, in fact, Evans' own version was that Earle never gave him detailed instructions. Evans admitted that his only source for saying that a "miscommunication" had occurred was that his ADM attorney told him so. ADM apparently may have used its conflicted joint representation to get Evans to testify against his own interest and contrary to his own version of events for the benefit of the Earle Defendants, as strengthening Earle's "miscommunication" theory would detract from the direct negligence claims against Earle for failing to properly train and supervise Evans. Aside from the harm to Mr. Evans, the integrity of our justice system suffers when an attorney capitalizes upon conflicted joint representation to influence a witness's testimony and the ultimate apportionment of fault in a lawsuit.

ADM argued below that it should be permitted to continue its joint representation because Evans certified that he wanted to keep ADM as his attorneys and that he did not understand the basis for the conflict inherent in the representation. Evans's certification begs the question of whether ADM adequately informed him of the risks posed by the conflicted representation. Most importantly, while a party may choose his counsel, no party may demand to be represented by an attorney disqualified due to an ethical requirement, as the Rules of Professional Conduct exist not only to protect the parties, but to preserve the integrity of the litigation and the justice system.

ADM's argument that it should be permitted to engage in this conflicted joint representation because Earle is vicariously liable for Evans's negligence and would ultimately pay any money judgment against Evans is also meritless. ADM overlooks the other harms Evans may suffer from having a judgment entered against him in a fatal motor vehicle case, such as the impact on his future employment and his credit score. Moreover, the need to preserve this litigation's integrity from manipulation by conflicted counsel is of equal, if not greater, significance.

Faced with the adverse testimony and factual positions of the Defendants, Judge Zazzali-Hogan correctly ruled that ADM was disqualified from jointly representing the Defendants due to an actual, concurrent conflict of interest. This Court should affirm the trial court's legally correct disqualification order.

STATEMENT OF PROCEDURAL HISTORY

Plaintiffs' complaint arising from the underlying July 20, 2022 fatal crash was filed on September 15, 2022. Pa1. On October 13, 2022, the ADM firm filed an answer on behalf of all Defendants. Pa19. Based on the facts set forth below, on February 28, 2024, the Honorable Mara Zazzali-Hogan, J.S.C., entered an order disqualifying ADM from representing Defendants due to a conflict of interest. See Da001 and T6:5-11:18; 34:20-41:12[2]. Defendants were granted leave to file the present interlocutory appeal of the February 28, 2024 order. Pa55. Plaintiff Carol Morris Stahlberg now submits this brief in opposition to Defendants' appeal and in support of Judge Zazzali-Hogan's disqualification order, which should be affirmed.

STATEMENT OF FACTUAL HISTORY

A. The July 20, 2022 Crash

At approximately 11:00 p.m. on July 20, 2022, Defendant Evans, while in the course of his employment for the Earle Defendants, made an illegal U-turn on the Garden State Parkway (GSP) by driving his Earle dump truck through the police emergency response turnaround / cut-through at milepost 87.5. Da025. There was no active construction zone in the area where Evans crossed from the northbound to the southbound side of the GSP. Da065 (103:18-24); Da086 (187:24-188:6). The

[2] The Corrected Transcript Of The February 16, 2024 Hearing before the trial court, referred to herein as T, has previously been filed as a separate document on March 28, 2024.

southbound left lane that Defendant Evans entered from the turnaround was open to regular traffic. Id. By making this illegal U-Turn, Defendant Evans pulled out "into live traffic unprotected" onto the southbound side of the GSP. Da172. Evans's illegal U-turn caused a crash between the Earle truck he was driving and a vehicle operated by Bertram Stahlberg, who was traveling south on the GSP. Da025. Mr. Stahlberg died from the injuries he sustained in the crash. Id. Mr. Stahlberg's wife Carol sustained physical injuries and suffered severe emotional distress from seeing her husband's fatal injuries. Da271-6. Evans received tickets for the illegal U-turn and reckless and careless driving. Da030-2. The police found no fault on the part of Mr. Stahlberg. See Da007, ¶ 4; Da024, 028 (indicating that the investigating officer entered code 25, for no contributing fault found on the part of Mr. Stahlberg).

The Earle Defendants, who conducted an internal review of the crash, blamed their driver Evans and summarized their conclusions as follows:

> **WRE 561 [which refers to Defendant Evans] wrongfully used police Cutthrough at 87.5 median**. Our northern job limit was 86.4. **We also had a grass median turnaround spot at 86.75 which was safely contained between both the northbound and southbound closures. This keeps operators and drivers within close[d] lanes while spinning around. Under no circumstances are police cutthrough's [sic] to be used unless there are lane closures northbound and southbound for trucks to safely dEcel [sic] and accel out of them. By this truck using the Cutthrough he [Evans] pulled out into Live traffic unprotected where an elderly couple drove at 65 miles an hour or greater into the right rear of the dump truck.** Car was totaled, driver was medevac and helicoptered out of location. turnpike operations put out a double lane closure tying into our double lane closure so they could investigate the scene four [sic]

> hours to come. The pictures within this report will show the severity of the accident. Within 120' of leaving the cut through the truck was struck by the vehicle.
>
> [Da172 (emphasis added).]

B. Plaintiff's Direct And Vicarious Claims Against Earle And Evans

On September 15, 2022, Carol Stahlberg, individually and as Executrix for the Estate of Bertram Stahlberg, filed a complaint against the Earle Defendants and Evans arising from the July 20, 2022 crash. Pa1. The complaint contains both direct and vicarious liability theories against the Earle Defendants. Among other allegations of direct negligence, Plaintiffs assert that the Earle Defendants:

- Engaged in negligent and careless hiring practices of the drivers of its vehicle (namely, Defendant, Jeffrey L. Evans);
- Failed to conduct proper background checks of the driver of its commercial dump truck (namely, Defendant, Jeffrey L. Evans); [and….]
- Failed to properly train and supervise the driver [Defendant Evans] of its vehicle as to the appropriate driving and operating protocols, limitations and instructions[.]

[See Pa3, ¶¶ A, B, and D; see also Pa6, ¶¶ A, B, and D.]

Plaintiffs have also asserted that the Earle Defendants are vicariously liable for the negligence of their employee, Evans. See Pa3, ¶ 10; Pa7, ¶ 7. In addition, Plaintiffs asserted negligence claims against Defendant Evans himself. See Pa8-9, Pa14-16. Plaintiffs subsequently filed an amended complaint to add a fraudulent

concealment of evidence claim against Earle while maintaining all counts from the initial complaint. Da260-276.

From the outset of this litigation, the Earle Defendants and Evans were jointly represented by the same attorney, Jeffrey M. Kadish, Esq. of the ADM firm. Pa19.

In Defendants' October 13, 2022 answer filed by ADM, Defendants included counterclaims alleging that decedent Bertram Stahlberg and Plaintiff Carol Morris Stahlberg were somehow liable for contributing to the happening of the crash. Pa29-30. Based on the facts set forth above, Plaintiffs' counsel (the Hobbie & DeCarlo firm) did not believe that there was any good faith basis for Defendants' attempt to blame Mr. and Mrs. Stahlberg, particularly where it was conceded that Defendant Evans made an illegal U-Turn into the southbound GSP, the police found no fault on the part of Mr. Stahlberg, and there were no conceivable grounds to support the assertion that Mrs. Stahlberg, a passenger at the time of the crash, bore any responsibility for its occurrence. See Da025, 28. Nevertheless, in order to avoid even the appearance of a conflict of interest, separate counsel (the Fuggi Law Firm) was retained to represent Co-Plaintiff the Estate of Bertram Stahlberg. Pa57. Mr. Fuggi filed his notice of appearance on behalf of the Estate on December 8, 2022. Id.

C. Earle And Evans's Directly Adverse Factual And Legal Positions

As set forth in detail below, as discovery progressed, it became clear that the Earle Defendants and Defendant Evans blame each other for the happening of the

illegal U-turn through the paved, police turnaround / cut-through at GSP mile-marker 87.5 that caused the July 20, 2022 fatal crash, rendering their legal and factual positions in this litigation fundamentally adverse.

1. <u>The Earle Defendants' Version (Disputed By Defendant Evans)</u>

The Earle Defendants issued a directive for the GSP project on which Evans was working that stated as follows: "Cop Turnarounds are only available when both Left lanes are closed. NB and SB. **UNDER NO CIRCUMSTANCES** are they to be used unless we have the lanes closed. If they are not available, use the next available exit to turn around." Da179. It is uncontested that both left lanes were <u>not</u> closed at the time of Evans's illegal U-turn. Da065 (103:18-24). Therefore, Defendant Evans violated the rule set forth in the Earle Defendants' directive when he used the police turnaround at the time of the July 20, 2022 crash. <u>See</u> Da179.

Evans's first day working on the subject Earle GSP project was the day prior to the crash, July 19, 2022. Da282. In an interrogatory answer prepared under the representation of their joint counsel, ADM, Defendants asserted that "Evans on 7/19 **started too late** and missed a meeting at the Toms River staging area and no one from Earle gave him any written job instructions and orally gave him no instructions regarding safety and use of cut-throughs." Da283 (emphasis added). On July 20, 2022, due to his late start time of 9:30 p.m., Evans "did not attend any staging meetings and did not receive any written or oral instructions." Da283. In other

words, the Earle Defendants blame Evans for starting "too late" and not receiving the Earle directive prohibiting the use of the paved police turnaround.

Evans's supervisor at Earle, Michael Morrow (also referred to as "Mauro" and "Marrow"), testified that, on the night of July 20, 2022, he broadcasted three to four detailed radio messages to all of the drivers that were working on the GSP, including Evans, and instructed them that they were to use a designated **grass** turnaround/cut-through marked by cones and that they were **not** to use the paved police turnaround. See Da225 (87:7-21); Da219 (62:7-63:6). This designated grass cut-through was located in an area where the trucks would be turning into a safely closed, coned-off lane, in contrast to the police cut-through, where vehicles would be turning into the active, open left lane of the GSP. See Da220 (65:22-66:3); Da249 (182:19-183:5); Da065 (103:22-24).

Morrow further testified that Evans called him "right after" the July 20, 2022 crash occurred. Da249 (183:14-24). Morrow claimed that, during this call, Evans admitted that he had "disobeyed" Morrow and used an illegal cut-through:

> Q. ***So he admitted it was an illegal cut-through that he took, yes?***
> A. I would imagine, yes. ***He said it was not the cut-through I told him to cut-through.***
> Q. So he disobeyed one of your instructions? Instead of going through the grassy cut-through, which was closer to your work area, he went and took the emergency cut-through, which was paved macadam up the road?
> A. To my recollection, yeah.
> Q. ***So he [Evans] disobeyed the instructions you gave him?***
> A. ***Yes.***

[Da251 (190:9-21) (emphasis added).]

The Earle Defendants' internal report regarding the crash blames Evans for "wrongfully" using the police cut-through, instead of the grass turnaround that was safely contained between lane closures, and for pulling out "into live traffic unprotected" as a result. Da172. The Earle Defendants' report further emphasized that "Under no circumstances are police Cutthrough's to be used unless there are lane closures northbound and southbound for trucks to safely DEcel [sic] and accel out of them." Da172. Based on the above-cited facts, according to the Earle Defendants, Evans, who missed his training sessions, disobeyed a repeated, direct order from his Earle supervisor not to use the police cut-through in question.

2. Defendant Evans's Version (Disputed By The Earle Defendants)

Contrary to the Earle Defendants' version of events, Defendant Evans testified that his Earle supervisor, Morrow, instructed him, three to four times, to use "the turnaround," without specifying a particular turnaround to use; therefore, Evans believed that Earle had instructed him to use the police turnaround:

> Q: Your foreman at Earle, Michael [Morrow], did he tell you to use the emergency turnaround at 87.5 or **did he say to use the grass turnaround** that was located in the work zone at milepost 84, 85?
>
> A: **What I heard him say was the turnaround.**

[Da046 (28:18-22) (emphasis added).]

***

> Q: How many times did Mike [Morrow] call and tell you to go through the cut through?
> A: Three, he said it through the CB [radio], he wasn't—he didn't say Jeff, he just said it through the CB three times.
>
> [Da095 (223:21-25).]

Similarly, in a sworn certification, Defendant Evans attested as follows:

> I have testified under oath my recollection of the messages the Foreman, Michael Morrow transmitted over the CB radio **3-4 times** after 10:00 p.m. on 7/20/11 when I was stopped in the Earle dump truck NB in the work area. I testified that **I recall Michael M[o]rrow stated over the CB to use the cut through and recall no further substance. I have been told Michael M[o]rrow testified at his deposition that he stated to use the grassy cut thru where the cones were located but this is not my recollection.** [….] I traveled NB until I saw a cut thru that was macadam and took the macadam cut thru as I thought it was safer rather than using any other cut thru and **believed** I was in a construction zone and that **my use of the macadam cut thru was neither illegal nor unauthorized. I was following my understa[nd]ing and recollection of the Foreman, Michael M[o]rrow['s] instructions.**
>
> [Da313, Evans Certification, ¶¶ 3-4, (emphasis added).]

Evans further testified that no one from Earle warned him that it was illegal to use police emergency turnarounds prior to the crash. Da065 (104:11-14). Evans disputed Earle's allegation that he "started too late" to attend Earle safety meetings at which he would have been informed about the prohibition against using the paved police cut-through: in contrast, Evans testified that he started when Earle told him to start, which was at a later time than the other drivers, and that it was not his own lateness that caused him to miss safety meetings. Da090-1 (204:18-206:23).

3. The Earle Defendants And Evans Dispute Each Other's Testimony

The Earle Defendants' foreman Morrow disputed Evans's testimony and insisted that he gave Evans detailed instructions to use the grass turnaround, as opposed to the paved police turnaround:

> Q. **Mr. Evans apparently says** he received -- three times you told him about this cut-through, but **you never mentioned grass, you just said take the cut-through.** Is that a correct or incorrect recollection?
> A. **Incorrect.**
> Q. And that is incorrect because why?
> A. **I did mention the grass and cones.**

[Da229, (101:17-24) (emphasis added).]

> Q. He said you told him -- you told him -- this is your attorney's certification, paragraph **Jeff Evans testified in his deposition, his recollection was -- instruction on 7/20 he received regarding the cut-through, and he stated he was told merely to use the cut-through and that there was no more detail provided.** Is that true or false?
> MR. KADISH: Object to form.
> Q. You provided detail or did you not? What is true, what is false?
> A. **I provided detail.**

[Da226, (89:3-25) (emphasis added)].

In contrast, Evans consistently maintained that his Earle foreman provided no detail and he was simply told to use "the cut through"/ "turnaround", with no mention of grass or cones. See Da046 (28:18-22) (at which Evans testified that what he heard Morrow say was "use the turnaround"); Da065 (105:19-21) (at which Evans testified, "I just heard him [Morrow] say use the cut through"); Da066 (106:4-6) (at

which Evans testified, "the person said take the cut through"); Da095 (223:21-25) (at which Evans testified that Morrow told him to go through "the cut through" three times over the CB radio).

Evans also disputes the testimony of his Earle foreman Morrow, who claims that Evans called him immediately after the crash and admitted that he had "disobeyed" Morrow's instructions and taken an illegal cut through: In contrast to Morrow's testimony, see Da249 (183:14-24) and Da251 (189:24-190:21), Evans testified that "[he] never spoke to Mauro [Morrow]." Da050 (44:20). Thus, Evans disputes Earle's claim that he admitted to disobeying Earle's instructions. Id.

D. ADM Continues Its Joint Representation Of Evans And The Earle Defendants Despite Their Clearly Adversarial Positions

As set forth in the examples below, ADM continued its joint representation of Defendants, even as the conflict of interest became increasingly apparent.

1. The June 7, 2023 Municipal Court Hearing

On June 7, 2023 Jeffrey Kadish, Esq. of ADM represented Defendant Evans at his municipal court hearing regarding the traffic offenses arising from the fatal crash. Da034. Under Mr. Kadish's representation, Evans pled guilty to committing an illegal U-turn and admitted that doing so "resulted in a motor vehicle accident". Da036 (4:4-8). Mr. Kadish's represented Evans regarding this guilty plea despite the fact that Evans believes that he has a valid defense based on his testimony that the

Earle Defendants had instructed him to use "the turnaround" and that he believed that doing so was "neither illegal nor unauthorized". See Da313, ¶¶ 3-4.

2. ADM's July 27, 2023 Answers To Form C Interrogatories

On July 27, 2023, ADM submitted joint interrogatory answers on behalf of the Earle Defendants and Evans in which ADM's own clients accused each other of negligent conduct. See Da282-4. For example, ADM's interrogatory answers contained admissions that the Earle Defendants did not ensure that Evans received any written or oral instructions regarding the protocol he was supposed to follow while driving a dump truck on the job in question. See Da282 (admitting that "Evans, being new to Earle Transit and new to the Parkway job did not receive any written and or oral instructions re the protocol for the truck drivers to follow on the job").

The interrogatory answers also contained the allegation that Evans "started too late and missed a meeting at the Toms River staging area and no one from Earle gave him any written job instructions and orally gave him no instructions regarding the safety and use of cut-throughs". Da283. The answers further stated that "Evans did not receive any specific instructions on the designated cut through [….]", Da284, which contradicts the testimony of Earle foreman Morrow that he repeatedly gave specific instructions to use the grass cut-through. See Da225 (87:7-21); Da226, (89:3-25); Da219 (62:7-63:6); Da229, (101:17-24).

These interrogatory answers, in which ADM's own clients make statements that conflict with each other's testimony and which accuse each other of negligent conduct, clearly demonstrate the conflict of interest between Defendant Evans and the Earle Defendants. See Da282-4.

3. Defense Counsel Contradicts The Sworn Testimony Of One Of His Own Clients (Evans) In A September 15, 2023 Certification

On September 15, 2023, defense attorney Jeffrey Kadish, Esq. of ADM submitted a certification in which he certified that Michael Morrow (the supervisor employed by his client, the Earle Defendants) would be testifying in a manner that **contradicted** the testimony of Defendant Evans (also his client in the same matter):

> 23. **Jeff Evans testified** at his deposition what his recollection was [as to] the instructions on 7/20 he received regarding the cut thru and **he stated he was told merely to use the cut thru and that there was no more detail provided.**
>
> 24. **I offer the following proffer that there will be testimony that there were CB instructions giving greater detail regarding the correct cut thru including a cut up grassy cut thru and there were cones by the cut thru.**
>
> [Da185 (emphasis added).]

ADM attorney Kadish's action in submitting a certification in which he proffered testimony from one of his clients (Earle) that contradicted the sworn deposition testimony of his other client in the same litigation (Evans) is a stark demonstration of the concurrent conflict of interest posed by ADM's joint representation of the Earle Defendants and Evans. Id.

4. Conflicted Counsel ADM Appears To "Spoon Feed" Testimony To Evans, To His Detriment And Earle's Benefit, Regarding An Alleged "Miscommunication"

The attorneys who have been jointly representing the Earle Defendants and Evans, both ADM and their current counsel on appeal, rely heavily on their claim that there was a mere "miscommunication" between Earle supervisor Morrow and Defendant Evans in order to suggest that their joint representation poses no conflict of interest. See Db1, 3-5, 14-15, 17, 23. However, as set forth above, Evans was adamant that Morrow never specified to use the "grassy" cut-through, Da313, ¶ 3, and Morrow was equally adamant that he repeatedly provided specific instructions to use the grass-covered, cone-marked cut-through. Da226, (89:3-25); Da229, (101:17-24).

Disturbingly, ADM appeared to attempt to use its joint representation to influence Evans's deposition testimony by telling him that a "miscommunication" had occurred when, in fact, Evans' own version was that Earle never gave him detailed instructions and just told him to use "the turnaround". Evans admitted that his only source for saying that a "miscommunication" had occurred was that his ADM attorney, who also represented the Earle Defendants, told him so:

> Q: Why did you use the emergency vehicle turnaround at 87.5?
> A: **Because I was instructed to use the turnaround by the foreman on job.** It was a **miscommunication**, I thought that that was the one I was supposed you use when there was one further back over the grass that he was talking about?
> Q: Who was this person that instructed you.

A: Michael Mauro [Morrow].

[Da046 (27:10-18) (emphasis added).]

***

Q: After the crash, did you ever confront Mr. Mauro and say you told me to use that one, did you ever say that?
A: No. I didn't.
Q: Well, how do you know it was a miscommunication then?
A: <u>Because my lawyer</u>
MR. KADISH: Don't
Q: No, don't tell me about your lawyer.
A: Okay. Repeat that, I'm sorry.
Q: **How do you know it was a miscommunication,** when you say it was a miscommunication between you and Michael Mauro who works for Earle?
A: **Because when all of the information was gathered after the crash then I came to that conclusion from the information.**

[Da046 (29:5-20) (emphasis added).]

***

Q: [D]id you find out who the person was who gave you the instruction [to take "the turnaround"]?
A: After the fact, yes.
Q: And who was that person?
A: Michael Mauro.
[….]
Q: **Who told you other than your attorney that it was Mr. Mauro?**
A: **<u>My attorney told me.</u>**

[Da050 (44:4-8, 21-23) (emphasis added).]

It appears from the above testimony that Defendant Evans may have been spoon-fed a factual scenario by his counsel (who also represented his employers the

Earle Defendants) that had no basis in his own personal knowledge and that undercut his own testimony that (1) his Earle supervisor failed to give him specific instructions about which turnaround to use and (2) that Earle gave him no basis to believe that he was not authorized to use the paved police turnaround. Id. ADM apparently may have used its conflicted joint representation to get Evans to testify against his own interest and to contradict his own version of events for the benefit of the Earle Defendants, as strengthening Earle's "miscommunication" theory would detract from the direct negligence claims against Earle for failing to properly train and supervise Evans. Id.

E. Plaintiff Repeatedly Advises AMD Of The Subject Conflict

On September 19, 2023, Plaintiffs' counsel sent letters to Mr. Kadish advising that AMD's joint representation of Evans and the Earle Defendants represented a concurrent conflict of interest and requested any conflict waivers that Mr. Kadish had obtained. Da189-190; 192-3. On September 20, 2023, Mr. Kadish responded, saying that he saw no conflict of interest. Da195. On December 19, 2023, when Earle foreman Morrow testified at his deposition in a manner that directly contradicted the testimony of Evans, Plaintiff's counsel again advised Mr. Kadish that ADM's continued representation of all defendants posed a conflict of interest and offered him the opportunity to adjourn the deposition so that Evans and the Earle Defendants could obtain separate counsel. Da226, 90:10-92:3. Mr. Kadish refused

to recognize any conflict. Id., 91:2-5. Tellingly, later in the same deposition, Mr. Kadish stated during a colloquy, "I am protecting the interest of **Earle**," making no mention of his Evans, who was also his client. Da237 (133:17) (emphasis added).

F. Judge Zazzali-Hogan Disqualifies AMD As Counsel For Defendants

After ADM refused to voluntarily recognize the concurrent conflict inherent in its joint representation of Defendants, on December 21, 2023, Plaintiffs moved to disqualify ADM pursuant to RPC 1.7 (Da004-Da257). Despite the fact that Evans was clearly blaming the Earle Defendants for failing to give him adequate instructions, training, and supervision, and the fact that Evans was directly disputing the testimony and position of the Earle Defendants regarding the instructions they gave, Da313, ¶¶ 3-4, ADM continued to maintain that there was no conflict inherent in its joint representation of Evans and the Earle Defendants. Da306-9.

In opposition to Plaintiffs' motion to disqualify, ADM relied on the certification of Defendant Evans, who stated that he wished for ADM to continue representing him. Da314, ¶ 5. However, in the same certification, Defendant Evans admitted as follows: "I do not understand the basis for this alleged conflict", Da313, ¶ 2, which calls into question whether and to what extent ADM explained the risks posed by the conflict, much less whether ADM advised Mr. Evans to seek advice from independent counsel, which is not addressed in the certification. See Da312-4. Remarkably, in his certification, Defendant Evans continued to contradict the Earle

Defendants' version of the facts by once again averring that Earle foreman Michael Morrow told him to "use the cut through" without provided any further detail and maintaining that he had no basis to believe that the cut through he used was illegal or unauthorized. Da313 ¶¶ 3-4.

On February 16, 2024, following oral argument, the Honorable Mara Zazzali-Hogan, J.S.C., disqualified ADM from representing Defendants due to an actual, concurrent conflict of interest pursuant to RPC 1.7. Da001-2; T6:5-11:18; T34:20-41:12. Judge Zazzali-Hogan found, in part, as follows:

> Here, although disqualification is a heightened threshold, The Court must still balance the interest of both the clients and the lawyer to determine if a conflict exists. While The Court recognizes that an attorney has an opportunity to represent multiple defendants in some circumstances, once a conflict arises as it does here, between representation of both clients, the attorney must withdraw.
> [….]
> **Here, representation of all these defendants would directly conflict with one another and already do conflict with each other. In terms of the basic rudimentary concept of whether or not Evans did cut through on this own accord or whether he was told by his employer.** Again, representation for Evans, the driver, relies on the theory that he was told to make the illegal cut through and did not do so on his own. Conversely, [the Earle Defendants] rely on the notion that the supervisor explicitly instructed the drivers to refrain from the cut throughs. **Those theories are directly adverse to each other under the rule [RPC 1.7(a)(1)] and a conflict has arisen.** Regardless, even if defendant can rebut 1.7(a)(1), a conflict still arises under 1.7(a)(2), because of a significant risk of representing more than one client [….] **Again, to be clear, however, I've already found there is an actual conflict**.
> [….]

> While it's undisputed that an employer/employee relationship exists, this does not necessarily permit counsel to represent both sides when there's a significant risk as there is here.
>
> [T36:1-9; 36:15-37:14; 37:25-38:3 (emphasis added).]

Judge Zazzali-Hogan further found that, although ADM had not attempted to obtain written conflict waivers from Defendants, waiver of the conflict would be prohibited under RPC 1.7(b) because it involved the assertion "of a claim by one client against another" in the same litigation. See T38:8-39:16.

Judge Zazzali-Hogan's disqualification ruling was based on the substantial conflict presented by ADM's joint representation of the Defendants and the need to protect the integrity of the litigation and the judicial system:

> To be clear, there indeed may be some commonality here [between Defendants' positions.] However, this difference in testimony that we've heard thus far is not simply an inconsistency. Keep in mind that these rules exist to protect the actual clients, the attorney and the integrity of the litigation itself as well as the greater judicial system and the legal profession.
>
> But for the foregoing reasons I've already stated on the record, plaintiff's motion to disqualify is granted.
>
> [T39:17-40:1.]

In response to Mr. Kadish's inquiry, Judge Zazzali-Hogan confirmed that ADM could not continue to represent any of the Defendants in light of the privileged knowledge it obtained regarding both sets of Defendants' positions. T40:13-41:7.

In prosecuting their present interlocutory appeal from the disqualification order, Defendants continue to be represented by a single law firm (now the firm of Trif & Modugno), in apparent violation of Judge Zazzali-Hogan's order requiring non-conflicted, separate representation for Defendant Evans and the Earle Defendants, which order has not been stayed or modified by the trial court or this Court. See Da001-2.

STANDARD OF APPELLATE REVIEW

"[A] determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010).

LEGAL ARGUMENT

JUDGE ZAZZALI-HOGAN CORRECTLY DISQUALIFIED ADM FROM JOINTLY REPRESENTING THE DEFENDANTS DUE TO A CONCURRENT CONFLICT OF INTEREST (Da001)

The New Jersey Supreme Court has held that the resolution of a motion to disqualify counsel requires the Court to conduct a "painstaking analysis of the facts" in order to balance "the need to maintain the highest standards of the [legal] profession" against "a client's right freely to choose his counsel." Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 205 (1988) (internal citation and quotation marks omitted). "We recognize that a person's right to retain counsel of his or her choice is limited in that there is **no right to demand to be represented by an**

attorney disqualified because of an ethical requirement." Dewey, 109 N.J. at 218 (internal citation and quotation marks omitted). "We also emphasize that only in extraordinary cases should a client's right to counsel of his or her choice outweigh the need to maintain the highest standards of the profession." Id. at 220. "Although doubts are to be resolved in favor of disqualification, the party seeking disqualification must carry a 'heavy burden' and must meet a 'high standard of proof' before a lawyer is disqualified." Alexander v. Primerica Holdings, Inc., 822 F.Supp. 1099, 1114 (D.N.J. 1993) (internal citation omitted). Motions to disqualify "can have such drastic consequences [that] courts disfavor such motions and grant them only 'when absolutely necessary.'" See also Rohm and Haas Co. v. American Cyanamid Co., 187 F.Supp.2d 221, 226 (D.N.J. 2001) (internal citation omitted).

Here, Judge Zazzali-Hogan correctly recognized the "heavy burden" and "high standard of proof" that must be carried by the party seeking disqualification. T10:17-20. Judge Zazzali-Hogan further recognized her obligation to balance Defendants' right to choose their counsel with the goal of "maintaining the highest standards of the profession". See T10:4-8 (citing Van Horn v. Van Horn, 415 N.J. Super. 398 (App. Div. 2010), which, at 415-416, quotes Dewey, 109 N.J. at 218, 220); see also T39:20-23 (recognizing that the ethical rules "exist to protect the actual clients, the attorney and the integrity of the litigation itself as well as the greater judicial system and the legal profession").

While acknowledging that "doubts are to [be] resolved in favor of disqualification", Judge Zazzali-Hogan recognized that disqualification should be employed only "when absolutely necessary". T10:17-11:7 (citing Rohm and Haas). Accordingly, Judge Zazzali-Hogan appreciated and applied the correct standards when she recognized that Defendants' glaring concurrent conflict of interest satisfied the heightened threshold required for disqualification.

RPC 1.7(a) prohibits attorneys from representing clients where there is a "concurrent conflict of interest", which exists if:

> (1) the representation of one client will be **directly adverse** to another client; **or**
>
> (2) there is a **significant risk** that the representation of one or more clients will be **materially limited by the lawyer's responsibilities to another client**, a former client, or a third person or by a personal interest of the lawyer.
>
> [RPC 1.7(a) (emphasis added).]

Under RPC 1.7(b), in some circumstances, an attorney may represent a client despite a concurrent conflict of interest by obtaining written informed consent. "When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved[.]" RPC 1.7(b)(1). However, a conflict **cannot** be waived when it involves "**the assertion of a claim by one client against another client** represented by the lawyer in the **same litigation**[….]" RPC 1.7(b)(4) (emphasis added).

"RPC 1.7 is rooted in the concept that '[n]o man can serve two masters,' […] and it has been suggested that employment should be declined if there is a question whether the representation will create an adversity of interest between two clients." State ex rel. S.G., 175 N.J. 132, 139 (2003) (internal citation omitted).

Furthermore, RPC 1.13(e) provides that a lawyer who seeks to represent an organization and one of its employees is "subject to the provisions of RPC 1.7".

In the specific context of the instant matter, when a single attorney seeks to jointly represent multiple defendants in a civil suit, this Court has held that "[a] disqualifying conflict may arise in representing co-defendants 'by reason of **substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party** or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.'" New Jersey Div. of Child Protection and Permanency v. G.S., 447 N.J. Super. 539, 570 (App. Div. 2016) (quoting Michels, N.J. Attorney Ethics, § 19:2-1(e) at 415 (2015) (quoting ABA Model Rules of Prof'l Conduct, R. 1.7 (2000))[3] (emphasis added).

In Wolpaw v. General Acc. Ins. Co., 272 N.J. Super. 41, 45 (App. Div.), certif. denied, 137 N.J. 316 (1994), this Court held that there was a conflict of interest inherent in a single firm representing three defendants whose "interests in

[3] The same quoted language is present in the current edition of Michels & Hockenjos, N.J. Attorney Ethics, § 19:2-1(e) at 286 (Gann, 2024).

maximizing the percentage of the other [defendants'] fault and minimizing their own were clearly in conflict." The Wolpaw case arose from an incident in which a boy playing with a BB gun shot out another child's eye. Id. at 44. The boy and his mother were sued and were represented by the same attorney. This Court recognized that, even though the jointly-represented defendants "had the common interests of minimizing the amount of the [injured party's] judgment and maximizing the percentage of fault attributed to other the other defendants," there was a conflict of interest because it was also in the boy and his mother's interest to assert claims against each other. Id. at 45. Specifically, it was in the boy's interest to argue that his mother failed to adequately secure the rifle and it was in his mother's interest to argue that she had adequately secured the rifle and "had carefully instructed him in its safe use, which he negligently disregarded." Id. at 45. Thus, this Court held that separate, non-conflicted counsel were required to advise each defendant. Id. at 46. "[W]hen the interests of multiple insureds differ on issues of liability, separate counsel must be appointed to protect and advance those interests." Princeton Ins. Co. v. Qureshi, 380 N.J. Super. 495, 504 (App. Div. 2005).

Here, Judge Zazzali-Hogan correctly recognized that the Earle Defendants and Defendant Evans have asserted factual and legal positions that "are directly adverse to each other" and that an "actual conflict" has therefore arisen under RPC 1.7(a)(1). T36:15-37:14. As Judge Zazzali-Hogan explained, there is a "basic

rudimentary" adversity between Evans and the Earle Defendants regarding the nature of the instructions Earle did or did not give to Evans regarding the cut-through. See T36:15-37:4. Defendants' theories and testimony are "directly adverse to each other" under RPC 1.7(a)(1) and a conflict has therefore arisen. Id.

The factual record, as set forth in more detail above and as summarized in the chart below, amply supports Judge Zazzali-Hogan's finding of an actual conflict:

SUMMARY OF ADVERSE POSITIONS OF EARLE AND EVANS

EARLE	**EVANS**
1. Earle blames Evans for arriving "too late" to receive instructions prohibiting use of police turnarounds. *Da283.*	1. Evans claims that Earle determined his start time and denies lateness. *Da090-1 (204:18-206:23).*
2. Earle claims that Evans was instructed by Earle foreman Morrow, three to four times, to specifically use the "grass" turnaround marked by cones where the lanes were closed. *Da219 (62:7-63:6); Da220 (65:22-66:3); Da225 (87:7-21); Da226, (89:3-25)Da229, (101:17-24); Da249 (182:19-183:5).*	2. Evans denies that Earle's foreman ever specified to use a "grass" turnaround marked by "cones"; Earle simply instructed him to use "the" turnaround/cutoff, so he used the paved turnaround; Earle gave him no reason to believe this was unauthorized or illegal. *Da046 (28:18-22); Da065 (104:11-14); Da095 (223:21-25); Da313, ¶¶ 3-4.*
3. Earle claims Evans called Morrow right after the crash to admit that he had "disobeyed" Earle's instructions and used an illegal turnaround. *Da249 (183:14-24); Da251 (189:24-190:21).*	3. Evans denies ever speaking to Morrow about the crash. *Da050 (44:20).*

In light of the foregoing adverse positions regarding liability, Judge Zazzali-Hogan correctly disqualified ADM from jointly representing Defendants because "this difference in testimony that we've heard thus far is not simply an inconsistency." T39:18-20. Rather, the record here demonstrates precisely the type

of "substantial discrepancy in the parties' testimony [and] incompatibility in positions in relation to an opposing party" that warrants disqualification. See New Jersey Div. of Child Protection and Permanency v. G.S., 447 N.J. Super. at 570. The Earle Defendants, through their foreman Morrow, asserted that they specifically instructed Evans as to which turnaround to use and that Evans disobeyed their instructions, thereby placing the blame on Evans and attempting to exculpate themselves from direct liability for negligent training and supervision. In contrast, Defendant Evans testified that Earle never told him not to use the paved police turnaround in question and simply told him to use "the turnaround" without further specific instructions, which testimony supports a direct claim of negligent training and supervision against the Earle Defendants. As Judge Zazzali-Hogan correctly held: "Those theories are directly adverse to each other under the rule and a conflict has arisen." T37:3-4.

As was the case in Wolpaw, Judge Zazzali-Hogan recognized that, while there "may be some commonality" of interest between the Earle Defendants and Evans, as they both have an interest in minimizing Plaintiffs' damages, the overlapping of some of Defendants' interests do not negate their direct adversity regarding fault for the U-turn. T39:17-23. As Judge Zazzali-Hogan properly found, "the difference in testimony that we've heard thus far [regarding the U-turn] is not simply an

inconsistency." Id. Rather, Defendants have blamed each other for the happening of the U-Turn and therefore have fundamentally adverse interests.

Like the mother in Wolpaw, 272 N.J. Super. at 45, whose interests were served by arguing that she properly instructed her son in the safe use of the BB gun but he disregarded her commands, the Earle Defendants' interests are served by their argument that they properly instructed Evans to use the grass-covered, cone-marked turnaround, not the police turnaround, but Evans disobeyed their instructions. Like the son in Wolpaw, Evans's interests are served by his argument that Earle never instructed him not to use the police turnaround and that Earle failed to adequately instruct him as to which turnaround to use. As in Wolpaw, the existence of other common interests between Defendants does not negate the existence of a concurrent conflict in their positions. See Wolpaw, 272 N.J. Super. at 45. Separate counsel is therefore required. Judge Zazzali-Hogan correctly determined that Defendants' adverse, inconsistent positions and interests regarding liability cannot be ethically advanced by the same attorney under RPC 1.7(a)(1).

Judge Zazzali-Hogan also correctly concluded that an "actual", present conflict had arisen in this litigation. As set forth in more detail in sub-section D of the Statement of Facts above at pages 13-18, the impact of ADM's conflict of interest upon its joint representation of Defendants became increasingly egregious. First, ADM represented Defendant Evans at municipal court, where he pled guilty to

making an "illegal U-turn" that "resulted in" the subject fatal crash despite his continued belief that he did so as a result of the instructions he received from Earle. See Da036 (4:4-8) and Da313, ¶¶ 3-4. Thereafter, ADM submitted interrogatory answers in which its own clients made statements that conflicted with each other's testimony and which accused each other of negligent conduct, clearly demonstrating the conflict of interest between Defendants and the impermissibility of joint representation. See Da282-4.

On September 15, 2023, ADM attorney Jeffrey Kadish submitted a certification in which he contradicted the testimony of his client Evans, who claimed that he was not given specific instructions as to which cut-through to use, in order to advance the adverse position of his other clients (the Earle Defendants), who claimed they gave Evans detailed instructions about which cut-through to use. See Da185, ¶¶ 23-24. Mr. Kadish's certification represents a flagrant example of a conflicted attorney disserving the interests of one client for the benefit of another client in the same case.

Most disturbingly, ADM appeared to attempt to use its conflicted joint representation to influence Evans's deposition testimony by telling him that a "miscommunication" had occurred when, in fact, Evans' own version was that Earle simply never gave him detailed instructions and just told him to use "the turnaround". See Da313, ¶¶ 3-4. Despite Evans's repeated statements that Earle

never gave him specific instructions, at his deposition, Evans also testified that a "miscommunication" between Earle foreman Morrow and himself had occurred. See Da046 (27:10-18; 29:5-20); Da050 (44:4-8, 21-23). When asked what his basis was for saying that a "miscommunication" had occurred, Defendant Evans admitted that his saying so was based entirely on what his ADM attorney had told him and not his own personal knowledge. Id. In other words, the alleged "miscommunication", upon which Defendants repeatedly rely in attempting to deny the existence of a conflict of interest, appears to have originated from the actions of conflicted ADM counsel, who was apparently attempting to spoon-feed a factual scenario to Defendant Evans that had no basis in Evans's own personal knowledge, that contradicted Evans's own testimony, and that undercut Evans's own position regarding liability, in order to benefit Earle. ADM's action in telling Defendant Evans that a "miscommunication" had occurred had the effect of aiding one set of ADM's clients (the Earle Defendants) by detracting from the negligent training and supervision claim against them, while harming ADM's other client Evans, by undercutting his own defense regarding the actions he took on the night in question.

The above facts demonstrate that ADM's conflict of interest was not merely a hypothetical one. Rather, the actions of conflicted ADM counsel appear to have had a concrete impact on how Defendant Evans testified, impairing not only Evans's personal interests but, more importantly, undermining the integrity of this litigation

and the justice system. Advice and statements from conflicted counsel should not have any impact on the search for the truth that is meant to be the guiding principle of litigation in our adversary system. Faced with the foregoing facts, Judge Zazzali-Hogan's holding that ADM had to be disqualified due to an actual, concurrent conflict of interest was correct.

Defense counsel's attempts to deny the existence of a conflict are without merit and rely on ignoring or erroneously mischaracterizing the record. Defense counsel's repeated reliance on the employer-employee relationship between Earle and Evans ignores the fact that Plaintiffs have asserted direct claims of liability against Earle for negligent training, supervision, hiring and retention, which direct claims have nothing to do with vicarious liability for the conduct of Evans. See Pa3, ¶¶ A, B and D; Pa6, ¶¶ A, B and D. As this Court has held, "a claim based on negligent hiring or **negligent supervision is separate from a claim based on respondeat superior**." Hoag v. Brown, 397 N.J. Super. 34, 54 (App. Div. 2007) (emphasis added). While it is true that the Earle Defendants may also be held vicariously liable for any negligence that the jury attributes to Evans, that does not change the fact that the jury may independently attribute some or all of the responsibility for the crash directly to the Earle Defendants under theories such as negligent training or supervision. The existence of an alternate theory of liability based upon Earle's vicarious responsibility for Evans's negligence does not negate

the conflict created by the adverse interests of the Earle Defendants and Evans regarding the direct, independent claims against Earle for negligently failing to properly train and instruct Evans. Similarly, the Earle Defendants' admission that Defendant Evans was in the course of his employment at the time of the crash does not cure the conflict because it does not remove the separate basis for the Earle Defendants' liability for direct negligence under theories like negligent training or supervision. Defense counsel and Earle should not be permitted to use conflicted counsel to influence Defendant Evans's testimony regarding issues relevant to the apportionment of fault between the various direct and vicarious claims herein.

ADM argued below that it should be permitted to continue its joint representation because Evans certified that he wanted to keep them as his attorneys and he "do[es] not understand the basis for" the conflict inherent in the representation. Da313, ¶¶ 2, 5. Evans' certification begs the question of whether ADM truly or adequately informed him of the risks posed by the conflicted representation herein. For example, was Evans ever told that the primary strategy of the defense in this case is for the Earle Defendants to throw him under the proverbial bus and to use him as a fall guy by claiming he failed to follow a clear and concise company directive and repeated radioed instructions, and by claiming that he failed to show up for two safety meetings wherein the prohibition against driving dump trucks through the police turnaround was specifically discussed? Was Evans ever

informed that he could have defended his municipal court charges instead of pleading to the illegal U-Turn offense as charged? Was Evans ever informed that he would have an at-fault motor vehicle collision on his record that resulted in the death of another human being? Was Evans ever informed that a large monetary judgment could be entered against him in this civil suit that, even if it was ultimately paid by the Earle Companies, would be on his record and could affect his credit rating and other personal financial matters? Was Evans ever informed of the fact that the jury's determination of liability in this matter would be a matter of public record that he could have to explain to potential future employers? Most importantly, was Evans ever informed to consult with a separate attorney regarding the conflict/adversity of interest issue? The certification that ADM prepared for Defendant Evans to sign fails to address the foregoing issues and its silence loudly suggests that Evans was not given a full understanding of the risks posed by ADM's conflicted representation of both him and his employers in this lawsuit.

Furthermore, while a party may choose his counsel, no party may demand to be represented by an attorney disqualified due to an ethical requirement, as the Rules of Professional Conduct exist not only to protect the parties, but to preserve the integrity of the litigation and the justice system. See Dewey, 109 N.J. at 218. Thus, Evans's certification and alleged consent to the joint representation cannot override the Rules of Professional Conduct. See RPC 1.7(b)(4) (prohibiting the waiver of a

conflict of interest where parties are asserting claims against each other in the same litigation).

ADM's argument that it should be permitted to engage in this conflicted joint representation because Earle is vicariously liable for Evans's negligence and Earle would ultimately pay any money judgment against Evans is also meritless. This argument overlooks the other harms Evans may suffer from having a judgment entered against him in contexts such as his credit score and future employment, as well as the need to preserve this litigation's integrity from manipulation by conflicted counsel. Defense counsel's attempt to focus solely on the issue of who would ultimately pay a monetary judgment completely disregards the underlying basis for prohibiting joint representation of two clients with an adversity of interests, which is to avert undermining of the integrity of the Court, the judicial system, and the high standards governing our legal profession, without consideration of the parties' ability to pay a monetary judgment.

Here, separate and aside from the personal risks to Defendant Evans, the conflicted joint representation by ADM of Evans and the Earle Defendants has already had a negative effect on the integrity of these proceedings. The justice system as a whole suffers when conflicted counsel use their position in an attempt to influence one client to testify in a way that hurts his own defense but benefits another client, which is what appears to have occurred here when an ADM attorney

told Defendant Evans that there had been a "miscommunication" when Evans in fact maintained that Earle had simply never given him specific instructions. See Da046 (27:10-18; 29:5-20); Da050 (44:4-8, 21-23). A party should not be permitted to abuse our justice system by using conflicted joint representation to influence witness testimony and the ultimate apportionment of fault, which should be based on the truth as ascertained through properly, non-conflicted representation of parties.

Defendants' argument regarding the alleged implications of the trial court's decision to disqualify ADM from jointly representing Defendants under the specific facts of the instant matter is without merit. Judge Zazzali-Hogan did not announce a bright line rule under which employers and employees can never be defended by the same attorney. Judge Zazzali-Hogan simply recognized that a fact-specific analysis is required based on the circumstances of each case: the admitted existence of an employer/employee relationship "does not **necessarily** permit counsel to represent both sides [….]" T37:25-38:3 (emphasis added). Thus, while in some cases a single attorney can defend an employer and employee, under the facts of the instant matter, in which the employer and employee are asserting directly adverse factual and litigation positions, the resulting conflict of interest prevents joint representation. See New Jersey Div. of Child Protection and Permanency v. G.S., 447 N.J. Super. at 570.

Defendants' reliance on the case of Alam v. Ameribuilt Contractors, 474 N.J. Super. 30 (App. Div. 2022) is unavailing. Alam is distinguishable because it involved a Workers' Compensation matter in which the plaintiff, who was injured in a car collision, also happened to be a 50% owner of the defendant. Id. at 33. The question in Alam was whether counsel assigned to defend the defendant corporation by its insurance carrier had a conflict because the plaintiff was also an owner of the defendant corporation. Id. at 33-35. The facts in Alam are a far cry from the instant matter, in which a single law firm sought to jointly represent co-defendants, namely the Earle Defendants and their employee Defendant Evans, who have put forward conflicting testimony and directly adverse positions regarding fault for the subject collision.

Finally, Defendants' argument that any conflict of interest herein is "speculative" or in the "future" is both meritless and beside the point. The primary basis of Judge Zazzali-Hogan's disqualification order was her finding that there is an actual, current conflict of interest under RPC 1.7(a)(1). T36:15-17; 37:13-14. As Judge Zazzali-Hogan's conclusion regarding the present existence of a conflict is correct and requires ADM's disqualification, there is no need to reach the separate issue of whether there is also a "significant risk" of a conflict arising in the future under RPC 1.7(a)(2) if the conflicted representation continued, which Judge Zazzali-Hogan also correctly found to be the case based on the facts in the record. T37:3-20.

CONCLUSION

For the foregoing reasons, it is respectfully submitted Judge Zazzali-Hogan correctly disqualified ADM from jointly representing Defendants due to a clear, actual conflict of interest in violation of RPC 1.7(a)(1). Accordingly, Judge Zazzali-Hogan's disqualification order should be affirmed.

Thank you for the Court's consideration in this matter.

Respectfully submitted,
HOBBIE & DECARLO, P.C.
Attorneys for Plaintiff Carol Morris Stahlberg

By /s Jacqueline DeCarlo, Esq.
JACQUELINE DECARLO, ESQ.

Dated: 7/18/2024

CAROL MORRIS STAHLBERG, Executrix for the ESTATE OF BERTRAM J. STAHLBERG and CAROL MORRIS STAHLBERG, Individually, Plaintiffs/Respondents, v. **WALTER R. EARL TRANSIT, LLC, EARLE ASPHALT COMPANY, and JEFFREY L. EVANS,** Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No.: A-002373-23 On Appeal from the February 28, 2024 Interlocutory Order of the Superior Court of New Jersey, Law Division, Monmouth Vicinage TRIAL DOCKET No.: MON-L-2517-22 Sat Below: Hon. Mara Zazzali-Hogan, J.S.C.

BRIEF AND APPENDIX (Pa001-Pa032) OF PLAINTIFF/RESPONDENT ESTATE OF BERTRAM J. STAHLBERG IN OPPOSITION TO THE APPEAL OF DEFENDANTS/APPELLANTS

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PRELIMINARY STATEMENT

Defendants-Appellants Earle Asphalt Company, Walter R. Earle Transit, LLC, and Jeffrey L. Evans ("Appellants") appeal to this Court for relief from the February 28, 2024, Order of the Hon. Mara Zazzali-Hogan, J.S.C., disqualifying prior counsel and requiring that the Earle Appellants proceed with separate counsel from Appellant Evans. In partial compliance with that Order, Ahmuty Demers & McManus ("ADM") and Jeffrey M. Kadish, Esq. ("Mr. Kadish") do not represent Appellants here. Unfortunately, that is where Appellants' compliance comes to an end. In willful defiance of the Order under review, Appellants appear before this Court with joint representation by Trif & Modugno, LLC ("T&M"). Nowhere in Appellants' papers is the decision to willfully violate Judge Zazzali-Hogan's Order explained or even acknowledged. Seeking leave to appeal the court below was Appellants' right, but they had no right to ignore the Order under review. Because of Appellants' failure to abide by the Order under review, this Court should dismiss the pending appeal without more. Plaintiff-Respondent Estate of Bertram J. Stahlberg ("Respondent") defers to the Court whether some sanction beyond mere defeat should fall on Appellants and their counsel.

In what follows, Respondent will discuss the chances Appellants and their counsel had to seek appropriate relief in an appropriate form from the appropriate court. In support of Respondent's conclusion that Appellants are not operating in

good faith, there will additionally be some discussion of the deeply misleading arguments made in Appellants' merits brief. In sum, Appellants write as though they have stipulated to vicarious liability and that the Earle Appellants have contractually agreed to indemnify Appellant Evans, but they have done neither. Instead, the Earle Appellants seek a resolution that preserves their ability to contest vicarious liability without the inconvenience of conflict-free counsel for Appellant Evans having a say in the matter. Indeed, in the absence of conflict-free counsel, it is hard to see how this Court can even have confidence that Appellant Evans has made an informed decision to seek appellate review.

Finally, Respondent hereby joins in the more comprehensive opposition filed by co-counsel, Hobbie & DeCarlo, P.C., ("H&D") on behalf of Plaintiff-Respondent Carol Morris Stahlberg ("co-Respondent"). Regarding Respondent's esteemed co-counsel, it bears mentioning that H&D initially represented all plaintiffs in the court below. It was only after ADM wrote to H&D advising of the concurrent conflict of interest presented by joint representation that H&D withdraw as counsel for the estate in favor of the undersigned attorneys. No court order was required to compel H&D to act ethically, yet not even a court order was sufficient to compel Appellants' and their counsel to follow suit.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent respectfully incorporates by reference those analogous provisions of the brief filed by co-Respondent. As to the history of procedural failure by Appellants since the issuance of the Order under review, Respondent adds the following amalgam of facts, procedure and argument:

On February 16, 2024, in an oral opinion from the bench, the Hon. Mara Zazzali-Hogan, J.S.C. issued an oral opinion from the bench disqualifying ADM and Mr. Kadish, as well as ordering that the Earle Appellants have separate counsel from Appellant Evans. *Pa001 and Da001.* On February 27, 2024, Mr. Kadish wrote to the Hon. Owen C. McCarthy, P.J.Cv., the Presiding Judge in the division where Judge Zazzali-Hogan then sat. *Ibid.* In that letter, Mr. Kadish makes plain that he either did not understand what Judge Zazzali-Hogan's oral opinion required of him, or else that he had no intention of scrupulously abiding by it. *Ibid.* Mr. Kadish attempted to join in a motion despite his disqualification while also discussing the prospects for interlocutory review as though he were still ethically permitted to advise Appellants regarding this matter. *Ibid.* That same day, Jacqueline DeCarlo, Esq., filed a letter taking Mr. Kadish to task in no uncertain terms on the grounds discussed above. *Pa002.*

The following day, February 28, 2024, in response to the only correct legal assertion in Mr. Kadish's previous letter, the court below e-filed the Order under

review here. *Da001.* That same day, Mr. Kadish wrote to the court below advising that his "office will likely be authorized this afternoon by the clients to file a motion for leave to appeal and a motion for a stay." *Pa004.* Mr. Kadish did not deign to explain how a disqualified attorney employed by a disqualified law firm could be authorized to act on Appellants behalf at all. *Ibid.* Mr. Kadish closes with a collegial expression of willingness to discuss his letter at a case management conference, but again without elaborating on what place he and his firm might have at such a conference in view of their disqualification. *Ibid.*

On February 29, 2024, Ms. DeCarlo wrote to Mr. Kadish with copies to the court below emphasizing Mr. Kadish's seeming inability to comply with the Order under review. *Pa006.* She further inquired as to when Appellants would be obtaining the new counsel required by the Order under review. *Ibid.* In response, that same day, Mr. Kadish wrote to the court below requesting an informal stay pending his formal motion for a stay. *Pa008.* Mr. Kadish never addressed his ethical duty to abide by the Order under review, nor did he explain what part of the law of the State of New Jersey authorized an informal stay at all, let alone at the request of a disqualified attorney. *Ibid.* Later that day, both Ms. DeCarlo, *Pa009*, and the undersigned attorneys for Respondent filed letters in opposition to Mr. Kadish's informal application. *Pa011.* The undersigned attorneys also wrote to Mr. Kadish directly and provided a copy to the court below. *Pa013.* By text order dated

February 29, 2024, the court below advised that "A formal motion is required as the court cannot decide such an application based upon a letter that provides no legal analysis."[1]

On March 19, 2024, Appellants, through T&M, filed for leave to appeal. *Pa018.* After noticing that Appellants persisted in their unethical joint representation, the undersigned attorneys wrote to the court below on March 21, 2024. *Pa019.* In that letter, the undersigned attorneys advised Judge Zazzali-Hogan of Appellants' continued defiance of her mandate that the Earle Appellants have separate counsel from Appellant Evans. *Ibid.* The follow day – and nearly one month after the oral opinion of the Court below – T&M entered limited appearances on behalf of Appellants. *Pa024.*

Thereafter, on March 27, 2024, Appellants through T&M filed a motion seeking a stay of proceedings in the court below pending this appeal. *Pa025.* Respondent avers that the entirety of the brief in support of that motion was devoted to staying the proceedings and that it did not contain argument directed at modifying or staying the effect of the Order under review with respect to the requirement that the Earle Appellants have counsel separate from Appellant Evans. *Pa027.* Indeed, T&M would have been hard-pressed to raise that issue since they had already

[1] Owing to the unsuitability of text orders for inclusion in a formal appendix, the undersigned attorneys hope that the Transaction ID LCV2024550493 will be sufficient to document this assertion.

willfully violated that portion of Judge Zazzali-Hogan's Order by undertaking the forbidden joint representation.

This Court granted leave to appeal by Order dated April 9, 2024. *Pa029.* The following week, on April 15, 2024, the court below denied Appellants' Motion to Stay as moot. *Pa031.* With every respect to Judge Zazzali-Hogan, who presumably believed that this Court's grant of leave divested the court below of jurisdiction, this act was strictly speaking error. The combination of R. 2:9-5(a) and -(b) reveal that the court below still has jurisdiction to consider a stay as of today's date. See R. 2:9-5(b) (jurisdiction with trial court until oral argument in Appellate Division).

The following day, April 16, 2024, Anthony J. Fredella, Esq., of T&M wrote to the court below. *Pa032.* In that letter, Mr. Fredella asserted that having his motion denied as moot meant that proceedings in the trial court had in fact been stayed. *Ibid.* Harsh words would not doubt be hurled at Mr. Fredella here, save for the fact that he was essentially correct in that no proceedings have taken place in the trial court since leave to appeal was granted. Thus, although the instant case is not stayed at the time of filing, in effect all counsel have acquiesced to awaiting this Court's decision before proceeding.

LEGAL ARGUMENT

THE JOINT REPRESENTATION OF ALL APPELLANTS IN VIOLATION OF THE ORDER UNDER REVIEW JUSTIFIES DISMISSAL OF THE APPEAL

As discussed above, Appellants and both firms to represent them in this action had every opportunity to comply with the Order under review. First, they dragged their feet in the hopes that a letter to the Presiding Judge would solve their problems. Then they demanded a written order suitable for appeal when they had not yet taken steps to comply with the then-two-week-old but still binding oral opinion delivered on February 16, 2024. Even with the written order in hand, unequivocally disqualifying ADM and Mr. Kadish as well as requiring separate counsel for Appellant Evans, Appellants failed to take anything like appropriate action until March 22, 2024.

Even then, their compliance consisted of half measures. ADM was replaced by T&M, but no conflict-free counsel was every obtained for Appellant Evans. T&M conducted themselves as though the requirement for separate counsel simply did not exist. Perhaps they could have been forgiven had they entered joint appearances solely for the purpose of modifying the Order under review to permit joint representation on appeal. That at least would have given appropriate respect to the filed court order requiring separate counsel.

Indeed, the undersigned attorneys fervently wished to be able to point to the collateral bar rule – made infamous by the Rev. Dr. Martin Luther King, Jr.'s stay in the Birmingham jail – as dooming Appellants' application. See Walker v. City of Birmingham, 388 U.S. 307 (1967). Instead, Respondent wonders whether general

principles of equity don't require dismissal here where Appellants made no effort to comply with the prohibition on joint representation. In the alternative, Respondent encourages the Court to invoke its inherent authority to control its calendar and supervise attorneys appearing before it and to dismiss Appellants application on that basis.

MICHAEL EARLE'S CERTIFICATION REVEALS THAT APPELLANTS DO NOT INTEND TO CONCEDE VICARIOUS LIABILITY

Appellants' brief contains a full-throated endorsement of the strength of Respondent's vicarious liability claims. So thoroughly persuaded are Appellants, that they almost concede vicarious liability in their merits brief; almost, but not quite. In the Certification of Michael Earle, first filed in connection with Appellants' opposition to disqualification below, Mr. Earle discusses Appellant Evans's conduct. *Da310.* According to his Certification, Michael Earle is a principal owner and officer of both Earle Appellants. *Ibid* at ¶1. While Mr. Earle certifies that he has "followed the litigation with great interest," he does not certify that he has reviewed all documents and transcripts. *Ibid* at ¶ 3. Indeed, he does not specify in any way what information he is familiar with or what documents he has reviewed, nor does he proffer that his Certification is binding on the Earle Appellants.

Thus, it is more than a little suspicious when Michael Earle swears "Nothing I have reviewed in the course of this litigation indicates that Mr. Evans intentionally

violated company policy, or otherwise intended to cause the accident to occur." As the risk of being pedantic, absent a sworn statement that Michael Earle is familiar with all relevant information, negative inferences based on the unspecified subset of information he is familiar with have no value. Michael Earle continues, again couching his sworn statement in terms of "nothing [he] ha[s] reviewed. *Ibid* at ¶5. Finally, in a non-committal turn of phrase beloved by the undersigned attorneys, Michael Earle concludes that "there appears to have been a miscommunication." *Ibid* at ¶6. Candidly, Michael Earle's personal opinion about the "appearance" of this case has no probative value here and would not be competent evidence against the Earle Appellants at trial.

Respondent asks that the Court review the Certification of Michael Earle closely, as it betrays Appellants' intentions to mislead the Court regarding vicarious liability. It reveals a corporate officer and principal owner who chooses his words very carefully even as Appellants' counsel write like summary judgment on vicarious liability has already been granted. Further, the Certification of Michael Earle lacks an adequate basis of knowledge to support the negative inferences it purports to draw. Finally, and most troublingly, the Certification of Michael Earle is a personal capacity certification. While he explains that he is a corporate officer, he never indicates which corporate officer and his title does not appear on the signature line. Taken together, it seems like the Earle Appellants in the person of

Michael Earle very well may plan on contesting vicarious liability, T&M's glowing assessment of the strengths of Respondent's case notwithstanding.

While deferring to and joining in co-Respondent's just-filed opposition, Respondent also avers that Appellants' slippery discussion of vicarious liability sheds further light on the extent of the conflict presented by joint representation here.

CONCLUSION

For the forgoing reasons and those discussed at length in co-counsel's opposition, Appellants' appeal should be denied and the wisdom of the court below affirmed.

FUGGI LAW FIRM, P.C.
For the firm

MICHAEL R. NAPOLITANO, ESQ.

CAROL MORRIS STAHLBERG, Executrix for the ESTATE OF BERTRAM J. STAHLBERG and CAROL MORRIS STAHLBERG, Individually, Plaintiffs/Appellees, v. WALTER R. EARL TRANSIT, LLC, EARLE ASPHALT COMPANY, and JEFFREY L. EVANS, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No: A-002373-23 TRIAL DOCKET NO: MON-L-2517-22 Sat Below: Hon. Mara Zazzali-Hogan, J.S.C. CIVIL ACTION

REPLY BRIEF IN SUPPORT OF DEFENDANTS'/APPELLANTS' APPEAL OF TRIAL COURT'S ORDER OF FEBRUARY 28, 2024, DISQUALIFYING COUNSEL

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Dated: August 1, 2024

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PRELIMINARY STATEMENT

This appeal follows the trial court's error in disqualifying the law firm of Ahmuty Demers & McManus ("ADM") from its representation of Defendants/Appellants, Jeffrey Evans ("Evans"), Walter R. Earle Transit, LLC, and Earle Asphalt Company (collectively "Earle"), pursuant to Rule of Professional Conduct ("RPC") 1.7.

The decision below, which was rendered by way of Order dated February 28, 2024, was incorrectly premised upon a presumed conflict between Evans and Earle due to a miscommunication between Evans and his Earle supervisor, Michael Morrow, about the cut-through to be utilized while travelling on the Garden State Parkway prior to the accident in question, which resulted in the death of Bertram J. Stahlberg ("the Decedent").

Morrow testified that he advised all Earle drivers, including Evans, that they were to utilize a grass cut-through that was marked by cones and lane closures. Evans testified, however, that he mis-heard Morrow's instructions about the appropriate cut-through to use, and only learned subsequently that he had made a mistake and used an improper paved cut-through immediately preceding the crash. Evans attributed his use of the paved cut-through to a miscommunication between he and Morrow.

The fact that Morrow advised Evans of the appropriate cut-through to use, and Evans mis-heard those instructions and mistakenly used a different cut-through, does not present adverse legal theories between the two, nor does it create a direct, concurrent conflict of interest. Earle has not "thrown Evans under the bus" for its own benefit, and any claim to the contrary is unfounded, incorrect, and whole-heartedly unsupported within the record. Furthermore, neither Evans nor Earle have blamed the other for the accident. Instead, Evans has testified that his use of the paved cut-through was simply a "miscommunication," and Morrow attributes the tragic event to "an accident."

Simply stated, Evans and Earle do not have any adverse legal positions within their defenses of the claims in this litigation but are instead aligned in each and every aspect, and the Respondents have failed to establish othersie. As such, no direct, concurrent conflict of interest is present between Evans and Earle, and, therefore, the trial court's disqualification of ADM was in error.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S DISQUALIFICATION OF ADM WAS IN ERROR AS THE RESPONDENTS HAVE FAILED TO IDENTIFY ANY DIRECT, CONCURRENT CONFLICT OF INTERST BETWEEN EARLE AND EVANS. (Raised Below Da001-002, 1T35:10-38:20).

Disqualification of counsel is a harsh discretionary remedy which must be used sparingly." Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000). "Generally, motions to disqualify are disfavored because they 'can have such drastic consequences.'" Twenty-First Century Rail Corp. v. N.J. Transit Corp., 419 N.J. Super. 343, 357 (App. Div.), certif. granted, 206 N.J. 37 (2011) (quoting Rohm & Haas Co. v. Am. Cyanamid Co., 187 F.Supp.2d 221, 226 (D.N.J. 2001)). "To be resolved in favor of disqualification, the party seeking disqualification must carry a 'heavy burden' and must meet a 'high standard of proof' before a lawyer is disqualified." Carlyle Towers Condominium Ass'n, Inc. v. Crossland Sav., 944 F. Supp. 341, 345 (D.N.J. 1996) (quoting Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1114 (D.N.J. 1993)).

In the matter at hand, the trial court erred is disqualifying ADM because the Respondents have failed to carry their heavy burden in identifying and properly articulating any direct, concurrent conflict of interest between Earle and Evans. Even in response to this appeal, the Respondents do nothing more than offer this Court

assertions and allegations that are unsupported by the record, information that is taken out of context, and bold, baseless assumptions.

Contrary to the Respondents' arguments, neither Earle nor Evans have "blamed" the other for the happening of the accident. Rather, Earle and Evans have different recollections of the communications that occurred just prior to the accident. Earle supervisor, Michael Morrow, testified that he specified in calls over CB radio to drivers, including Evans, that they were to use a grass cut-through that was marked by cones. Da249, 181:24 – 183:5. Evans, however, has testified that he simply heard Morrow use the term "cutoff," and that his use of the paved cut-through was simply a miscommunication between him and Morrow. Da46-47, 29:15-30:3. Nowhere within the record does Evans blame Morrow for his use of the paved cut-through. Likewise, the record is devoid of any mention of blame cast upon Evans by Earle for the happening of the accident. Any assertion that Earle has "thrown Evans under the bus," is imaginary.

Moreover, any argument by the Respondents that the "miscommunication theory" was a fabricated maneuver that was orchestrated by ADM, is simply disingenuous. Evans used the term "miscommunication" upon being questioned at his deposition about his use of the paved cut-through:

> Q: Why did you use the emergency vehicle turnaround at 87.5?
>
> A: Because I was instructed to use the turnaround by the foreman on the job. It was a **miscommunication**, I thought that that was

the one I was supposed to use when there was one further back over the grass that he was talking about.

Q: Who was this person that instructed you?

A: Michael Morrow.[1]

Q: Michael Morrow told you to use a turnaround, but you made a mistake and you used the emergency vehicle turnaround at 87.5 instead of the grass covered turnaround which is closer to 84 and 85, yes?

MR. KADISH: Object to the form. He can answer it.

A: Yes.

[Da46, 27:10-25 (emphasis added).]

If anything has been fabricated within this litigation, it is the assertion that ADM's dual representation of Earle and Evans presents a direct, concurrent conflict of interest. In fact, the Respondents have failed to put forth any evidence contained within the record wherein Evans and Earle utilized adverse legal positions, wherein they assigned responsibility to the other, or wherein each attempted to distance themselves to the detriment of the other.

Furthermore, the Respondents have also failed to direct this Court, or the trial court below, to one single instance wherein a court within this state found a direct, concurrent conflict of interest to exist between an employee and an employer simply for having different recollections, or versions, of the events that led up to the

[1] The Evans transcript incorrectly spells "Morrow" as "Mauro." We therefore substitute the correct spelling herein.

happening of an accident. Respondents' reliance upon New Jersey Div. of Child Protection and Permanency v. G.S., 447 N.J. Super. 539, 570 (App. Div. 2016) is entirely unpersuasive. If anything, that holding illustrates why the Hobbie DeCarlo firm was conflicted out of representing both Stalhberg and the Estate. However, that holding is inapplicable to the current circumstances between Evans and Earle.

Additionally, while the Respondents argue that Earle and Evans are "blaming" each other for the accident, they fail to show support for such a baseless position within the record. That is because neither Evans nor Earle is assigning fault to the other. In fact, when directly questioned about Evans' conduct on the date of the accident, Morrow, who therein had the perfect opportunity to lay blame upon Evans, testified as follows:

> Q: Did you tell Mr. DeFelice that Mr. Evans admitted to you that he went through an illegal cut-through?
>
> A: No.
>
> Q: Did you tell him that he disobeyed your instruction and didn't go through the legitimate cut-through and went through an illegal one?
>
> A: No.
>
> Q: Why not?
>
> A: **It was an accident. I just told him it was an accident.**
>
> [Da251-252, 192:20-193:7 (emphasis added).]

Moreover, there is nothing in the record before this Court to establish that the legal positions of Earle and Evans are directly adverse to one another. To the contrary, both Earle's and Evans' strategies are directly aligned, that being to limit the apportionment of liability attributed to each of them, and to establish, instead, the comparative negligence of the Decedent. A miscommunication, or factual discrepancy, between two employees of a company, about which cut-through was to be utilized prior to the crash, does not, in and of itself, establish a conflict between that company and one of the employees.

Accordingly, no direct, concurrent conflict exists between Earle and Evans which would warrant the disqualification of ADM from the joint representation of each. Without such a conflict, Earle and Evans are entitled to their counsel of choice – that being ADM – to represent them in this litigation. Accordingly, the trial court's Order of February 28, 2024, disqualifying ADM should be reversed.

Lastly, to address the baseless argument regarding Trig & Modugno's ("T&M's") dual representation of Evans and Earle on this appeal, counsel for the Respondents are well aware that T&M entered a limited appearance, by way of a Notice of Appearance in the trial court, for the sole purposes of (1) prosecuting this appeal, and (2) seeking a stay of the matter in the trial court pending this appeal.

CONCLUSION

Based upon the foregoing, and those arguments contained within the moving brief, the trial court's Order of February 28, 2024, disqualifying ADM from its representation of Defendants under RPC 1.7 should be reversed.

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Dated: August 1, 2024