PATERSON BOARD OF EDUCATION, Plaintiff-Appellant, v. PRITCHARD INDUSTRIES, INC., and THOMAS MARTIN, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A – 003079 – 22T2 **Appeal from court orders dated February 17 / April 28 / June 9, 2023, granting reconsideration and summary judgment, by Hon. Vicki A. Citrino, J.S.C., Superior Court of New Jersey, Passaic County, Law Division, Civil, Dkt. No. PAS–L–2013–22** **Submitted to Appellate Division on February 5, 2024**

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF APPEAL

SOUDER SHABAZZ & WOOLRIDGE LAW GROUP, LLP
Attorneys for Plaintiff-Appellant, Paterson Board of Education
570 Broad Street
15th Floor
Newark, New Jersey 07102
Phone: (973) 500 – 2030
Fax: (973) 484 – 7464
E-Mail: bhorsley@sswlawgroup.com
E-Mail: kshabazz@sswlawgroup.com

Bryant Lawrence Horsley, Jr., Esquire (017222006)
Of Counsel and On the Brief

Khalifah Shabazz-Charles, Esquire (007132005)
Of Counsel

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POINT TWO [Appeal of jurisdiction issues] (Argued at Pa369 – Pa371)
A primary jurisdiction analysis requires the court to determine whether the matter at issue is within the conventional experience of judge, is peculiarly within the agency's discretion or expertise, whether inconsistent rulings would disrupt the statutory scheme, and whether prior application has been made to the agency. The application, interpretation, and enforcement of the school law, State aid statute, *N.J.S.A.* 18A:7F-1, *et seq.,* is not within the conventional experience of judges; is a matter peculiarly in the Commissioner of Education's discretion; inconsistent rulings will disrupt the statutory scheme; and no application to the Commissioner was made by Pritchard. So even if the court declined to find that the Commissioner of Education has exclusive jurisdiction, the court lacked primary jurisdiction over Pritchard's Counterclaim. The court committed legal error when it reversed itself and held that it retained jurisdiction over Pritchard's Counterclaim.

1. / 2. "whether the matter at issue is within the conventional experience of judges"; "whether the matter is peculiarly within the agency's discretion, or requires agency expertise" (Argued at Pa369 – Pa370)

3. "whether inconsistent rulings might pose the danger of disrupting the statutory scheme" (Argued at Pa370 – Pa371)

4. "whether prior application has been made to the agency" (Argued Pa371)

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POINT THREE [Private right to a cause of action issues] (Argued Pa372 – Pa373)
The Legislature does not authorize lawsuits against public entities for any and every statutory violation. To sue a public entity in Superior Court for statutory violations, the Legislature must express a private right to a cause of action. After several amendments to *N.J.S.A.* 7F-9, the Legislature never expressed that there is a private right to a cause of action for a private company to sue a public school district in Superior Court. Since Pritchard lacks an express private right to a cause of action, its Counterclaim against the Board must be dismissed. The court thus committed legal error in granting the Counterclaim.

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POINT FOUR [Appeal of failure to exhaust administrative remedies issues] (Argued at Pa373 – Pa374)
Courts have held that the existence of administrative remedies obviates the need for a private right to a cause of action to sue in Superior Court. Courts therefore require the exhaustion of administrative remedies to prevent circumvention of procedures to redress alleged violations against public entities. Administrative remedies before the Commissioner of Education existed for Pritchard to seek redress of the Board's alleged violations of *N.J.S.A.* 18A:7F-9(e)(3). Thus, the existence of the administrative remedies obviates the need for a private right to a cause of action, and Pritchard is legally prohibited from suing the Board in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3) without having exhausted its administrative remedies. Thus, the court committed legal error when it granted the Counterclaim without Pritchard exhausting its administrative remedies.

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POINT FIVE [Appeal of private right to a cause of action issues] (Pa375– Pa378)
When a private right to a cause of action is not express, then a court may look at whether there is an implied right to a private cause of action. There must be evidence that the Legislature intended to create a private right of action and it must be consistent with the Legislative scheme. The Legislature did not intend a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3), and allowing such lawsuits would be inconsistent with the Legislative scheme. Hence, the court should not infer that there exists an implied private right to a cause of action that allows Pritchard to sue the Board in Superior Court. Without an implied right to a cause of action to sue the Board on its Counterclaim, the Counterclaim should have been dismissed.

Page 28 – 31
POINT SIX [Appeal of private right to a cause of action, no remedy, issues] (Argued at Pa378 – Pa380)
To determine whether there is an implied private right to a cause of action, there also must be a private remedy. Courts cannot infer a private right to a cause of action unless a private remedy exists. The statute that Pritchard seeks relief under, *N.J.S.A.* 18A:7F-9(e)(3), does not include a private remedy. Hence, without a private remedy, the court cannot infer that Pritchard has an implied private right to a cause of action to sue the Board in Superior Court, requiring the dismissal of the Counterclaim.

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POINT SEVEN [Appeal of Counterclaim as untimely] (Argued at Pa381 – Pa383)
Pritchard's Counterclaim is based on April 2020 and July 2020 invoices, which Pritchard alleges were not paid in full in violation of *N.J.S.A.* 18A:7F-9(e)(3). Pritchard's suit against the Board was filed September 16, 2022, more than two years after the accrual of the action. The applicable statute of limitations, the doctrine of accord and satisfaction, and the equitable doctrine of laches, bars Pritchard's Counterclaim as out of time. The court therefore committed legal error in granting the Counterclaim. (Argued at Pa362 – Pa368)

VII. A. New Jersey Court Rule 4:69-1, et seq. details the procedure to force a government entity to comply with a statute. Those suits for a writ of mandamus are filed as a Complaint in Lieu of Prerogative Writ, and carry a 45-day statute of limitations under R. 4:69-6. Pritchard's Counterclaim clearly and unambiguously seeks to enforce the District's compliance with N.J.S.A. 18A:7F-9(e)(3). Pritchard's Counterclaim for statutory compliance was filed well past the 45-day statute of limitations, necessitating dismissal of the Counterclaim. (Argued at Pa381 – Pa382)

VII. B. After Pritchard received what it now deems a partial payment of the April 2020 and July 2020 invoices, it never sent notice of breach of contract, nor petitioned the Commissioner for relief. Pritchard did not formally challenge the Board until it filed an Answer and Counterclaim to the lawsuit in September 2022. Being in a new budget year, the Board is unduly prejudiced if it has to fund the unbudgeted and unanticipated payment Pritchard now seeks in the Counterclaim. The doctrines of accord and satisfaction, and laches, prohibits Pritchard from obtaining recovery over 2 years later in retaliation to a lawsuit. (Argued Pa224 – Pa225)

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POINT EIGHT [Court's interpretation would render statute unconstitutional] (Argued at Pa384 – Pa387)
Under the U.S. and New Jersey Constitutions, no State may pass a law that impairs the obligations of contracts. The contract between Pritchard and the Board required Pritchard to perform work as a condition of receiving payment. The obligation of Pritchard was to perform services as a prerequisite to payment, and the obligation of the Board was to pay Pritchard for services rendered. Pritchard's Counterclaim asks the court to force the Board to pay for services that were not performed, even though there is not a renegotiated contract enabling such a gratuitous arrangement. The legal basis for the Counterclaim requires the court to interpret N.J.S.A. 18A:7F-9(e)(3) in a manner that violates the Impairment of Contracts Clauses under the U.S.

Constitution and New Jersey Constitution, because if the Board is required to pay Pritchard without a renegotiated contract, then the statute, as applied, impaired the obligation of Pritchard to perform services as a prerequisite to payment, and impaired the obligation of the Board to pay Pritchard after services were rendered.

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POINT NINE [Analysis of Count 1 of the Counterclaim] (Argued at Pa387 – Pa391)
Count One of the Counterclaim for an alleged "Breach of Contract" should be dismissed because Pritchard fails to establish all four elements of a prima facie case.

Four elements of a breach of contract claim

IX. A. "first, that the parties entered into a contract containing certain terms" Pritchard does not plead or identify a renegotiated contract where the Board was obligated to pay Pritchard despite not working. (Argued Pa388 – Pa389)

IX. B. "second, that plaintiffs did what the contract required them to do" Pritchard does not plead or establish that it performed the work and was therefore entitled to payment. (Argued at Pa389)

IX. C. "third, that defendants did not do what the contract required them to do, defined as a breach of the contract"
The contracts required the Board to pay for work performed. Pritchard does not plead or establish that the Board failed to pay for work actually performed. (Argued at Pa389 – Pa390)

IX. D. "fourth, that defendants' breach, or failure to do what the contract required, caused a loss to the plaintiffs" (Argued at Pa390)

IX. E. All four elements are required to establish a prima facie case for breach of contract – Pritchard has none, requiring a dismissal of Count One of the Counterclaim. (Argued at Pa390)

Page 41 – 42
POINT TEN [Individual analysis of Count 2 of the Counterclaim] (Argued Pa391)
Unjust enrichment requires Pritchard to establish a benefit conferred upon the Board, and expected remuneration due to the Board's receipt of the benefit. The Board obtained no benefit whatsoever for Pritchard not working, so there was no expected remuneration for not working. Count Two of the Counterclaim for an alleged

"Unjust Enrichment" should be dismissed because Pritchard does not satisfy the elements for a prima facie case of unjust enrichment.

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POINT ELEVEN [Individual analysis of Count 3 of Counterclaim] (Argued Pa392)
Count 3 of the Counterclaim for an alleged "Failure to Follow a Statutory Obligation" should be dismissed because it is not a legally-recognized cause of action, and did not follow the procedures under *R.* 4:69-1, *et seq.,* required to force a public entity to comply with a statute.

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POINT TWELVE [Deficiency of court order] (Pa153 – Pa159)
The court's summary judgment order never articulated which of the three counts it granted favor of Pritchard. This obvious deficiency cannot make the Board liable to Pritchard. (Argued at Pa466 – Pa467)

Page 45 – 46
POINT THIRTEEN [Denial of ability to obtain discovery] (Argued at Pa231; Pa449 – Pa450)
The Board's second set of interrogatories, which would have been followed by a deposition, were designed to obtain further proofs of each of its claims in the Complaint, as well as test the veracity of Defendant's purported documents and claims. The Board was entitled to pursue discovery of its claims prior to the dismissal of its 10-count Complaint. The court violated *R.* 4:46-2 in dismissing Plaintiff's 10-count Complaint several months before the discovery end date and without affording the Board meaningful ability to prosecute its case before the discovery end date.

Page 46 – 47
POINT FOURTEEN [Erroneous wholesale dismissal of entire Complaint] (Argued at Pa409 – Pa443)
Pritchard's summary judgment motions and the court's dismissal order fail to specifically address each of the ten counts and whether the Board can sustain the elements for a cause of action of each of the ten counts. The court's wholesale dismissal of the Board's ten individual counts, without any analysis of same, cannot successfully meet the standard for the court to dismiss the Board's entire 10-count Complaint months before the expiration of the original discovery end date. To the contrary, a fair analysis dictates that the Board could sustain a prima facie case for each of the ten individual counts pleaded in the Complaint, and to the extent proofs

were lacking, the Board indeed was entitled to obtain its answers to interrogatories and depose Defendants prior to the discovery end date.

Page 48 – 49
POINT FIFTEEN [Improper credibility and fact-finding] (Argued Pa228 – Pa229)
In summary judgment motions, the court should not play the 13th juror by resolving genuine issues of material facts in dispute. The court also should not make credibility determinations and findings of fact that are relegated to the jury. In dismissing the Complaint, the court erroneously made findings of fact and credibility determinations that were within the province of a jury. The court's dismissal of the Complaint should therefore be reversed.

Page 49 – 53
POINT SIXTEEN [Mistake of fact] (Argued at Pa221 – Pa227)
The parties clearly disputed the amount of money owed in April and July 2020. The court made a mistake of fact and legal error when it ordered the Board to pay the full amount claimed by Pritchard based solely on the self-serving certification and contested, purported payroll record from an irrelevant date produced by the Defendants. Being that Pritchard never formally contested the non-payment of the April/July 2020 invoices until over two years later in response to a lawsuit, the court denied the Board the ability to pursue an establish an accord and satisfaction defense as to why Pritchard cannot now claim its owed for the April/July 2020 invoices.

Page 53 – 54
POINT SEVENTEEN [Lack of, Failure of, Consideration] (Argued Pa408 – Pa409)
Consideration, or a value exchange by both parties, is necessary for an enforceable contract. The consideration for the contract was for the Board to pay Pritchard in exchange for services rendered. That consideration failed when Pritchard was no longer rendering services and was thus not entitled to payment. Pritchard's claims for additional payments despite not rendering services also fails for lack of consideration. Summary judgment on Pritchard's disingenuous breach of contract theory should have therefore been denied.

Page 55 – 56
POINT EIGHTEEN [Pritchard's breaches of contract] (Argued at Pa410 – Pa420; Pa490 – Pa494)
In addition to the force majeure clause voiding the contract, Pritchard breached the contract several times over, which underscores the necessity for the parties to renegotiate a new contract if it was to pay Pritchard under *N.J.S.A.* 18A:7F-9(e)(3).

The court's order dismissing the Complaint improperly rewarded Pritchard for breaching the contract.

1. Breach of contract at Section 14, Force Majeure (Argued at Pa418)

2. Other breaches of contract (Argued at Pa410 – Pa420; Pa490 – Pa497)

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POINT NINETEEN [Prospective Application of *N.J.S.A.* 18A:7F-9(e)(3)] (Argued at Pa402 – Pa407)
The effective date of the amendment authorizing Pritchard to pay its employees from the Board's money is June 29, 2020. As with all statutes, *N.J.S.A.* 18A:7F-9(e)(3) must be given prospective application, which negates all of Pritchard's claims for payment on its April / May / June 2020 invoices. The Legislature undisputedly did not express retroactive application of *N.J.S.A.* 18A:7F-9(e)(3). Under the two-prong implied retroactive application test, the court cannot apply retroactive application of the statute because 1) the Legislature never intended to give the statute retroactive application; and 2) the retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice. Pritchard's claims, which are based on the retroactive application of the statute, thus fails, thus requiring a denial of its motion for summary judgment.

XIX. A. Statutes by default have prospective application. (Argued at Pa402)

XIX. B. The statute amendment relied upon by Pritchard in claiming that it could lawfully convert the Board's money to pay its employees became effective June 29, 2020, which negates any legitimate claim for payment of the April / May / June 2020 invoices. (Argued at Pa403 – Pa404)

XIX. C. Legislature undisputedly did not express retroactive application of N.J.S.A. 18A:7F-9(e)(3). (Argued at Pa404)

XIX. D. Under the first prong of the implied retroactive application test, Pritchard's claims fail because the Legislature never intended to give N.J.S.A. 18A:7F-9(e)(3) retroactive application. (Argued at Pa404 – Pa405)

XIX. E. Under the second prong of the implied retroactive application test, Pritchard's claims fail because the retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice. (Argued at Pa405 – Pa407)

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

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New Jersey Court Rules

New Jersey Statutes

New Jersey Regulations

N.J.A.C. 6A:3-1.2

N.J.A.C. 6A:3-1.3(i)

N.J.A.C. 6A:3-3.2

N.J.A.C. 6A:23A-5.2

N.J.A.C. 6A:23A-8.3(f)(2)(ii)

Caselaw

Abbott v. Burke, 100 N.J. 269, 297-301, (1985)

Alexander v. Sandoval, 532 U.S. 275, 286 (2001)

Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ.,
352 N.J. Super. 420, 424 (App. Div. 2002)

Ardan v. Bd. of Rev., 231 N.J. 589, 609-10 (2018)

Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 157 (2001)

Bower v. Bd. of Educ. of City of E. Orange, 149 N.J. 416, 420 (1997)

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523

Cnty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)

Cont'l Bank of Pennsylvania v. Barclay Riding Acad., Inc., 93 N.J. 153, 170 (1983)

EnviroFinance Grp., LLC v. Env't Barrier Co., LLC,
440 N.J. Super. 325, 350 (App. Div. 2015)

Fox v. Millman, 210 N.J. 401, 417 (2012)

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STATEMENT OF ITEMS SUBMITTED TO THE COURT IN THE SUMMARY JUDGMENT MOTIONS

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- Notice of Motion
- Proposed Order
- Statement of Material Facts
- Brief
- Cert of Thomas Martin
- Cert of Patrick T. Collins Part 1, 3, other

* Not produced in Appendix as per *R.* 2:6-1(a)(2)

January 17, 2023
Plaintiff-Appellant's Cross-Motion for Partial Summary Judgment on the Counterclaim *

- Notice of Motion
- Proof of Service
- Brief in Support of Cross-Motion for Partial Summary Judgment on the Counterclaim *
- Statement of Material Facts *
- Proposed Order
- Omnibus Certification of Exhibits
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* Other than the Brief in Support of Cross-Motion for Partial Summary Judgment as to the Counterclaim, and the Statement of Material Facts, at Pa332 – Pa395, which were produced in the Appendix under *R.* 2:6-1(a)(2) because the matter is referenced in the Appellate Brief as to where it was argued below, and the document is required for a full understanding of the issues presented, the remainder of the materials are not submitted in the Appendix as per *R.* 2:6-1(a)(2).

February 7, 2023
Defendants-Respondents' Reply Brief * **

- Reply Brief
- Supplemental Certification of Thomas Martin

* Not produced in Appendix as per *R.* 2:6-1(a)(2)
** Pritchard's Response to Board's Statement of Undisputed Facts, Feb. 7, 2023, at 273a – 275a

February 7, 2023
Plaintiff-Appellant's Opposition to Motion for Summary Judgment * **
- Brief
- Response to Statement of Undisputed Facts
- Opposition (second filing)

* Not produced in Appendix as per *R.* 2:6-1(a)(2)
** Board's Response to Pritchard's Statement of Undisputed Facts, Feb. 7, 2023, at 267a – 272a

February 8, 2023
Plaintiff-Appellant's Letter to Court re. Defendants' improper filings *
* Not produced in Appendix

February 13, 2023
Defendants-Respondents' Second Reply (Letter) Brief *
* Not produced in Appendix as per *R.* 2:6-1(a)(2)

February 15, 2023
Plaintiff-Appellant's Reply Brief in Support of Cross-Motion for Partial Summary Judgment on the Counterclaim
* Not produced in Appendix as per *R.* 2:6-1(a)(2)

March 10, 2023
Defendants-Respondents' Motion for Reconsideration for Summary Judgment
- Proposed Order
- Certification of Thomas Martin
- Brief
- Statement of Material Facts

* Not produced in Appendix as per *R.* 2:6-1(a)(2)

April 7/24, 2023
Plaintiff-Appellant's adjournment requests
* Not produced in Appendix

April 26, 2023
Plaintiff-Appellant's Opposition to Motion for Reconsideration of Summary Judgment *
- Brief in Support of Opposition to Motion for Reconsideration *
- Certification of Exhibits A – C

- Letter to court

* Other than the Brief in Support of Opposition to Motion for Reconsideration at Pa486 – Pa502, which was produced in the Appendix under *R.* 2:6-1(a)(2) because the matter is referenced in the Appellate Brief as to where it was argued below, and the document is required for a full understanding of the issues presented, the remainder of the materials are not submitted in the Appendix as per *R.* 2:6-1(a)(2).

April 26, 2023
Defendants-Respondents' Reply Letter Brief in Support of Motion for Reconsideration
* Not produced in Appendix as per *R.* 2:6-1(a)(2)

May 8, 2023
Plaintiff-Appellant's Letter to Court Seeking Clarification
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May 18, 2023
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- Proposed Order
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* Other than the Certification in Support of Motion with Exhibits A-C at Pa466 – Pa485, which were produced in the Appendix under *R.* 2:6-1(a)(2) because the matter is referenced in the Appellate Brief as to where it was argued below, and the document is required for a full understanding of the issues presented, the remainder of the materials are not submitted in the Appendix as per *R.* 2:6-1(a)(2).

PROCEDURAL HISTORY

1. Plaintiff filed its Complaint on August 11, 2022. The Complaint included Plaintiff's initial set of interrogatory and document request. *Pa1 – Pa72*

2. Pritchard filed an Answer & Counterclaim on September 16, 2022. *Pa73 – Pa152*

3. The court assigned an original discovery end date of July 13, 2023, which, as of the date of the court's orders dismissing the Complaint and granting the Counterclaim, had not yet expired.

4. Without any discovery exchanged by the parties, and 7 months before the discovery end date, Defendants filed a motion for summary judgment on the Counterclaim and to dismiss the Complaint.

5. After consented-to adjournments, Plaintiff filed a motion to dismiss the counterclaim in lieu of an answer for failure to state a claim under R. 4:6-2(e), a cross-motion for summary judgment on the counterclaim only, and opposition to the summary judgment motion. *Pa332 – Pa395; Pa396 – Pa451*

6. After the parties submitted oppositions and replies, the court heard oral argument on the motions on February 17, 2023.[1] Following oral argument, the court filed three orders: 1) denying Defendants' motion for summary judgment; 2) denying Plaintiff's motion to dismiss in lieu of an answer under *R.* 4:6-2(e); and 3) granting Plaintiff's cross-motion for summary judgment on the Counterclaim, and finding

[1] Transcript of Summary Judgment Hearing on February 17, 2023; 1T (pgs. 1-24)

that Pritchard breached the contract. *Pa452 – Pa458; Pa162 – Pa168; Pa159 – Pa175*

7. After more than 20 days passed, Defendant thereafter sought a reconsideration of the court's decision to grant Plaintiff's cross-motion for summary judgment on the Counterclaim, to which Plaintiff opposed. Following oral argument, on April 28, 2023,[2] the court granted the reconsideration motion. The court order was not certified as a final judgment, and eCourts did not indicate that the matter was final. *Pa153 – Pa159*

8. Within 20 days of the court's April 28th order, Plaintiff filed a letter and motion for clarification of the court's order as to whether it was interlocutory as to the Counterclaim only, or also dismissed the Complaint, and asked the court to extend the time to file a reconsideration motion if the court clarified that the order constituted a final judgment as to all issues. *Pa466 – Pa485*

9. On June 9, 2023, the court signed a clarification order claiming that the April 28th order was a final judgment even though the court never certified it as a final judgment, and also dismissed Plaintiff's Complaint, and denied Plaintiff the ability to seek a reconsideration motion. *Pa160 – Pa 161*

10. On June 12, 2023, over a month before the original discovery end date, Plaintiff filed a timely appeal. *Pa176 – Pa180*

[2] Transcript of Reconsideration Hearing on April 28, 2023; 2T (pgs. 1-17)

STATEMENT OF FACTS

Paterson Board of Education ("Board" or "District") educates over 27,000 Pre-K–12th Grade students across its 52 schools. Other than a few head custodians, the District does not employ its own custodial staff, so it relies on outside vendors to maintain its 54 facilities across 4.2-million square feet of building space. For the 2019-2020 school year, the Board contracted with Defendants, Pritchard Industries, Inc. ("Pritchard"), led by its Vice President, Thomas Martin ("Tom Martin"), to provide custodial services under a $8.2-million custodial services contract. The Board has a multi-year history contracting with Pritchard. Each year, as with all services contracts with all vendors, Pritchard was required to actually perform work as a prerequisite for payment.[3]

In March 2020, during the pandemic, Governor Murphy issued a stay at home order and ordered the closure of all schools, requiring the District to pivot to a costly and burdensome remote instruction model that it never before implemented in its history. With over 70% of its 27,000+ students living at or below the poverty level, the stay at home order created extraordinary logistical, financial, and emotional burdens on the District that were unbudgeted and unanticipated, which included: feeding all of its students 2-3 meals a day during a stay-at-home order, ensuring that over 22,000 students were supplied with computers and WiFi to engage in remote instruction, and

[3] Pa55 – Pa61; Pa211 – Pa215

ensuring compliance with the Individualized Education Plans (IEPs) of over 3,600 students.[4]

As a result of Governor Murphy's school closures and stay at home orders, Pritchard did not work for the months of April, May, June, and July 1-6, 2020, so it provided no value or benefit to the Board or its 27,000+ students. Although the District's schools were closed and no services were rendered in April – July 6, 2020, Pritchard submitted invoices seeking payment of $1,921,550.[27] for purported "custodial services" that were never rendered. Pritchard claims that a school law, *N.J.S.A.* 18A:7F-9(e)(3), under the New Jersey Department of Education's jurisdiction, enabled them to receive this $1,301,300.[18], but they did not comply with any of the major components of that law, which mandated a renegotiated written contract and allowed the Board access to certain company data to determine what a fair payment would be. Pritchard alleges that the $1,301,300.[18] received for not working was converted to pay its employees, but Pritchard's own unionized workforce sent the Board a letter in June 2021 advising that several of their members were actually laid off by Pritchard, and did not receive payment.[5] And Pritchard's own payroll records show that their actual payroll expenses were over $427,000 less than the money it unlawfully obtained from the Board, which begs the question, "Where did the $427,000 of excess funding go?".[6]

[4] Pa215 – Pa216; Pa267 – Pa275
[5] Pa221
[6] Pa226 – Pa227

Upon the Superintendent's discovery and investigation that Pritchard unlawfully obtained payment of the $1,301,300.[18] as a result of a breach of contract and false pretenses, the Board sought an immediate return of the money. Since Pritchard alleged that it believed payment was lawful under *N.J.S.A.* 18A:7F-9(e)(3), as a measure of good faith, the Board submitted a Questionnaire so Pritchard could comply with the statute and so the parties could come to an amicable agreement with Pritchard over a fair, reasonable, and compliant payment with the statute. But rather than do the right thing, Defendants thumbed their nose at the Board (and, by extension, the 27,000+ Paterson students and their families), and refused to return any of the money, and refused to comply with the law they claim authorized their payment.[7]

In a fiscal crisis where District students tremendously suffered academically, physically, and emotionally during the school closures, that $1,301,300.[18] in critical funding that Defendants' illegally secured from Plaintiff *could* have been used to fund educational programs and services to combat learning loss and render social and emotional supports for the 27,000+ students negatively impacted from the closures. But when given the choice to do the right thing and return the money, Pritchard and Tom Martin chose corporate profit over student welfare. The Board was therefore forced into the unenviable predicament to petition the court for relief and justice for

[7] Pa62 – Pa72; Pa228

the return of the taxpayer's $1,301,300.[18] that Defendants secured illegally pursuant to a breach of contract and tortious conduct.[8]

The Board is paid in full for all Pritchard invoices, and between April 2020 and September 16, 2022, when Pritchard filed its Answer & Counterclaim, at no time did Pritchard produce any notice of a breach of contract, nor has Pritchard sought relief from the Commissioner of Education that it believed the Board violated the school law statute, *N.J.S.A.* 18A:7F-9(e)(3). So it came as a surprise that on September 16, 2022, in retaliation for being sued, Pritchard filed a Counterclaim alleging that the Board still owed on a second April 2020 invoice for $620,250.[09], a $2,054.[40] invoice that the Board actually paid before the Answer was filed, and an alleged $77,141.[40] underpayment of a July 2020 invoice for $591,417.[42], even though the invoice was satisfied in full. Although Pritchard never petitioned the Commissioner for relief, Pritchard's Counterclaim incorrectly claims that the school law statute under the Commissioner of Education's jurisdiction, *N.J.S.A.* 18A:7F-9(e)(3), entitles them to full payment, inclusive of their profits and net revenues over and above actual payroll expenses.[9]

As if receiving $1,301,300.[18] for not working is not enough, Pritchard's Counterclaim sought to siphon an additional $697,391.[49] for not working – money that the Board needs to educate the students who still suffer from the educational losses from the school closures. If this court affirms the court's reconsideration order granting

[8] Pa222 – Pa224
[9] Pa267 – Pa275

Pritchard's Counterclaim for $697,031, then the court will effectively convert the parties' contract requiring the performance of services as a condition of getting paid, into an illegal no-show contract that grants Pritchard a total windfall of $1,998,691.[67] of taxpayer money for not working – all to the detriment of the education of over 27,000+ Paterson students who need the resources for its education. And by reaffirming the court's original, correct ruling dismissing the Counterclaim, and allowing the Board to pursue its 10-count Complaint, the Board will be able to renegotiate a fair payment to Pritchard consistent with the statute, and recoup resources that were unlawfully and unjustly taken from Paterson's students.[10]

ISSUES PRESENTED

This appeal asks the Appellate Division to correct the trial court's error on the following **two main issues**.

1. During the pandemic, on April 14, 2020, the Legislature passed a Title 18A school law statute, *N.J.S.A.* 18A:7F-9(e)(3), authorizing school districts to renegotiate contracts with vendors to provide for payments during a Covid-related work stoppage. In passing that statute in mid-April, and amending it in late-June 2020, the Legislature never expressly or impliedly conferred a private right to a cause of action for private vendors to sue public school districts in Superior Court related to the enforcement or interpretation of that statute. Rather, under *N.J.S.A.* 18A:6-9, the Commissioner of

[10] Pa226 – Pa231

Education retains jurisdiction to adjudicate such claims over the school laws, including *N.J.S.A.* 18A:7F-9(e)(3). Defendants never exhausted its administrative remedies with the Commissioner, but brought a Counterclaim and motion for summary judgment seeking the interpretation, enforcement, and adjudication of an 18A school law statute, *N.J.S.A.* 18A:7F-9(e)(3), within the exclusive jurisdiction of the Commissioner of Education. In its original February 17, 2023, order, the court correctly concluded that the court lacked jurisdiction over Defendants' 18A school law claims, and that Defendants breached the contract. In its April 28, 2023, reconsideration order, did the court commit legal error when it reversed itself and retained jurisdiction to adjudicate Defendants' school law claim to enforce and interpret an 18A statute in a suit that the Legislature never expressly or implied authorized to be brought in Superior Court?

2. It is axiomatic that plaintiffs may use the discovery period to obtain discoverable information from defendants to prosecute its complaint. Under the summary judgment standard, trial judges should refrain from resolving issues relegated to a jury, namely, credibility determinations and resolving genuine issues of material facts in dispute. Seven months before the original discovery end date, Defendants' moved for summary judgment, seeking dismissal of Plaintiff's 10-count Complaint alleging various breaches of contract, torts such as fraud and civil theft, and a demand for contractual indemnification. In its original February 17, 2023, order, the court correctly denied Defendants' summary judgment to dismiss the 10-count Complaint, which had no analysis whatsoever related to whether Plaintiff's could establish a prima facie cause

of action under the ten counts pleaded in the Complaint. In its April 28, 2023, reconsideration order, did the court commit legal error when it reversed itself and made credibility determinations and resolved genuine issue of material facts in dispute by dismissing Plaintiff's 10-count Complaint 2.5 months before the original discovery end date?

LEGAL ARGUMENT

This Brief has two parts, and addresses the granting of summary judgment as to the Counterclaim and Complaint separately, in that order.

ARGUMENTS RELATED TO THE APPEAL OF THE COURT'S GRANTING OF THE COUNTERCLAIM (Pa153 – Pa159; Pa160 – Pa161)

POINT ONE [Appeal of jurisdiction issues] (Argued at Pa362 – Pa368)

The Commissioner of Education retains exclusive jurisdiction for matters arising under the school laws. Title 18A school law statutes, which includes *N.J.S.A.* 18A:7F-9, are the school law statutes falling under the Commissioner's jurisdiction. Pritchard's Counterclaim for payment, alleging violations and seeking enforcement of *N.J.S.A.* 18A:7F-9, requires an interpretation and application of this school law statute, so the Counterclaim is based wholly on a statute falling under the exclusive jurisdiction of the Commissioner of Education. The Judge's first summary judgment order that the Superior Court, Law Division, lacked jurisdiction to adjudicate Pritchard's 18A school law Counterclaim was correct, and the court committed error when it reversed itself and held that it retained jurisdiction over Pritchard's Counterclaim.

The Legislature determined that the Commissioner of Education (not Superior Court, Law Division) retains jurisdiction over matters arising under Title 18A school laws, such as *N.J.S.A.* 18A:7F-9. The Commissioner of Education jurisdiction statute, *N.J.S.A*. 18A:6-9, is entitled, "Jurisdiction over controversies and disputes under school law not relating to higher education and rules of the commissioner and the state board".

As per *N.J.S.A*. 18A:6-9, "The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner".

"The Commissioner's authority is plenary."[11] The "the legislative purpose to set up a comprehensive system of internal appeals with broad powers vested in the administrative tribunals to insure that controversies are justly disposed of in accordance with the School Laws".[12] Citing a host of precedent, the Appellate Division concluded that, "The State Department of Education, through its State Board and Commissioner, has broad powers and responsibilities to supervise public education in the State and **effectuate** constitutional and **legislative** policies concerning it" (emphasis supplied).[13]

"The Commissioner of Education has complete power to hear and determine all controversies and disputes arising under the school laws."[14] "It is, of course, clear that the Commissioner has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws and that, moreover, the Supreme Court has repeatedly reaffirmed the great breadth of the Commissioner's power."[15]

A. The Counterclaim alleges violations of *N.J.S.A.* 18A:7F-9(e)(3), and seeks interpretation, enforcement, and payment under this 18A school law statute. (Argued at Pa363 – Pa365)

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[11] *Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ.*, 352 N.J. Super. 420, 424 (App. Div. 2002)
[12] *Laba v. Bd. of Educ. of Newark*, 23 N.J. 364, 381–82, 129 A.2d 273, 283 (1957)
[13] *Piscataway Twp. Bd. of Educ. v. Burke*, 158 N.J. Super. 436, 440–41 (App. Div. 1978)
[14] *Sukin v. Northfield Bd. of Ed.,* 171 N.J. Super. 184, 187 (App. Div. 1979)
[15] *Theodore v. Dover Bd. of Ed.,* 183 N.J. Super. 407, 412–13 (App. Div. 1982)

Here, a fair reading of the Counterclaim dictates that it is essentially a claim for relief under the school laws, *N.J.S.A.* 18A:7F-9(e)(3). Pritchard clearly and unambiguously alleged a violation of *N.J.S.A.* 18A:7F-9(e)(3) for its attempted cause of action. Rather than cite to the contract or specific contractual provision where the Board was required to pay, Pritchard's sole contention in the Counterclaim is that the school law statute, *N.J.S.A.* 18A:7F-9(e)(3), obligated the Board to pay its April and July 2020 invoices. For example, the Statement of Facts section to the Counterclaim specifically quotes *N.J.S.A.* 18A:7F-9(e)(3) and cites to it several times. Within the three counts, in Paragraph 15 of the Counterclaim, Pritchard states, "By virtue of N.J.S.A. 18A:7F-9, Plaintiff could not claim to refuse payment because Pritchard did not provide custodial services in those months". Even Count Three is entitled, "Failure to Follow a Statutory Obligation", *i.e., N.J.S.A.* 18A:7F-9(e)(3). In Paragraph 23 of the Counterclaim, Pritchard wrongly asserts that "*N.J.S.A.* 18A:7F-9(e)(3) mandates" that the Board pay Pritchard, and asks the court to enforce this mandate.[16]

Pritchard's Counterclaim attaches five exhibits to it, and not one exhibit is of the 2019-2020 or 2020-2021 contract that the Board allegedly breached.[17] And most telling of Pritchard's real claim is its original summary judgment brief and statement of material facts mentions and cites the statute, *N.J.S.A.* 18A:7F-9, no less than 89 times. The entirety of Pritchard's three main arguments in the summary judgment brief rests

[16] Pa111 – Pa115
[17] Pa118 – Pa150

wholly on the (mis)interpretation and (mis)application of *N.J.S.A.* 18A:7F-9. Each of the three point headings in the summary judgment brief specifically reference *N.J.S.A.* 18A:7F-9(e)(3). In contrast, Pritchard's summary judgment motion states "breach of contract" only six times, but *all* references to a breach of contract refer only to Pritchard's summary of the Board's original Complaint. Not one of the three main points in the summary judgment brief mention the elements of a breach of contract cause of action, nor do they analyze how the Board's breach of contract is the basis for judgment. Instead, the alleged violation of the school law statute, *N.J.S.A.* 18A:7F-9(e)(3), forms the sole basis for Pritchard's claim for relief. For example, Pritchard's summary judgment brief asserts, "Therefore, under the plain language *N.J.S.A.* 18A:7F-9(e)(3), as well as the legislative history and spirit of the statute, Paterson is required to pay Pritchard the money that Pritchard is owed in the amount of $697,391.49." Of course, Pritchard does not allege that the money is owed pursuant to a breach of contract, but instead admits that its claim for payment is based wholly on the application of the school law statute, *N.J.S.A.* 18A:7F-9(e)(3), under the Commissioner's jurisdiction.

It is impossible to ignore the observable reality that Pritchard's entire claim for judgment rests in the interpretation and application of *N.J.S.A.* 18A:7F-9(e)(3). Hence, Pritchard's Counterclaim is nothing more than an attempted claim to enforce an alleged violation of an 18A school law statute under the Commissioner's jurisdiction.

B. The statute itself confirms the Commissioner's jurisdiction over the Counterclaim. (Argued at Pa365 – Pa366)

Title 18A contains the education / school law statutes under the Commissioner's jurisdiction. *N.J.S.A.* 18A:7F-9 is organized under the *Comprehensive Education Improvement and Financing Act,* which are the 18A statutes with the "7F" designation. These 7F statutes govern school funding and budget matters, and certainly fall within the purview of the Commissioner's jurisdiction. The beginning of the statute at issue confirms the Commissioner's jurisdiction in the enforcement and violations of *N.J.S.A.* 18A:7F-9(e)(3). As per *N.J.S.A.* 18A:7F-9(a):

> In order to receive any State aid…a school district…shall comply with the rules and standards for the equalization of opportunity…and shall further comply with any directive issued by the **commissioner**…The **commissioner** is hereby authorized to withhold all or part of a district's State aid for failure to comply with any rule, standard or directive. (emphasis supplied)

The Legislature thus expressly authorized the Commissioner of Education (not Superior Court, Law Division) to enforce compliance with *N.J.S.A.* 18A:7F-9. In carrying out that authority, the Commissioner of Education (not Superior Court) is authorized to withhold State funding for school districts who are not compliant.

The original statute under *N.J.S.A.* 18A:7F-9, which confirms the Commissioner's authority to withhold State aid for lack of compliance, became effective in December 1996. At no time was there a subsequent amendment that granted those powers in the Superior Court, Law Division. The statute that Pritchard's Counterclaim and summary judgment rely upon does not have general application to

all persons, such as civil rights statutes. Instead, the 18A statute is specific and applicable only to school districts, so it no doubt arises under the school laws for which the Commissioner of Education retains jurisdiction.

C. New Jersey Dept. of Education regulations reinforce the Commissioner's jurisdiction over *N.J.S.A.* 18A:7F-9 violations. (Argued at Pa366 – Pa367)

The Commissioner's jurisdiction to enforce violations of *N.J.S.A.* 18A:7F-9 is further reiterated through Title 6A of the Administrative Code. Title 6A of the Administrative Code are the New Jersey Department of Education regulations to implement Title 18A school law statutes. These regulations confirm the Commissioner's authority and jurisdiction over violations of *N.J.S.A.* 18A:7F-9. For example, in *N.J.A.C.* 6A:3-3.1, where the Commissioner is authorized to issue an order to show cause to school districts for 18A violations, *N.J.S.A.* 18A:7F-9 is mentioned twice:

> An order to show cause [from the Commissioner of Education] shall be appropriate in the following circumstances, although it is not to be deemed limited thereto:
> …
> 2. Withholding State aid for unsuitable facilities (N.J.S.A. 18A:33–2 and **18A:7F–9**)
> …
> 7. Withholding or recovery of State aid due to unreasonable, ineffective or inefficient expenditures (**N.J.S.A. 18A:7F–9** and N.J.A.C. 6A:23A–5.1). (emphasis supplied)

Under *N.J.A.C.* 6A:23A-8.3(f)(2)(ii), if the Commissioner determines non-compliance with budget matters, a school district "May be subject to withholding of State aid, pursuant to N.J.S.A. 18A:7F-9". Also, under *N.J.A.C.* 6A:23A-8.3(f)(2)(ii), if the

Commissioner determines repeat non-compliance with budget matters, a school district "shall be subject to" "Withholding of State aid, pursuant to N.J.S.A. 18A:7F-9". Hence, the New Jersey Department of Education's regulations no doubt specifically confirm the Commissioner's jurisdiction and authority over *N.J.S.A.* 18A:7F-9.

D. Administrative law precedent confirms the Commissioner's jurisdiction over claims under *N.J.S.A.* 18A:7F. (Argued at Pa367 – Pa368)

The Commissioner's docket is filled with numerous cases seeking relief for violations of *N.J.S.A.* 18A:7F-1, *et seq.* For example, in a 2004 case, *Lacey Twp. Bd. of Ed. v. N.J. Dept. of Ed.*, the Commissioner of Education decided a claim alleging that the New Jersey Department of Education "failed to provide petitioner with the appropriate level or amount of funding pursuant to the Comprehensive Education Improvement and Financing Act, N.J.S.A. 18A:7F-1, *et seq.*". The Commissioner of Education interpreted *N.J.S.A.* 18A:7F-1, *et seq.* and decided whether the petitioner was entitled to monetary relief under that statute.[18] In *Lakewood Bd. of Ed. v. N.J. Dept. of Ed.,* the petitioner appealed alleging a violation of *N.J.S.A.* 18A:7F-15 (which has since been repealed), asserting that it was owed additional funding under the statute. The Commissioner of Education confirmed his own jurisdiction in that matter when he held, "Initially, the Commissioner finds that the express language of *N.J.S.A.* 18A:7F-15 provides petitioner with the right of appeal" to the Commissioner.[19] The court

[18] Pa182 – Pa195
[19] Pa196 – Pa210

therefore has no reason to break from the Commissioner's precedent in deciding matters under *N.J.S.A.* 18A:7F-1, *et seq*.

E. Interpreting, implementing, and enforcing *N.J.S.A.* 18A:7F-9 is under the Commissioner of Education's jurisdiction. (Argued at Pa368)

The Commissioner of Education (not Superior Court, Law Division) is tasked with interpreting and implementing the 18A legislation under *N.J.S.A.* 18A:7F-9(e)(3). The Commissioner of Education has the authority and expertise to determine how the statute is applied to school districts, and can order the Board to act in a specific manner. Pritchard's Counterclaim clearly attempts to circumvent the Commissioner's review of their claim based on *N.J.S.A.* 18A:7F-9(e)(3). Hence, since the Counterclaim arises under the school laws, the Commissioner of Education (not Superior Court, Law Division) retains jurisdiction over Pritchard's Counterclaim. The court's initial ruling on the cross-motion for summary judgment that the Commissioner had jurisdiction over the Counterclaim was therefore correct.[20] The court's reconsideration ruling that it had jurisdiction over the Counterclaim was in error and should be reversed.[21]

POINT TWO [Appeal of jurisdiction issues] (Argued at Pa369 – Pa371)

A primary jurisdiction analysis requires the court to determine whether the matter at issue is within the conventional experience of judge, is peculiarly within the agency's discretion or expertise, whether inconsistent rulings would disrupt the statutory scheme, and whether prior application has been made to the agency. The application, interpretation, and enforcement of the school law, State aid statute, *N.J.S.A.* 18A:7F-1, *et seq.,* is not within the conventional experience of judges; is a matter peculiarly in the Commissioner of Education's discretion; inconsistent rulings will disrupt the statutory scheme; and no application to the

[20] Pa169 – Pa175
[21] Pa153 – Pa159

Commissioner was made by Pritchard. So even if the court declined to find that the Commissioner of Education has exclusive jurisdiction, the court lacked primary jurisdiction over Pritchard's Counterclaim. The court committed legal error when it reversed itself and held that it retained jurisdiction over Pritchard's Counterclaim.

"The two main purposes of primary jurisdiction are to (1) allow an agency to apply its expertise to questions which require interpretation of its regulations…and (2) preserve uniformity in the interpretation and application of an agency's regulations."[22] The Appellate Division recited:

> four factors [that] must be weighed when determining the application of the primary jurisdiction doctrine: 1) whether the matter at issue is within the conventional experience of judges; 2) whether the matter is peculiarly within the agency's discretion, or requires agency expertise; 3) whether inconsistent rulings might pose the danger of disrupting the statutory scheme; and 4) whether prior application has been made to the agency.[23]

In a matter arising under the school laws that was litigated in the Law Division of Superior Court, our Supreme Court concluded that, "the Law Division action should have been dismissed because the Commissioner of Education has primary jurisdiction to hear and determine all controversies arising under the school laws".[24]

1. / 2. "whether the matter at issue is within the conventional experience of judges"; "whether the matter is peculiarly within the agency's discretion, or requires agency expertise" (Argued at Pa369 – Pa370)

The matter at issue is not within the conventional experience of judges, and is peculiarly within the Commissioner of Education's discretion and expertise. The

[22] *Nordstrom v. Lyon*, 424 N.J. Super. 80, 99 (App. Div. 2012), internal quotations and citations omitted
[23] *Nordstrom v. Lyon*, 424 N.J. Super. 80, 99 (App. Div. 2012), internal quotations and citations omitted
[24] *Bower v. Bd. of Educ. of City of E. Orange*, 149 N.J. 416, 420 (1997)

interpretation and litigation over violations of the school laws fall within the province of the Commissioner of Education. Especially violations of *N.J.S.A.* 18A:7F-9, where the legal remedy is for the Commissioner to order specific performance for 18A statutory violations and withhold State aid. The Commissioner of Education has a long and storied history of implementing, interpreting, and adjudicating 18A violations, especially under *N.J.S.A.* 18A:7F-1, *et seq.* And the withholding of State aid penalty, which is actually part of the statute's title and appears at the beginning of the statute, *N.J.S.A.* 18A:7F-9(a), is not within the power or authority of Superior Court judges. If Pritchard believed they were aggrieved by the Board's alleged violation of *N.J.S.A.* 18A:7F-9(e)(3), then they could have petitioned the Commissioner of Education for relief under *N.J.A.C.* 6A:3-1.1, *et seq.* where the agency's expertise would have been applied to adjudicate the matter.

3. "whether inconsistent rulings might pose the danger of disrupting the statutory scheme" (Argued at Pa370 – Pa371)

Inconsistent rulings will pose a danger of disrupting the statutory scheme. The plain language of the statute requires an interpretation, analysis, and implementation of a host of factors affecting school funding and public school districts, including: **a)** the money private companies are and are not entitled to; **b)** who the statute applies to; **c)** what is allowable and unallowable under the statute, and what is required to effectuate a renegotiated contract; **d)** where the money is sent; **e)** why the statute applies

and does not apply to certain companies and entities; and **f)** how school districts and private parties are supposed to renegotiate contracts during school closures.

The interpretation, enforcement, and implementation of *N.J.S.A.* 18A:7F-9(e)(3) is not a purely legal issue as it requires an analysis of how it impacts the burdens upon school districts that must conserve resources to fund unprecedented, unanticipated, and unbudgeted expenses caused by the pandemic. The Superior Court, Law Division, does not routinely adjudicate, interpret, implement, and enforce matters under the 18A school laws, especially the State aid statute under *N.J.S.A.* 18A:7F-9(e)(3). Thus, unlike the Commissioner of Education's rulings, the Superior Court, Law Division, does not routinely consider how its rulings affects: other New Jersey Department of Education regulations under Title 6A, Commissioner decisions and precedent, State Board of Education policies, and directives from the Governor. Nor does the Superior Court, Law Division, routinely contemplate how a ruling impacts a public school district's budget, funding, and ability to deliver the constitutionally protected thorough and efficient, in contrast to Commissioner of Education rulings. Thus, for the Superior Court, Law Division, to assert primary jurisdiction over the Commissioner of Education primes the statute to have inconsistent rulings, where the Board could be impacted in a manner that the Commissioner of Education never intended school districts to be impacted.

4. "whether prior application has been made to the agency" (Argued Pa371)

Here, Pritchard never filed a petition with the Commissioner of Education. If it did, then under *N.J.A.C.* 6A:3-1.1, *et seq.,* Pritchard was required to send notice and proof of service upon the Board, and the matter would have been transmitted to the Office of Administrative Law as a contested case. Had Pritchard petitioned the Commissioner of Education, then the court would be required to perform the primary jurisdiction analysis. But the fact that Pritchard never petitioned the Commissioner is fatal to the court attempting to assert primary jurisdiction over the Commissioner of Education. Hence, applying the factors of primary jurisdiction necessitates dismissal of Pritchard's Counterclaim for lack of jurisdiction.

POINT THREE [Private right to a cause of action issues] (Argued Pa372 – Pa373)

The Legislature does not authorize lawsuits against public entities for any and every statutory violation. To sue a public entity in Superior Court for statutory violations, the Legislature must express a private right to a cause of action. After several amendments to *N.J.S.A.* 7F-9, the Legislature never expressed that there is a private right to a cause of action for a private company to sue a public school district in Superior Court. Since Pritchard lacks an express private right to a cause of action, its Counterclaim against the Board must be dismissed. The court thus committed legal error in granting the Counterclaim.

In the federal courts, where the New Jersey law on whether a litigant has a private right of action is derived from, the Third Circuit reasoned, "even when Congress creates rights or obligations (including personal rights), it does not necessarily follow that private parties can enforce them or obtain a direct remedy through the judicial process".[25] "New Jersey courts have been reluctant to infer a statutory private right of

[25] *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of City of Pittsburgh*, 382 F.3d 412, 420 (3d Cir. 2004)

action where the Legislature has not expressly provided for such action."[26] The Appellate Division concluded, "In other types of regulatory statutes, the Legislature has also **expressly** conferred private causes of action when it wanted members of the public to have access to the civil courts for violations of remedial statutes".[27]

Pritchard's Counterclaim is essentially an attempted claim for enforcement of an alleged violation of *N.J.S.A.* 18A:7F-9(e)(3). But the Legislature has not expressly created a private right of action to sue school districts for enforcement or violations of *N.J.S.A.* 18A:7F-9(e)(3). If they did, then surely Pritchard could have cited it in their Counterclaim and summary judgment motion – but they cannot because there is no express private right to a cause of action. Hence, even if the court were to assert jurisdiction over Pritchard's Counterclaim, the court should dismiss the Counterclaim because the Legislature did not expressly confer a private right to a cause of action for Pritchard to sue the Board in Superior Court. Without Pritchard's private right to a cause of action to sue the Board in Superior Court, the Counterclaim should have been dismissed.

POINT FOUR [Appeal of failure to exhaust administrative remedies issues] (Argued at Pa373 – Pa374)

Courts have held that the existence of administrative remedies obviates the need for a private right to a cause of action to sue in Superior Court. Courts therefore require the exhaustion of administrative remedies to prevent circumvention of procedures to redress alleged violations against public entities. Administrative remedies before the Commissioner of Education existed for Pritchard to seek redress of the Board's alleged violations of *N.J.S.A.* 18A:7F-9(e)(3). Thus, the

[26] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271 (2001)
[27] *Miller v. Zoby*, 250 N.J. Super. 568, 576, 595 (App. Div. 1991)

existence of the administrative remedies obviates the need for a private right to a cause of action, and Pritchard is legally prohibited from suing the Board in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3) without having exhausted its administrative remedies. Thus, the court committed legal error when it granted the Counterclaim without Pritchard exhausting its administrative remedies.

In what our Supreme Court stated was the "seminal case in New Jersey to consider whether a state statute confers an implied private right of action"[28], "In a unanimous decision, the Court held that the plaintiffs had no private right of action" because the "the statute's legislative scheme provided mechanisms…that obviates the plaintiffs' need for a private cause of action", so "the Court determined that the doctrine of exhaustion of remedies should be applied to prevent the circumvention of established procedures".[29] In citing the *Abbott* school law cases where litigants sued school districts and the Commissioner under the school laws, the Supreme Court concluded,

> Just as we generally require that litigants exhaust their administrative remedies before they come to court, see Abbott v. Burke, 100 N.J. 269, 297–301…(1985), so we hold that these plaintiffs must seek relief in the first instance through the designated statutory vehicle.[30]

In an environmental protection case where the plaintiff failed to exhaust his administrative remedies before the governing administrative agency, the Appellate Division concluded, "Although a private action might help to deter violations of the act, such protracted civil litigation could not possibly be as effective in promoting

[28] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 273 (2001)
[29] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 273 (2001)
[30] *Matter of State Comm'n of Investigation*, 108 N.J. 35, 44–45 (1987)

environmental protection as the summary proceedings available to the Department [of Environmental Protection]".[31]

Here, there is certainly a Legislative scheme that obviates the need for plaintiffs to pursue a private cause of action in Superior Court. Under *N.J.S.A.* 6A:3-1.1, *et seq.,* private parties may petition the Commissioner of Education for enforcement or violations of Title 18A school laws, inclusive of *N.J.S.A.* 18A:7F-9. *If* Pritchard was *truly* aggrieved by the Board's conduct, then the Commissioner of Education, who governs the Board and all other public school districts, can certainly find the Board to have violated an 18A statute, and order the Board to comply with an 18A statute. Because there are already administrative remedies and mechanisms to sue school districts by petitioning the Commissioner of Education for enforcement of Title 18A statutes, such as in *N.J.S.A.* 18A:7F-9(e)(3), there was no need for the Legislature to create a burdensome mechanism to sue a school district in Superior Court.

Pritchard did not exhaust its administrative remedies by petitioning the Commissioner for relief under *N.J.A.C.* 6A:3-1.1, *et seq.* The availability of administrative remedies further obviates the need to sue in Superior Court, and dictates that the court should not infer that *N.J.S.A.* 18A:7F-9(e)(3) created an implied right to a private cause of action for Pritchard to sue the Board in Superior Court. Hence, the dismissal of the Counterclaim should have been affirmed.

[31] *Jalowiecki v. Leuc,* 182 N.J. Super. 22, 32 (App. Div. 1981)

POINT FIVE [Appeal of private right to a cause of action issues] (Pa375– Pa378)

When a private right to a cause of action is not express, then a court may look at whether there is an implied right to a private cause of action. There must be evidence that the Legislature intended to create a private right of action and it must be consistent with the Legislative scheme. The Legislature did not intend a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3), and allowing such lawsuits would be inconsistent with the Legislative scheme. Hence, the court should not infer that there exists an implied private right to a cause of action that allows Pritchard to sue the Board in Superior Court. Without an implied right to a cause of action to sue the Board on its Counterclaim, the Counterclaim should have been dismissed.

In addition to the Legislature not *expressly* conferring a private right to a cause of action to allow Pritchard to sue the Board for enforcement and violations of *N.J.S.A.* 18A:7F-9(e)(3), the court should dismiss the Counterclaim because it should not *infer* an *implied* private right to a cause of action to sue the Board in Superior Court. To make an inference that a statute implies a private right to a cause of action to sue in Superior Court, our Supreme Court concluded:

> To determine if a statute confers an implied private right of action, courts consider whether: (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy.[32]

The Supreme Court in *R.J. Gaydos* cited clear precedent where our courts rejected a plaintiff's "request to infer a private right of action where none was statutorily authorized".[33] "Although courts give varying weight to each one of those factors, 'the

[32] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272 (2001)
[33] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271 (2001)

primary goal has almost invariably been a search for the underlying legislative intent'."[34] Here, there is no evidence that the Legislature intended to create a private right of action to sue a public entity in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3).

A. Legislation that enables suits against public entities have express language prescribing when and how a public entity can be sued. (Argued at Pa376)

When it comes to suing public entities who, as a default, retain a level of sovereign immunity, the Legislature creates statutes that expressly confer a private right of action to sue the public entity in Superior Court. For example, if a public school district violates the *Open Public Records Act*, the "Proceeding to challenge access denial" statute under *N.J.S.A.* 47:1A-6 expressly authorizes a private cause of action to sue a public school district in Superior Court. If a plaintiff is the victim of a tort, the Legislature provided the *New Jersey Tort Claims Act, N.J.S.A.* 59:1-1, *et seq.*, to prescribe how a victim can sue for damages against a public school district in Superior Court. For employment discrimination claims against a public school district, the Legislature expressly provided the *New Jersey Law Against Discrimination, N.J.S.A.* 10:5-1, *et seq.,* to allow an aggrieved employee to sue a public school district in Superior Court.

But no similar statutes exist here. While the Legislature is generally descriptive and prescriptive when it comes to who, what, where, when, why, and how sovereign

[34] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272-73 (2001), quoting *Jalowiecki v. Leuc,* 182 N.J. Super. 22, 30 (App. Div. 1981)

public entities may be sued in Superior Court, *N.J.S.A.* 18A:7F-9 is wholly devoid of any language to infer an implied private right to a cause of action allowing Pritchard to sue the Board in Superior Court over alleged violations of *N.J.S.A.* 18A:7F-9(e)(3).

B. A review of the Legislative history establishes no evidence of Legislative intent to allow private companies to sue public school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3). (Argued at Pa376–Pa377)

The Legislature created two amendments of *N.J.S.A.* 18A:7F-9(e)(3) during the pandemic, the first being effective April 14, 2020, the second being effective June 29, 2020. In both amendments, after robust discussions and comments, the Legislature never even hinted at a mechanism to allow for-profit private companies to sue school districts in Superior Court who were dealing with all of the challenges of the pandemic and school closures. For example, a Legislative history reveals multiple Legislative history sources establishing that the Legislature never intended to grant private companies a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3):

1) Of the two versions of the bill that were adopted and made effective April 14, 2020, and June 29, 2020, none of those versions discuss enabling a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3).

2) *N.J.S.A.* 18A:7F-9 underwent nine bill drafts, with the final eight occurring on or after March 23, 2020. None of the nine bill drafts discuss enabling a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3).

3) Between January 11, 2022, and March 7, 2022, there were six proposed bills to amend *N.J.S.A.* 18A:7F-9. None of these proposed bills discuss enabling a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3).

4) Of the 15 Legislative history materials, inclusive of proposals, Assembly statements, and Governor's veto comments, none of the history discusses enabling a private right of action to sue school districts in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3).[35]

C. With school closures and never-before-implemented full remote instruction, school districts faced heavy burdens to pivot to an unfamiliar education model that expended additional costs and resources. With hundreds of private vendors that each school district contracts with, it is absurd to infer that the Legislature intended for school districts to be tied up in costly litigation with its multiple hundreds of private vendors in Superior Court over alleged violations of *N.J.S.A.* 18A:7F-9(e)(3). (Argued at Pa377 – Pa378)

During the time of school closures, school districts had to immediately pivot to operating and educating within a remote business model that it never faced in the history of compulsory education. School districts, such as the Board who is responsible for 27,000+ students, were still required to feed its students two to three meals a day, ensure that every student had the proper technology and Internet service for remote instruction, comply with special education students' IEPs, and expend unbudgeted resources caused by the pandemic. The Legislature thus created emergency legislation to address the challenges.

School districts contract with hundreds of private vendors for various goods and services. It is absurd to infer that the Legislature intended to add an additional time and cost burden on school districts by allowing the multiple hundreds of private vendors to sue them in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3), especially when

[35] Pa232 – Pa266

the Commissioner of Education was charged with governing and advising school districts throughout the pandemic, and has a mechanism for redress of 18A violations. Hence, the court should not infer that there is an implied private right to a cause of action for Pritchard to sue the Board in Superior Court for violations of *N.J.S.A.* 18A:7F-9(e)(3). Dismissal of the Counterclaim is therefore warranted.

POINT SIX [Appeal of private right to a cause of action, no remedy, issues] (Argued at Pa378 – Pa380)

To determine whether there is an implied private right to a cause of action, there also must be a private remedy. Courts cannot infer a private right to a cause of action unless a private remedy exists. The statute that Pritchard seeks relief under, *N.J.S.A.* 18A:7F-9(e)(3), does not include a private remedy. Hence, without a private remedy, the court cannot infer that Pritchard has an implied private right to a cause of action to sue the Board in Superior Court, requiring the dismissal of the Counterclaim.

In the *Open Public Records Act, New Jersey Tort Claims Act,* and *New Jersey Law Against Discrimination* examples cited earlier, the Legislature provided specific remedies for plaintiffs suing public entities. These include pain and suffering damages, punitive damages, attorneys' fees, etc. As it relates to public entities funded by taxpayer dollars, the Legislature is prescriptive on the types of remedies available to litigants suing the public entity. But no such private remedies exist for violations of *N.J.S.A.* 18A:7F-9.

In analyzing whether a court may infer that the Legislature created an implied right to a private cause of action, the courts look to whether there is a private *remedy* in addition to the private right. The U.S. Supreme Court concluded:

> But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private **remedy**'. (emphasis original)[36]

Our Supreme Court reviewed precedent where the lack of a remedy meant that the court cannot infer an implied private right to a cause of action for a case alleging non-compliance with a statute:

> In *Osback v. Lyndhurst Township*, 7 N.J. 371, 81 A.2d 721 (1951), the plaintiff, a town employee, injured a bystander in the course of his employment. When the plaintiff discovered that the municipality did not have the statutorily-required liability insurance to satisfy the injured party's claim, the plaintiff sued the Township.
>
> The Court rejected the plaintiff's contention that one affected detrimentally by noncompliance with a statute has a cause of action for the injury or loss sustained, and stated that
>
> > we are cognizant of the individual hardship which may occasionally befall an employee as a result of the municipality's default in obeying the legislative command. The statute, however, while stating the requirement of public liability insurance in mandatory language, does not provide a remedy for those who may suffer through a failure to comply with its terms. If it had done so, the right to recover would be clear.[37]

Here, there is no private remedy for a violation of *N.J.S.A.* 18A:7F-9(e)(3). The only "remedy" available for a violation of *N.J.S.A.* 18A:7F-9 is found in *N.J.S.A.* 18A:7F-9(a), which states, "The **commissioner** is hereby authorized to withhold all or part of a district's State aid for failure to comply with any rule, standard or directive".

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[36] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002), quoting *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001)

[37] *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271–72 (2001)

The existence of this express remedy to withhold State aid from a school district certainly cannot be vested in a private person.

Under *N.J.S.A.* 18A:7F-9(e)(3), the obligation of the Board is to "make all reasonable efforts to renegotiate a contract in good faith". If Pritchard believed that the Board was violating the statute, then it could petition the Commissioner for relief, and the Commissioner can enforce the Board to comply with the statute and withhold State aid. However, Pritchard's Counterclaim and summary judgment motion, in reliance on *N.J.S.A.* 18A:7F-9(e)(3), demands a "remedy" that requires the Board to pay a for-profit company $697,391.[49] without a renegotiated contract for work that was never performed.

After passing two iterations of amendments to the statute, once on April 14, 2020, and again on June 29, 2020, the Legislature failed to create or imply a remedy for private contractors who believed the school district was not complying with the statute.[38] Also, providing for a remedy under *N.J.S.A.* 18A:7F-9(e)(3) was unnecessary because any private party could petition the Commissioner of Education for relief from a violation of the school laws under 18A statutes.

Consistent with the precedent, since no remedy exists, there can be no private right to a cause of action. Similar to the *Osback* case, although Pritchard contends that the there was an obligation for the Board to comply with the statute, the lack of a private

[38] Pa232 – Pa266

remedy means that Pritchard does not enjoy a private right to a cause of action to sue the Board in Superior Court for a non-legislated remedy. Since the lack of a remedy means that the court cannot imply a private right to a cause of action for Pritchard to sue the Board in Superior Court, dismissal of the Counterclaim is necessary.

POINT SEVEN [Appeal of Counterclaim as untimely] (Argued at Pa381 – Pa383)

Pritchard's Counterclaim is based on April 2020 and July 2020 invoices, which Pritchard alleges were not paid in full in violation of *N.J.S.A.* 18A:7F-9(e)(3). Pritchard's suit against the Board was filed September 16, 2022, more than two years after the accrual of the action. The applicable statute of limitations, the doctrine of accord and satisfaction, and the equitable doctrine of laches, bars Pritchard's Counterclaim as out of time. The court therefore committed legal error in granting the Counterclaim. (Argued at Pa362 – Pa368)

Even if the court were to found that it had jurisdiction over the Commissioner and that Pritchard does have a private right to a cause of action to sue the Board in Superior Court, then it still should have dismissed the Counterclaim as out of time under the statute of limitations, doctrine of accord and satisfaction, and equitable doctrine of laches.

A. New Jersey Court Rule 4:69-1, *et seq.* details the procedure to force a government entity to comply with a statute. Those suits for a writ of mandamus are filed as a Complaint in Lieu of Prerogative Writ, and carry a 45-day statute of limitations under *R.* 4:69-6. Pritchard's Counterclaim clearly and unambiguously seeks to enforce the District's compliance with *N.J.S.A.* 18A:7F-9(e)(3). Pritchard's Counterclaim for statutory compliance was filed well past the 45-day statute of limitations, necessitating dismissal of the Counterclaim. (Argued at Pa381 – Pa382)

The New Jersey Rules of Court prescribe specific procedures for obtaining a writ of mandamus against a public entity, essentially where a court orders a public entity to fulfill a statutory obligation. Under *R.* 4:69-1, a litigant must file the mandamus action

as a Complaint in Lieu of Prerogative Writ, and then proceed under *R.* 4:69-1, *et seq.* These procedures to force a public entity to comply with a statutory obligation, however, have a 45-day statute of limitation. Under *R.* 4:69-6(a) ("Limitation on Bringing Certain Actions"; "General Limitation"), "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed".

Here, Pritchard's Counterclaim clearly and unambiguously seeks to enforce a public entity's compliance with a statute. Since Pritchard seeks mandamus relief for a court to force compliance with an alleged statutory obligation, then that claim accrued in or around the spring of 2020 when Pritchard sent its invoice for payment, and the Board did not pay. Pritchard's Counterclaim was filed over two years later on September 16, 2022, which is obviously well past the 45-day statute of limitations for forcing the Board to comply with a statute. Hence, even if the court were to retain jurisdiction and infer that *N.J.S.A.* 18A:7F-9(e)(3) created an implied private right to a cause of action for Pritchard to sue the Board, it should still dismiss the Counterclaim because Pritchard's attempted claims are barred by the 45-day statute of limitations (*R.* 4:69-6) to force a public entity to comply with a statute.

B. After Pritchard received what it now deems a partial payment of the April 2020 and July 2020 invoices, it never sent notice of breach of contract, nor petitioned the Commissioner for relief. Pritchard did not formally challenge the Board until it filed an Answer and Counterclaim to the lawsuit in September 2022. Being in a new budget year, the Board is unduly prejudiced if it has to fund the unbudgeted and unanticipated payment Pritchard now seeks in the Counterclaim. The doctrines of accord and satisfaction, and laches,

prohibits Pritchard from obtaining recovery over 2 years later in retaliation to a lawsuit. (Argued at Pa224 – Pa225)

After Pritchard received payment on its April 2020 and July 2020 invoices, it never sent a notice of breach of contract to the Board, nor did it file a petition with the Commissioner. The first breach of contract notice or request to a tribunal for relief surprisingly came 2.5 years later on September 16, 2022, when Pritchard filed its Answer and Counterclaim.[39] The Board is over two budget years removed from the April 2020 invoice, so Pritchard is attempting to collect on an extraordinary unbudgeted alleged expense of $697,391.[49] from] 2.5 years ago, to the detriment and prejudice of the Board. Pritchard's Counterclaim is thus barred by the doctrines of accord and satisfaction, and laches.

POINT EIGHT [Court's interpretation would render statute unconstitutional] (Argued at Pa384 – Pa387)

Under the U.S. and New Jersey Constitutions, no State may pass a law that impairs the obligations of contracts. The contract between Pritchard and the Board required Pritchard to perform work as a condition of receiving payment. The obligation of Pritchard was to perform services as a prerequisite to payment, and the obligation of the Board was to pay Pritchard for services rendered. Pritchard's Counterclaim asks the court to force the Board to pay for services that were not performed, even though there is not a renegotiated contract enabling such a gratuitous arrangement. The legal basis for the Counterclaim requires the court to interpret *N.J.S.A.* 18A:7F-9(e)(3) in a manner that violates the Impairment of Contracts Clauses under the U.S. Constitution and New Jersey Constitution, because if the Board is required to pay Pritchard without a renegotiated contract, then the statute, as applied, impaired the obligation of Pritchard to perform services as a prerequisite to payment, and impaired the obligation of the Board to pay Pritchard after services were rendered.

[39] *Pa73 – Pa152*

The Impairment of Contracts Clause under the *U.S. Constitution* Art. I § 10, cl. 1, states, "No State shall…pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts". The Impairment of Contracts Clause under the New Jersey Constitution Art. 4, § 7, ¶ 3, states, "The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made".

Here, the clear and unambiguous obligation of the custodial services contract was that Pritchard was supposed to actually perform work as a prerequisite to obtaining payment. To interpret the contract otherwise to allow Pritchard to receive payment without performing work would be an illegal "no-show" contract.

In terms of the Impairment of Contracts clauses under the *U.S. Constitution* and *New Jersey Constitution*: Pritchard's "obligation" under the contract was to perform services as a prerequisite to payment, and the Board's "obligation" under the contract was to pay Pritchard for services after proof that services were actually rendered. Any law or interpretation of a law that impairs those obligations, such as a law that would excuse Pritchard's performance obligation and require the Board to pay Pritchard money despite receiving no services, would no doubt violate the Impairment of Contracts clauses under the U.S. Constitution and New Jersey Constitution.

Under its Counterclaim for payment of $620,250.[09] and $77,141.[40], Pritchard is asking the court to interpret *N.J.S.A.* 18A:7F-9(e)(3) as requiring the Board to breach

its contract, and pay for services not rendered without a renegotiated contract authorizing payment for not working. If the court were to interpret *N.J.S.A.* 18A:7F-9(e)(3) as *not* requiring Pritchard to execute a new, renegotiated contract with the Board as a prerequisite to receiving payment, then *N.J.S.A.* 18A:7F-9(e)(3), as *applied*, violates the Impairment of Contracts Clause under the *U.S. Constitution* Art. I § 10, cl. 1, since it would mean that the Legislature passed an "ex post facto Law, or law impairing the Obligation of Contracts" because it would have essentially impaired Pritchard's contractual obligation to perform services as a prerequisite to payment, and impaired the Board's contractual obligation to tender payment after proof of receipt of services, in effect converting Pritchard's services contract into an illegal "no-show" contract that excused Pritchard's performance and required the Board to pay Pritchard despite receiving no services.

If the court were to interpret *N.J.S.A.* 18A:7F-9(e)(3) as *not* requiring Pritchard to execute a new, renegotiated contract with the Board as a prerequisite to receiving payment, then *N.J.S.A.* 18A:7F-9(e)(3), as *applied*, violates the Impairment of Contracts Clause under the *New Jersey Constitution* Art. 4, § 7, ¶ 3, since it would have meant that the Legislature passed an "ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made" because it would have essentially impaired Pritchard's contractual obligation to perform services as a prerequisite to payment, and impaired the Board's contractual obligation to tender payment after proof of receipt of services,

in effect converting Pritchard's services contract into an illegal "no-show" contract that excused Pritchard's performance and required the Board to pay Pritchard despite receiving no services.

To clarify, the Board does not argue that the statute itself is unconstitutional. Rather, the Board posits that the court's misinterpretation and misapplication of the statute as not requiring a renegotiated contract interprets the statute in a manner that is unconstitutional because it impairs the most basic, fundamental obligations in a services contract, *i.e.,* to pay for services rendered. Under the rules / canons of statutory construction, statutes cannot be interpreted in a way that would invalidate a constitutional clause. If the court agrees with Pritchard's Counterclaim and summary judgment motion, and allows them to stake a claim for payment for no services rendered and without a renegotiated contract, then *N.J.S.A.* 18A:7F-9(e)(3), as applied, effectively violates the Impairment of Contracts Clauses under the U.S. Constitution and New Jersey Constitution. Thus, the only interpretation of *N.J.S.A.* 18A:7F-9(e)(3) that avoids it being applied in an unconstitutional manner is to interpret it as requiring a renegotiated contract signed by the parties that effectively alters the respective obligations of the parties. That is why the "renegotiated contract" reference is contained in *N.J.S.A.* 18A:7F-9(e)(3). Pritchard admits that there was no renegotiated contract between the parties that authorized payment for services not rendered. So Pritchard's Counterclaim for payment under *N.J.S.A.* 18A:7F-9(e)(3) fails as a matter of law.

POINT NINE [Analysis of Count 1 of the Counterclaim] (Argued at Pa387 – Pa391)

Count One of the Counterclaim for an alleged "Breach of Contract" should be dismissed because Pritchard fails to establish all four elements of a prima facie case.

The prior points present procedural bars to the Counterclaim. Also, when analyzing each of the three counts individually, it is apparent that Pritchard failed to establish a prima facie case under each count, necessitating a dismissal of each count individually.

Four elements of a breach of contract claim

To prove a breach of contract, our Supreme Court notes:

> our law imposes on a plaintiff the burden to prove four elements: first, that the parties entered into a contract containing certain terms; second, that plaintiffs did what the contract required them to do; third, that defendants did not do what the contract required them to do, defined as a breach of the contract; and fourth, that defendants' breach, or failure to do what the contract required, caused a loss to the plaintiffs.[40]

Pritchard fails to establish any of these four elements under Count One of the Counterclaim.

A. "first, that the parties entered into a contract containing certain terms"

Pritchard does not plead or identify a renegotiated contract where the Board was obligated to pay Pritchard despite not working. (Argued Pa388 – Pa389)

The only contract between the parties is the 2019-2020 and 2020-2021 contract where Pritchard was paid to perform janitorial and custodial services as a condition of payment.[41] Count One of the Counterclaim seeks a $620,250.09 payment for April 2020.

[40] *Goldfarb v. Solimine*, 245 N.J. 326, 338 (2021)
[41] Pa55 – Pa61

As admitted by Pritchard, Governor Murphy, not the Board, issued a stay at home order and ordered school closures in March 2020. Pritchard did not work in April 2020, so it was not entitled to payment.

Pritchard cannot identify any contract between the parties where the Board was obligated to pay Pritchard over $620,250.^09^ on a no-show contract. Such an arrangement for a public school district to pay over $620,000 in public taxpayer money to a for-profit private company to perform no services would be obviously illegal. Although it could have under *N.J.S.A.* 18A:7F-9(e)(3), Pritchard did not renegotiate its 2019-2020 contract and enter into a contract that allowed it to be paid despite not working.

As a pretext for an attempted breach of contract claim, Pritchard identified *N.J.S.A.* 18A:7F-9(e)(3) as forming the basis for payment, and not an actual contract. Pritchard's failure to produce a new contract that allowed it to be paid for not working means that it cannot establish the first element of a breach of contract claim, namely, that "the parties entered into a contract containing certain terms"[42]. Thus, Pritchard did not satisfy the first element for a breach of contract.

B. "second, that plaintiffs did what the contract required them to do"

Pritchard does not plead or establish that it performed the work and was therefore entitled to payment. (Argued at Pa389)

[42] *Goldfarb v. Solimine*, 245 N.J. 326, 338 (2021)

Without identifying a contract that authorized payment for not working, it is impossible to satisfy this second element. Regardless, Count One of the Counterclaim does not establish that Pritchard "did what the contract required them to do". The 2019-2020 or 2020-2021 contract required Pritchard to actually perform custodial or janitorial services as a condition of payment. Pritchard admits that it did not actually perform work in April 2020, and did not begin work on the 2020-2021 contract until July 6, 2020. Thus, without establishing that Pritchard performed the work required to obtain payment, the court order does not establish that Pritchard satisfied the second element of a breach of contract claim, requiring the dismissal of Count One.

C. "third, that defendants did not do what the contract required them to do, defined as a breach of the contract"

The contracts required the Board to pay for work performed. Pritchard does not plead or establish that the Board failed to pay for work actually performed. (Argued at Pa389 – Pa390)

Pritchard's Counterclaim, and the court order, do not establish the third element for a breach of contract claim, namely, that the Board "did not do what the contract required them to do".[43] In the 2019-2020 contract, the Board was required to pay Pritchard for actually performing work. Pritchard's Counterclaim does not point to any contractual provision in the 2019-2020 or 2020-2021 contract that required the Board to pay Pritchard for not working – that, of course, would be an illegal no-show contract.

[43] *Goldfarb v. Solimine*, 245 N.J. 326, 338 (2021)

Pritchard's Counterclaim admits that Governor Murphy's executive orders caused the school closures and stay at home orders. Without any work performed, Pritchard's Counterclaim does not cite to any contractual language where the Board was required to pay Pritchard for not working. Thus, the Counterclaim does not establish that the Board "did not do what the contract required them to do", meaning that Pritchard's Counterclaim fails to establish the third element of a breach of contract claim.

D. "fourth, that defendants' breach, or failure to do what the contract required, caused a loss to the plaintiffs" (Argued at Pa390)

Under the contract, Pritchard is not entitled to be paid for work not performed. The only "loss" identified by Pritchard is an alleged "loss" based on *N.J.S.A.* 18A:7F-9(e)(3), and not a loss from a breach of contract. Pritchard therefore did not suffer any loss from a breach of contract.

Pritchard's Counterclaim and the court order do not establish the fourth element for a breach of contract claim, namely, that the Board's breach, or failure to do what the contract required, caused a loss to the plaintiffs"[44]. To establish a loss under the fourth element, Pritchard would have to identify a contractual clause that it was entitled to receive payment even though it did not work – Pritchard and the court failed to do so. As even more evidence that the breach of contract claim is a thinly veiled action for statutory compliance, rather than cite to an actual contract, Pritchard's purported "loss" stems only from a claim for payment under *N.J.S.A.* 18A:7F-9(e)(3). Thus, Pritchard

[44] *Goldfarb v. Solimine*, 245 N.J. 326, 338 (2021)

failed to establish the requisite "loss" under the fourth element, requiring dismissal of Count One to the Counterclaim.

E. All four elements are required to establish a prima facie case for breach of contract – Pritchard has none, requiring a dismissal of Count One of the Counterclaim. (Argued at Pa390)

Pritchard must establish all four elements to state a claim for breach of contract. Pritchard has not established any of the four elements. Likewise, nowhere in the court's order does it express that Pritchard satisfied all four elements for a breach of contract claim. Although the court did not express which, if any, of the three counts of the Counterclaim the court was granting, Pritchard could not have been granted summary judgment on Count One (breach of contract) of its Counterclaim. The court's original order dismissing the Counterclaim was thus correct.

POINT TEN [Individual analysis of Count 2 of the Counterclaim] (Argued Pa391)

Unjust enrichment requires Pritchard to establish a benefit conferred upon the Board, and expected remuneration due to the Board's receipt of the benefit. The Board obtained no benefit whatsoever for Pritchard not working, so there was no expected remuneration for not working. Count Two of the Counterclaim for an alleged "Unjust Enrichment" should be dismissed because Pritchard does not satisfy the elements for a prima facie case of unjust enrichment.

The Appellate Division discussed the elements of an unjust enrichment claim:

> To demonstrate unjust enrichment, 'a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust' and that the plaintiff 'expected remuneration' and the failure to give remuneration unjustly enriched the defendant.[45]

[45] *EnviroFinance Grp., LLC v. Env't Barrier Co., LLC,* 440 N.J. Super. 325, 350 (App. Div. 2015), quoting *VRG Corp. v. GKN Realty Corp.,* 135 N.J. 539, 554 (1994)

Here, the Counterclaim admits that Pritchard did not perform services during the period it seeks payment for. Pritchard admittedly did not work in April 2020 and the beginning of July 2020, so the Board did not receive any benefit to justify a public school district forking over $699,000+ of taxpayer money to a for-profit private company on a no-show contract. Without identifying a contractual agreement where the Board agreed to (gratuitously and illegally) pay Pritchard on a no-show contract, Pritchard cannot also satisfy the "expected remuneration" element. Count Two for unjust enrichment therefore fails.

POINT ELEVEN [Individual analysis of Count 3 of Counterclaim] (Argued Pa392)

Count 3 of the Counterclaim for an alleged "Failure to Follow a Statutory Obligation" should be dismissed because it is not a legally-recognized cause of action, and did not follow the procedures under *R.* 4:69-1, *et seq.,* required to force a public entity to comply with a statute.

Count Three of the Counterclaim alleges "Failure to Follow a Statutory Obligation", namely, as per Paragraph 23, the Board allegedly failed to comply with the "mandates" of *N.J.S.A.* 18A:7F-9(e)(3). This count should be dismissed for at least the following two reasons:

1. "Failure to Follow a Statutory Obligation" is not a judicially recognizable, cognizable cause of action. If it was, then there would be elements to such a claim and perhaps Model Civil Jury Charges to address suits under that claim.

2. Forcing a public entity to comply with a statute is governed by *R.* 4:69-1, *et seq.,* where Pritchard is required to file its action as a complaint in lieu of prerogative writ, within 45-days (*R.* 4:69-6), and *after* exhausting administrative remedies (*R.* 4:69-5). None of these requirements were met.

Hence, Count Three of the Counterclaim should be dismissed.

POINT TWELVE [Deficiency of court order] (Pa153 – Pa159)

The court's summary judgment order never articulated which of the three counts it granted favor of Pritchard. This obvious deficiency cannot make the Board liable to Pritchard. (Argued at Pa466 – Pa467)

The court's order granting summary judgment on the Counterclaim was woefully deficient in that it never identified which of the three counts in the Counterclaim, if any, the court was granting. The individual analyses of each of the three counts in the Counterclaim establishes that Pritchard did not meet any of the elements of a claim for breach of contract and unjust enrichment under counts one and two, and was out of time and used the wrong procedure for an order to require the public entity-Board to follow a statutory obligation under count three. Nowhere in the court order and opinion does the court analyze or articulate that Pritchard met all of the elements for a breach of contract under Count One or unjust enrichment under Count Two. The court order and opinion further does not state that it is granting Count Three of the Counterclaim. Even with a liberal reading of the court's summary judgment reconsideration order, it is impossible to identify which of the three counts of the Counterclaim the court was granting. Thus, there is no basis to hold the Board liable to Pritchard's Counterclaim.

ARGUMENTS RELATED TO THE APPEAL OF THE COURT'S DISMISSAL OF PLAINTIFF'S COMPLAINT (Pa153 – Pa159; Pa160 – Pa161)

SUMMARY JUDGMENT LEGAL STANDARD OF REVIEW UNDER *R.* 4:6-2(e)

Under *R.* 4:46-2(c) ("Proceedings and Standards on [Summary Judgment] Motions"):

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

Under *Brill*, "when deciding a motion for summary judgment under Rule 4:46–2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.[46] "It is critical that a trial court ruling on a summary judgment motion not shut a deserving litigant from his or her trial".[47] The "motion judge [is] to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'."[48]

[46] *Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520, 523, holding modified by *Schneider v. Simonini,* 163 N.J. 336 (2000)
[47] *Brill, supra,* 142 N.J. at 540-41 (internal citations and quotations omitted)
[48] *Brill, supra,* 142 N.J. at 533 (internal citation omitted)

POINT THIRTEEN [Denial of discovery] (Argued Pa231; Pa449–Pa450)

The Board's second set of interrogatories, which would have been followed by a deposition, were designed to obtain further proofs of each of its claims in the Complaint, as well as test the veracity of Defendant's purported documents and claims. The Board was entitled to pursue discovery of its claims prior to the dismissal of its 10-count Complaint. The court violated *R.* 4:46-2 in dismissing Plaintiff's 10-count Complaint several months before the discovery end date and without affording the Board meaningful ability to prosecute its case before the discovery end date.

Pritchard's first summary judgment motion was filed in December 2022, about seven months before the July 2023 discovery end date, and the court's reconsideration dismissal order in April 2023 occurred 2.5 months before the expiration of the original discovery end date. The Board pursued timely discovery by sending a second set of interrogatories, whose due date was before the original July 13, 2023, discovery end date, and the Board anticipated deposing Defendants after receipt of those answers.[49]

When disputing the statement of material facts that Pritchard posited in its motion for summary judgment filed 7 months before the original discovery end date, the Board repeatedly argued that it was entitled to discovery to test the veracity of the Defendants' self-serving, disputed claims. For example:

> **16.** Consistent with N.J.S.A. 18A:7F-9e(3), Pritchard provided Paterson with invoices for payment for custodial services for the months of April, May, and June 2020, so that Pritchard could pay its employees. (Martin Cert. at ¶¶ 7-8).
>
> ***Board's Response***
> Disputed. As per the Complaint and Shafer Cert., the invoices were fraudulent and deceitful, and there is evidence that the money was used for other unlawful purposes. The Board is entitled to discovery to check the veracity of these claims.

[49] Pa279 – Pa331

> **23.** While the parties' contract required Pritchard to provide Paterson with a listing of all employees, wages, and hours worked, during the time when Paterson instructed Pritchard not to provide services, due to the coronavirus shutdown, Pritchard obviously could not provide that information, since it did not exist.
>
> ***Board's Response***
> Disputed. The Board is entitled to discovery to check the veracity of these claims.[50]

By granting summary judgment 2.5 months before the discovery end date, before the Board could obtain answers to interrogatories and depose Defendants, the court unfairly prohibited the Board from prosecuting its case, and testing the credibility, veracity, and analysis of the alleged payroll document and defendant's self-serving certification that the court relied on in its dismissal order.

POINT FOURTEEN [Erroneous wholesale dismissal of entire Complaint] (Argued at Pa409 – Pa443)

Pritchard's summary judgment motions and the court's dismissal order fail to specifically address each of the ten counts and whether the Board can sustain the elements for a cause of action of each of the ten counts. The court's wholesale dismissal of the Board's ten individual counts, without any analysis of same, cannot successfully meet the standard for the court to dismiss the Board's entire 10-count Complaint months before the expiration of the original discovery end date. To the contrary, a fair analysis dictates that the Board could sustain a prima facie case for each of the ten individual counts pleaded in the Complaint, and to the extent proofs were lacking, the Board indeed was entitled to obtain its answers to interrogatories and depose Defendants prior to the discovery end date.

The Board's well-pleaded Complaint alleged ten individual counts, with multiple theories of liability within several of the counts, against Defendants:

a. Count I – Breach of Contract (multiple breaches)
b. Count II – Statutory and Legal Violations

[50] Pa267 – Pa272

c. Count III – Unjust Enrichment
d. Count IV – Breach of the Implied Covenant of Good Faith and Fair Dealing
e. Count V – Promissory Estoppel
f. Count VI – Conversion or Civil Theft
g. Count VII – Fraud / Misrepresentation
h. Count VIII – Tortious Interference with Contractual Relations
i. Count IX – Punitive Damages
j. Count X – Indemnification

The Board was entitled to pursue discovery on these claims, which it did through interrogatories, which could have been followed by depositions had the court not prematurely dismissed the Complaint.[51] The 10-count Complaint alleged multiple theories of liability within each count, and each theory of liability had its own set of elements and jury charges as to whether the Board established a prima facie case.

It is unfathomable that the court granted a wholesale dismissal of the Board's entire 10-count Complaint without any analyses whatsoever of the elements within each of the counts, or allowing the Board to pursue those proofs in discovery. For example, Count VII of the Complaint alleges that Pritchard committed Fraud / Misrepresentation when it knowingly and willfully produced fraudulent invoices that misrepresented that it was for "custodial services", when Pritchard admittedly never performed any custodial services for the months in question. But rather than analyze the specific elements of whether Pritchard is liable for Fraud / Misrepresentation under Count VII, the court enforced a wholesale dismissal of the entire Complaint.

[51] Pa279 – Pa331

POINT FIFTEEN [Improper credibility and fact-finding] (Argued Pa228 – Pa229)

In summary judgment motions, the court should not play the 13th juror by resolving genuine issues of material facts in dispute. The court also should not make credibility determinations and findings of fact that are relegated to the jury. In dismissing the Complaint, the court erroneously made findings of fact and credibility determinations that were within the province of a jury. The court's dismissal of the Complaint should therefore be reversed.

Another glaring example of the court's error in dismissing the Complaint is in Count VI, where the Board alleges that Pritchard is liable for Conversion / Civil Theft when it violated the statute by using public taxpayer dollars for private profit. Note the Board's disputed facts:

> **21.** Pritchard used the $1,301,300.18 that Paterson paid for the months of May and June 2020 to pay its employees for those months.
>
> ***Board's Response***
> Disputed. As per Pritchard's own records, the payroll was at least $427,000 less than the $1.3-million tendered to Pritchard. The Board is entitled to discovery to check the veracity of these claims.
>
> **22.** Pritchard, however, has been unable to pay its employees for the month of April 2020, because Paterson has not paid Pritchard for that month. (Martin Cert. at ¶ 10).
>
> ***Board's Response***
> Disputed. Several of the employees were laid off and/or not entitled to payment because they collected unemployment. Pritchard also had access to other government paycheck relief assistance. The Board is entitled to discovery to check the veracity of these claims.[52]

Here, the court relied on the self-serving certification of a named defendant, Thomas Martin, who was not yet deposed, as well as a purported payroll document dated in

[52] Pa267 – Pa272

October 2020, which the Board did not see prior to the summary judgment motion and contends is not even relevant to the April – July 2020 months in dispute. The credibility, truthfulness, and accuracy of the named defendant's self-serving certification and purported payroll document that the Board contested is for a jury to determine, and not the Judge. The court did not address or acknowledge these disputed facts in its wholesale dismissal of the Complaint.

The court's further overstepped a jury's authority when it held the following:

> Additionally, under N.J.S.A. 18A:7F-9(e)(3) it is the school district's responsibility to 'make all reasonable efforts to renegotiate a contract in good faith.' Sending a 'Questionnaire' and demand for 'production of Pritchard's payroll records,' as Paterson did in the present case, does not strike this Court as being in good faith.

The court's conclusion of bad faith was in reliance on the self-serving certification of an undeposed defendant, without any testimony from a Board employee. To the contrary, with the fraud and civil theft counts, the Board accuses Pritchard of acting in bad faith. Despite both parties accusing each other of bad faith, the court chose sides and took on the role of the jury who was supposed to make that determination. Whether the Board acted in "good faith" or bad faith is a fact-sensitive inquiry that requires a credibility determination by a jury. The court thus committed error in dismissing the Complaint.

POINT SIXTEEN [Mistake of fact] (Argued at Pa221 – Pa227)

The parties clearly disputed the amount of money owed in April and July 2020. The court made a mistake of fact and legal error when it ordered the Board to pay the full amount claimed by Pritchard based solely on the self-serving

certification and contested, purported payroll record from an irrelevant date produced by the Defendants. Being that Pritchard never formally contested the non-payment of the April/July 2020 invoices until over two years later in response to a lawsuit, the court denied the Board the ability to pursue an establish an accord and satisfaction defense as to why Pritchard cannot now claim its owed for the April/July 2020 invoices.

Pritchard erroneously contends that it was owed $620,250.^09^ for April 2020, even though the Board undisputedly paid $60,800 for April 2020. The $697,031 sought by Pritchard is comprised of a $620,250.^09^ from a *second* April 2020 invoice, and an alleged balance on a $77,141.^40^ from a July 2020 invoice that the Board paid in full. In establishing that the $697,031 was contested with a genuine dispute of material fact, note the Board's response to Par. 4 of Pritchard's Undisputed Statement of Material Facts:

> **4.** In exchange for Pritchard's custodial services from July 1, 2019, through June 30, 2020, Paterson agreed to pay a monthly amount of $620,250.09.
>
> ***Board's Response***
> Disputed. As stated throughout the Complaint and Shafer Cert., the contract was a services contract where Pritchard was to be paid for services rendered. Pritchard's failure to render services means that it was not entitled to payment for the months it did not render services.[53]

This claim was based only on a self-serving certification by Pritchard, of which the Board did not have the benefit of obtaining discovery on and testing through a deposition. The factual dispute as to whether the Board owed $620,250.^09^ thus required submission to a jury, and should not have been resolved by the court.

[53] Pa267 – Pa272

Also note Par. 18 of Pritchard's Undisputed Statement of Material Facts, where Pritchard admits that the Board indeed paid $60,800 in the month of April 2020:

> **18.** In August 2020, Paterson paid for three of the five invoices above, in particular, Invoice nos. 7020000137 [April 2020 invoice for $60,800], -226, and –230, for a total of $1,301,300.18.
>
> ***Board's Response***
> Admitted that the invoices were paid. Disputed because the Board approved a resolution rescinding payment.[56]

Being that the April 2020 invoice was paid, that would have otherwise served to reduce the $620,250.[09] payment by $60,800. Thus, the court should have never ordered the entire payment of $620,250, and the factual dispute was for a jury to decide, and not the court.

The Board further disputed Par. 19 of Pritchard's Undisputed Statement of Material Facts:

> **19.** However, Paterson did not pay Pritchard's invoice for April 2020, and did not pay its July 2020 invoice in full, withholding $77,141.40. (Martin Cert. at ¶ 9). It failed to make those payments in violation of N.J.S.A. 18A:7F-9e(3).
>
> ***Board's Response***
> Disputed. The July 2020 invoice was paid in full because Pritchard did not begin work until July 6, 2020, and thus was not entitled to payment for the full month of July 2020.[54]

Note Pritchard's admissions and disputes related to the July 2020 invoice:

> **13.** Admitted that Paterson did not direct Pritchard back into service until July 6, 2020. (Martin Cert. at ¶ 12, Board Exhibit 10).

[54] Pa267 – Pa272

> **14.** Admitted that Pritchard received a payment of $514,276.02; and disputed that the payment satisfied Pritchard's July 2020 invoice in full. (SUMF at ¶ 19).[55]

Again, the Board contended that the July 2020 payment was paid in full since it was undisputed that Pritchard did not begin until July 6, 2020, meaning that the Board was entitled to a prorated reducing the July 2020 bill. The court should not have chosen sides to resolve that factual dispute between the parties.

Also relevant to an accord and satisfaction defense that the Board was entitled to pursue in discovery, please note Pritchard's admissions that it was satisfied with the Board's payments from April / July 2020, and never formally contested same:

> **11.** Admitted that Paterson paid for Invoice nos. 7020000137, -226, and -230, (SUMF at ¶ 18); admitted that Pritchard never filed a 'formal notice of breach of contract,' and disputed that Pritchard had any obligation to file a "formal notice of breach of contract.'
>
> **12.** Admitted that Paterson paid for Invoice nos. 7020000137, -226, and -230; admitted that Pritchard never filed a petition with the Commissioner of Education; and disputed that Pritchard had any obligation to file a petition with the Commissioner of Education.
>
> **15.** Admitted that Pritchard never filed a 'formal notice of breach of contract;' and disputed that Pritchard had any obligation to file a "formal notice of breach of contract.'[58]

The Board was indeed entitled to pursue an accord and satisfaction defense through discovery. However, the court took away the Board's accord and satisfaction defense when it prematurely approved a wholesale dismissal of the Complaint without

[55] Pa273 – Pa275

considering that Pritchard never filed any notices of breach of contract or sought payment of the April / July 2020 invoices until over two years later in response to a lawsuit.

POINT SEVENTEEN [Lack of, Failure of, Consideration] (Argued Pa408 – Pa409)

Consideration, or a value exchange by both parties, is necessary for an enforceable contract. The consideration for the contract was for the Board to pay Pritchard in exchange for services rendered. That consideration failed when Pritchard was no longer rendering services and was thus not entitled to payment. Pritchard's claims for additional payments despite not rendering services also fails for lack of consideration. Summary judgment on Pritchard's disingenuous breach of contract theory should have therefore been denied.

To be an enforceable contract there must be a definite offer, acceptance of that offer and consideration.[56] "No contract is enforceable, of course, without the flow of consideration—both sides must 'get something' out of the exchange."[57] Consideration is something of value. Where the contract provides for an exchange of promises, each promise is consideration for the other promise. A failure of consideration describes a situation in which a contract is valid when formed but becomes unenforceable because the performance bargained for has not been rendered.

Here, if we are to believe Pritchard's debunked claim that it is entitled to summary judgment on a breach of contract theory, then there must be consideration for the payment of invoices for services that undisputedly were never rendered. To wit, the consideration for the 2019-2020 contract was simple – the District was to pay Pritchard

[56] *Friedman v. Tappan Dev. Corp.*, 22 N.J. 523, 531 (1956)
[57] *Cont'l Bank of Pennsylvania v. Barclay Riding Acad., Inc.,* 93 N.J. 153, 170 (1983)

for actually performing work. Pritchard provided a service, and the District paid Pritchard after that service was provided. Both the promise to pay and promise to perform the service constituted consideration for the contract.

Pritchard admits that it did not work in April / May / June / July 1-6, 2020, so they did not provide anything of value to the Board. Without Pritchard establishing there was valid or sufficient consideration to change the payment terms of the agreement, it cannot claim that there was a valid contract to obtain payment for April / May / June / July 1-6, 2020.

The Board did not receive anything of value for the April / May / June 2020 invoices, so consideration for these payments under never-before-agreed-upon terms failed. Under the actual contract between the parties, the consideration for receiving payment was extinguished when Pritchard did not provide any value, *i.e.,* services. The failure of consideration thus invalidates any claim for payment under the April / May / June 2020 invoices under a breach of contract theory.

In citing Governor Murphy's mandated school closures along with a stay at home order, and admitting that Pritchard did not perform work, Pritchard's Counterclaim recognizes that consideration to obtain payment on the 2019-2020 contract failed, or was non-existent. Thus, Pritchard's motion for summary judgment based on its debunked breach of contract theory cannot be sustained for lack of, and failure of, consideration. The court therefore committed error in granting Pritchard's summary judgment on the Complaint.

POINT EIGHTEEN [Pritchard's breaches of contract] (Argued at Pa410 – Pa420; Pa490 – Pa494)

In addition to the force majeure clause voiding the contract, Pritchard breached the contract several times over, which underscores the necessity for the parties to renegotiate a new contract if it was to pay Pritchard under *N.J.S.A.* 18A:7F-9(e)(3). The court's order dismissing the Complaint improperly rewarded Pritchard for breaching the contract.

1. Breach of contract at Section 14, Force Majeure (Argued at Pa418)

Section 14, Force Majeure, of the contract states:

> Neither party hereto will be liable or responsible to the other for any loss or damage or for any delays or failure to perform due to causes beyond its reasonable control including, but not limited to…epidemics,…a U.S. Department of State Travel Warning or any other circumstances of like character (force majeure occurrence).

The COVID-19-related school closures qualifies as force majeure occurrence because it is an "epidemic", declared state of emergency, and resulted in a "travel warning" and stay at home order. As a force majeure occurrence, under Section 14 of the contract, the COVID-19 epidemic that forced school closures meant that the Board is not "liable or responsible to" Pritchard for "any loss or damage or for any delays or failure to perform".

Despite the force majeure occurrence, Pritchard sought to hold the Board liable or responsible for Pritchard's financial burdens and loss of income/profit when it solicited payment for April – July 6, 2020 invoices despite no services being rendered. These solicitations thus constituted a breach of the Section 14, Force Majeure, by seeking to hold the Board financially responsible to Pritchard despite the COVID-19

epidemic. Pritchard' refusal to return the $1,301,300.[18] obtained from the April / May / June 2020 constitutes a breach of Section 14, Force Majeure, because it held the Board liable or responsible to Pritchard to pay them for no services rendered due to the force majeure occurrence of the COVID-19 epidemic. Pritchard's breach of contract underscores why the parties were required to renegotiate a contract under *N.J.S.A.* 18A:7F-9(e)(3) as a prerequisite for payment. The court's dismissal of the Complaint without requiring a renegotiated contract to allow payment rewarded Pritchard for its breach, and punished the Board for attempting to comply with the statute.

2. Other breaches of contract (Argued at Pa410 – Pa420; Pa490 – Pa497)

For the sake of brevity, Plaintiff incorporates by reference, as if fully set forth at length herein: **1)** the multiple breaches of contract argued at Pa410 – Pa 420 in the Opposition to Summary Judgment; **2)** the sound legal reasoning in the court's original February 17th opinion finding that Pritchard was in breach of contract (Pa169 – Pa175); and **3)** the reinforcement and proofs in the Reconsideration Opposition that that the court indeed properly held that Pritchard breached the contract (Pa490–Pa497).

POINT NINETEEN [Prospective Application of *N.J.S.A.* 18A:7F-9(e)(3)] (Argued at Pa402 – Pa407)

The effective date of the amendment authorizing Pritchard to pay its employees from the Board's money is June 29, 2020. As with all statutes, *N.J.S.A.* 18A:7F-9(e)(3) must be given prospective application, which negates all of Pritchard's claims for payment on its April / May / June 2020 invoices. The Legislature undisputedly did not express retroactive application of *N.J.S.A.* 18A:7F-9(e)(3). Under the two-prong implied retroactive application test, the court cannot apply retroactive application of the statute because 1) the Legislature never intended to give the statute retroactive application; and 2) the retroactive application will result in either an unconstitutional interference with vested rights or a manifest

injustice. Pritchard's claims, which are based on the retroactive application of the statute, thus fails, thus requiring a denial of its motion for summary judgment.

Our Supreme Court in *Ardan v. Bd. of Rev.* discussed when a statute may have retroactive application:

A. Statutes by default have prospective application. (Argued at Pa402)

Statutes by default have prospective application. Our Supreme Court in *Ardan v. Bd. of Rev.* discussed when a statute may have retroactive application:

> Settled rules of statutory construction favor prospective rather than retroactive application of new legislation. Those rules are based on our long-held notions of fairness and due process. We consider (1) whether the Legislature intended to give the statute retroactive application and (2) whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice.[58]

B. The statute amendment relied upon by Pritchard in claiming that it could lawfully convert the Board's money to pay its employees became effective June 29, 2020, which negates any legitimate claim for payment of the April / May / June 2020 invoices. (Argued at Pa403 – Pa404)

The statute under *N.J.S.A.* 18A:7F-9(e)(3) reads as follows:

> If the schools of a school district are subject to a health-related closure for a period longer than three consecutive school days, which is the result of a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer, then the school district shall continue to make payments of benefits, compensation, and emoluments pursuant to the terms of a contract with a contracted service provider in effect on the date of the closure as if the services for such benefits, compensation, and emoluments had been provided, and as if the school facilities had remained open. Payments received by a contracted service provider pursuant to this paragraph shall be used to meet the payroll and fixed costs obligations of the contracted service provider, **and employees of the contracted service provider shall be paid as if the**

[58] *Ardan v. Bd. of Rev.*, 231 N.J. 589, 609–10 (2018) (internal quotations and citations omitted)

> **school facilities had remained open and in full operation [this portion in bold added later and became effective June 29, 2020].** A school district shall make all reasonable efforts to renegotiate a contract in good faith subject to this paragraph and may direct contracted service providers, who are a party to a contract and receive payments from the school district under this paragraph, to provide services on behalf of the school district which may reasonably be provided and are within the general expertise or service provision of the original contract. Negotiations shall not include indirect costs such as fuel or tolls. As a condition of negotiations, a contracted service provider shall reveal to the school district whether the entity has insurance coverage for business interruption covering work stoppages. A school district shall not be liable for the payment of benefits, compensation, and emoluments pursuant to the terms of a contract with a contracted service provider under this paragraph for services which otherwise would not have been provided had the school facilities remained open. Nothing in this paragraph shall be construed to require a school district to make payments to a party in material breach of a contract with a contracted service provider if the breach was not due to a closure resulting from a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer.

The April 14th version did not include the language, "and employees of the contracted service provider shall be paid as if the school facilities had remained open and in full operation". It was added later and became effective June 29, 2020. This is the portion Pritchard relies upon as justification to keep and use the money to pay its employees.

Pritchard's claim for payment is based on a *contested* fact that it paid its employees assigned to the Board. But that statutory authorization did not become effective until June 29, 2020, when the Legislature added, "employees of the contracted service provider shall be paid as if the school facilities had remained open and in full operation". The effective date no doubt blows up Pritchard's claim that it was entitled

to payment so that it could pay its employees who did no longer worked at the Board's buildings.

Even if the statute was given prospective application for April 14, 2020, then that still knocks out at least half of Pritchard's claim for full payment on a $620,250.[09] April 2020 invoice because it would not have been entitled to payment in the first half of April 2020. Thus, the court committed error in retroactively applying the statute back to April 1, 2020, and ordering full payment of the $620,250.[09] April 2020 invoice.

C. Legislature undisputedly did not express retroactive application of *N.J.S.A.* 18A:7F-9(e)(3). (Argued at Pa404)

Pritchard's Counterclaim and summary judgment motion for payment of the April / May/ June 2020 invoices presuppose the retroactive application of *N.J.S.A.* 18A:7F-9(e)(3), since all three months occurred prior to the June 29, 2020, effective date of the statute. It is undisputed that the Legislature never expressed the retroactive application of application of *N.J.S.A.* 18A:7F-9(e)(3), so the default rule is that it must have prospective application, *i.e.,* on and after June 29, 2020. If the Legislature wanted retroactive application of the statute, then it could have easily done so with a one-sentence statement that the statute is to have retroactive effect – but it did not. The Board had no obligation to pay Pritchard based on a statute that was never effective at the time Pritchard originally claimed payment, which negates the entire Counterclaim and request for summary judgment.

D. Under the first prong of the implied retroactive application test, Pritchard's claims fail because the Legislature never intended to give *N.J.S.A.* 18A:7F-9(e)(3) retroactive application. (Argued at Pa404 – Pa405)

Without the Legislature's express retroactive application of the statute, the court would have to rule, in the absence of evidence, that "(1) whether the Legislature intended to give the statute retroactive application and (2) whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice".[59] Under the **first prong**, "whether the Legislature intended to give the statute retroactive application", that answer is clearly "No". A review of the Legislative history reveals multiple Legislative sources establishing that the Legislature never intended to give retroactive application to *N.J.S.A.* 18A:7F-9(e)(3):

1) Of the two versions of the bill that were adopted and made effective April 14, 2020, and June 29, 2020, none of those versions discuss retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).

2) *N.J.S.A.* 18A:7F-9 underwent nine bill drafts, with the final eight occurring on or after March 23, 2020. None of the nine bill drafts discuss retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).

3) Between January 11, 2022, and March 7, 2022, there were six proposed bills to amend *N.J.S.A.* 18A:7F-9. None of these proposed bills discuss retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).

4) Of the 15 Legislative history materials, inclusive of proposals, Assembly statements, and Governor's veto comments, none of the history discusses retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).[60]

[59] *Ardan v. Bd. of Rev.*, 231 N.J. 589, 609–10 (2018) (internal quotations and citations omitted)
[60] Pa232 – Pa266

E. Under the second prong of the implied retroactive application test, Pritchard's claims fail because the retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice. (Argued at Pa405 – Pa407)

As to the **second prong, "**whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice", that answer is "Yes".

1. Unconstitutional interference with vested rights (Argued at Pa405 – Pa406)

First, the argument that the interpretation of *N.J.S.A.* 18A:7F-9(e)(3) as allowing payment to Pritchard without a renegotiated contract violates the Impairment of Contracts Clause under the U.S. and New Jersey Constitutions is detailed above under Point Eight of this Brief. Second, another unconstitutional interference with vested rights of the Board is under the *New Jersey Constitution,* Art. 8, § IV, ¶ 1, where school districts must provide for a "thorough and efficient" education. The Board is able to carry out this duty through *N.J.S.A.* 18A:11-1(d), where the Board "shall" "Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district". A major focus of the Board during the pandemic was to preserve and reserve funding and resources to thoroughly execute remote instruction and combat learning loss from remote instruction, so the Board prioritized its resources toward that end. It would have a detrimental impact on budgeting, planning, and financial resources, and by extension, negatively impact the Board's ability to provide the constitutional "thorough and efficient" education, if the statute was applied

retroactively where the Board is forced to spend exorbitant amounts of money on a for-profit private company who, at the time, provided no benefit to its students. Applying the statute retroactively thus unconstitutionally interferes with the Board's rights to ensure efficient spending of public taxpayer money for the lawful and proper conduct of the school district. Thus, even if Pritchard did have a right to be paid under *N.J.S.A.* 18A:7F-9(e)(3), this court cannot give the statute retroactive application. Without retroactive application, Pritchard's claim for payments of the April / May / June 2020 invoices fail.

2. Manifest injustice (Argued at Pa406 – Pa407)

In prior Board meetings, the Board engaged in lengthy and robust public discussions about Pritchard's custodial services and whether to renew / extend Pritchard's contract. A renegotiated contract to pay Pritchard under *N.J.S.A.* 18A:7F-9(e)(3), if any, would have been first discussed at a Board committee meeting, and then would have to be placed on a public agenda, and voted on at an open public meeting, before funds were dispersed to Pritchard.

The Counterclaim does not establish that the parties entered into a renegotiated contract. The contents of a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), if any, would have been available for public consumption prior to the Board's discussion and vote. By not entering into a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), the public was deprived of its right to government transparency and to engage in public comment on the merits of approving the renegotiated contract, if any. The Board could

have engaged in a private and public discussion at an open public meeting about the merits of approving a renegotiated contract, if any, under *N.J.S.A.* 18A:7F-9(e)(3). By not entering into a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), the Board was deprived of its right to publicly or privately discuss the merits of approving the renegotiated contract, if any. All contracts are subject to Board approvals by a roll call majority vote. By not entering into a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), the Board was deprived of its right to vote "Yes" or "No" to enter in to the renegotiated contract, if any.

It is certainly a manifest injustice to retroactively apply a law that would put a public school district on the hook for a $1.9-million obligation Pritchard attempts to collect on. The rights of the public and Board (*N.J.S.A.* 18A:11-1) were not preserved, resulting in a manifest injustice. Hence, the unconstitutional interference with vested rights, and manifest injustice, means that the second prong of the retroactive application test fails. The failure to satisfy both prongs of the retroactive application test means that the court should not rule that *N.J.S.A.* 18A:7F-9(e)(3) is to be given retroactive application, requiring the denial of Pritchard's summary judgment motion.

CONCLUSION

On February 17, 2023, the court properly granted the Board's cross-motion for summary judgment on the Counteclaim. To affirm the court's April 28, 2023, reconsideration order granting Pritchard's **Counterclaim**, the Appellate Division would have to: **1)** accept that the Superior Court had jurisdiction to hear a case under

an 18A school law statute within the jurisdiction of the Commissioner; **2)** find that the Commissioner lacks exclusive and primary jurisdiction to adjudicate an 18A school law claim; **3)** agree that there is an express and/or implied private right to a cause of action to sue in Superior Court despite being no remedy or statute authorizing suit; **4)** rule that Pritchard is not required to exhaust administrative remedies before seeking to enforce an 18A school law statute in Superior Court; **5)** rule that the 45-day statute of limitations under *R.* 4:69-6 for enforcing a public entity's compliance with the statute is inapplicable or should be enlarged to over 2.5 years; **6)** decline to impose the doctrines of accord and satisfaction, and laches, despite the fact that Pritchard waited until two budget years later to formally challenge the Board's compliance with the statute through its September 2022-filed Counterclaim; **7)** interpret and apply *N.J.S.A.* 18A:7F-9(e)(3) in a manner that violates the Impairment of Contracts clauses in the U.S. Constitution and New Jersey Constitution; **8)** rule that Pritchard established a prima facie case for a breach of contract under Count One despite not meeting any of the four elements for a breach; **9)** rule that Pritchard established a prima facie case for unjust enrichment despite not pleading any benefit the Board received; and **10)** rule that Pritchard established a prima facie case for a failure to follow a statutory obligation even though no such cause of action exists, nor did they comply with *R.* 4:69-1, *et seq.* Of course, the law and facts do not support the Appellate Division skipping over all of these reasons why the Counterclaim should be dismissed, and the court's original February 17, 2023, order should be affirmed.

To affirm the court's April 28, 2023, reconsideration order dismissing the Board's 10-count **Complaint**, the Appellate Division would have to: **1)** determine that **2)** decline to enforce the presumptive prospective application of *N.J.S.A.* 18A:7F-9(e)(3), even though the Legislature never expressed that the June 29, 2020, effective date of the statute was to have retroactive application; **3)** apply retroactive application to N.J.S.A. 18A:7F-9(e)(3), even though the Legislature never intended it to have retroactive application, and doing so would result in the unconstitutional interference with the vested rights of the Board or a manifest injustice; **4)** rule that there was sufficient consideration on a pay-for-services contract that allowed the Pritchard to hold the Board liable for $1.9-million in payments despite rendering no services; **5)** approve the wholesale dismissal of the Board's 10-count complaint, even though the Board can establish the prima facie elements of each of the individual counts under multiple theories of liability, and even though Pritchard and the court never analyzed any of the elements of the individually-pleaded counts in its motion; and **6)** rule that there are no genuine issues of material facts in dispute as to the Complaint without any exchange of discovery, even though the Board disputes Pritchard's claims, and had several months of discovery left when the court dismissed the Complaint.

In sum, the Appellate Division should reverse the court's April 28, 2023, order, dismiss Pritchard's Complaint with prejudice, and restore the Board's Complaint to the discovery calendar.

Respectfully Submitted,

SOUDER SHABAZZ & WOOLRIDGE LAW GROUP, LLP
Attorneys for Appellant – Plaintiff / Counterclaim Defendant, Paterson Board of Education

*/s/ Bryant Lawrence Horsley, Jr.*_____ Dated: February 5, 2024
Bryant Lawrence Horsley, Jr., Esquire
(017222006)

PATERSON BOARD OF EDUCATION, Plaintiff- Appellant, vs. PRITCHARD INDUSTRIES, INC., and THOMAS MARTIN, Defendants- Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3079-22 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY PASSAIC COUNTY/LAW DIVISION Docket No.: PAS-L-2013-22 Sat Below: Hon. Vicki A. Citrino, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANTS-RESPONDENTS, PRITCHARD INDUSTRIES, INC. AND THOMAS MARTIN

SKOLOFF & WOLFE, P.C.
293 Eisenhower Parkway
Livingston, NJ 07039
(973) 992-0900
pcollins@skoloffwolfe.com
Attorneys for Defendants-Respondents, Pritchard Industries, Inc. and Thomas Martin

On the Brief:
Patrick T. Collins, Esq. (044571984)

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PRELIMINARY STATEMENT

This appeal concerns a statute enacted shortly following the outset of and as a result of the COVID-19 pandemic. Defendant/respondent Pritchard Industries, Inc. ("Pritchard") is a janitorial services company that provides services to numerous New Jersey public school districts, which have chosen to outsource their custodial service requirements as a cost savings measure. Plaintiff/appellant Paterson Board of Education ("Paterson") operates one such district. Pritchard's contract with Paterson was publicly bid and provided for a monthly payment in exchange for Pritchard's provision of specified custodial services for Paterson's schools.

As was the case throughout the State, in mid-March 2020, Paterson closed its public schools and transitioned to remote learning. As a result, Pritchard was instructed not to enter Paterson's buildings, and in any event, since there were no students or employees occupying those buildings, they did not require custodial services. Pritchard accordingly laid off all of its custodians that had been assigned to Paterson. Paterson did not issue payment to Pritchard for services commencing in April 2020, as Pritchard was not rendering any services to it.

In an effort to ameliorate some of the ramifications of the pandemic arising from resulting employment terminations, the Legislature passed and the Governor signed into law an amendment to *N.J.S.A.* 18A:7F-9 (Public Law 2020, c.27), to add section e(3), to be effective on April 14, 2020, that provides in relevant part:

> If the schools of a school district are subject to a health-related closure for a period longer than three consecutive school days, which is the result of a declared state of emergency [or] declared public health emergency . . . then the school district shall continue to make payments of benefits, compensation, and emoluments pursuant to the terms of a contract with a contracted service provider in effect on the date of the closure as if the services for such benefits, compensation, and emoluments had been provided, and as if the school facilities had remained open. Payments received by a contracted service provider pursuant to this paragraph shall be used to meet the payroll and fixed costs obligations of the contracted service provider[.] (Emphasis supplied.)

The purpose of this statute (the "COVID Statute" or the "Statute") is quite obvious: It was intended to provide a continuation of income to businesses and workers whose employment was suspended as a result of the pandemic. School districts which had budgeted for certain services at the outset of the academic year were to continue to pay contractors who had been providing those services, even though the services were not being provided. And the contractors receiving those payments were required to apply them to their payrolls for employees who had been laid off as a result of the pandemic. This was part of government doing all it could to reduce the negative impact of the pandemic on citizens dependent upon paychecks that were being missed. Paterson seems to either disagree with the COVID Statute's mandate or be unable to comprehend this.

Paterson's schools reopened in early July 2020, and Pritchard then resumed providing services. Consistent with the COVID Statute, in August 2020, Paterson

issued payment to Pritchard for May and June 2020, but not for April 2020, or the period of July 2020 preceding the reopening of its schools. Pritchard anticipated receiving those payments as well, but before they were received, Paterson demanded the return of the payments it had made for May and June, claiming that they were made in error, the Statute notwithstanding. When Pritchard declined Paterson's repayment demand, Paterson filed this case, a ten ount complaint of 447 paragraphs, alleging not only breach of contract and unjust enrichment, but conversion/theft, fraud and tortious interference, all associated with Pritchard's retention of the funds paid to it pursuant to the COVID Statute. Pritchard naturally counterclaimed for the April and July 2020 payments it had not received. The lower court agreed with it.

Although it is patently evident that this case turns on the construction of the COVID Statute and nothing else, not only does Paterson largely ignore the Statute in its overlength brief, but it takes the position that the Court lacks jurisdiction to apply the Statute, under the reasoning that only the Commissioner of Education has authority to do so. In essence, it argues that in deciding this appeal of a case initiated by Paterson, the Court should turn a blind eye to the Statute on which the case turns. Pritchard submits that doing so is not sensible, and that a plain reading of the COVID Statute demonstrates the correctness of the lower court's disposition.

PROCEDURAL HISTORY

Paterson's complaint was filed August 11, 2022. 1a. Pritchard's answer and counterclaim was filed September 16, 2022. 73a. On December 20, 2022, Pritchard filed a notice of motion for summary judgment, 602a, supported by a R. 4:46-2(a) statement, 606a, and certifications of Thomas Martin ("Martin"), 638a, and counsel. 669a. In response, on January 17, 2023, Paterson filed a notice of cross motion for summary judgment on Pritchard's counterclaim and to dismiss under R. 4:6-2(e); Paterson did not include this filing in its appendix. These motions were supported by certifications of Eileen Shafer ("Shafer"), 211a, and counsel, 826a, and a response to Pritchard's R. 4:46-2(a) statement. 267a. On February 7, 2023, Pritchard filed a reply certification of Martin. 815a.

The lower court heard oral argument on February 17, 2023, and entered three separate Orders. Although the Order is not a model of clarity, Paterson's motion to dismiss was denied. 162a. Paterson's motion for summary judgment to dismiss Pritchard's counterclaim was granted. 169a. Pritchard's motion for summary judgment was denied. 452a.

On March 10, 2023, Pritchard filed a motion for reconsideration and summary judgment, 503a, supported by a certification of Martin. 508a. Following oral argument, on April 28, 2023, the lower court granted Pritchard reconsideration of its

Orders of February 17, 2023, granted summary judgment to Pritchard and entered judgment in favor of Pritchard and against Paterson for $697,391. 153a.

On May 18, 2023, Paterson filed a motion for clarification of the lower court's Order of April 28, 2023; its notice of motion does not appear in Paterson's appendix. That motion was supported with a certification of counsel. 467a. An Order denying this motion was entered by the lower court on June 9, 2023. 160a.

Paterson's notice of appeal was filed June 12, 2023; it amended notice of appeal was filed June 23, 2023. 176a.

STATEMENT OF FACTS

It should be noted that none of the factual averments set forth below are disputed by Paterson. As stated above, Pritchard is a custodial services contractor. Prior to the 2019-2020 school year, Pritchard had served as Paterson's custodial services contractor for several years. 638a. Its services were rendered under a contract that was awarded pursuant to public bidding conducted under *N.J.S.A.* 18A:18-1, *et. seq.* 638a. The contract appears at 515a. For the period under discussion, consistent with its bid, Pritchard was to be paid $620,250 per month for the provision of the services required under the specifications upon which Pritchard had bid, in addition to charges for any additional custodial services and supplies requested by Paterson beyond those specified. 638-39a. Through March 2020, payments were made by Paterson consistent with its contractual obligations. 639a.

On March 25, 2020, consistent with the Governor's executive orders pertaining to the coronavirus epidemic, Paterson instructed Pritchard that it was to cease providing its services effective the next day. On April 14, 2020, the Governor signed a bill passed by the Legislature, later codified at *N.J.S.A.* 18A:7F-9e(3), that required school districts to pay contracted service providers during the COVID-19 shutdown as if schools were still open and the services were being rendered, without regard to whether any services were being rendered or not; on June 29, 2020, the Statute was amended to require that that contractors receiving such payments make payment of wages to all employees who were laid off due to the school closure. 639a.

The full text of the COVID Statute in its amended form appears below. The language of the June 29, 2020 amendment is highlighted.

> If the schools of a school district are subject to a health-related closure for a period longer than three consecutive school days, which is the result of a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer, then the school district shall continue to make payments of benefits, compensation, and emoluments pursuant to the terms of a contract with a contracted service provider in effect on the date of the closure as if the services for such benefits, compensation, and emoluments had been provided, and as if the school facilities had remained open. Payments received by a contracted service provider pursuant to this paragraph shall be used to meet the payroll and fixed costs obligations of the contracted service provider, **and employees of the contracted service provider shall be paid as if the school facilities had remained open and in full operation**. A school district shall make all reasonable efforts

> to renegotiate a contract in good faith subject to this paragraph and may direct contracted service providers, who are a party to a contract and receive payments from the school district under this paragraph, to provide services on behalf of the school district which may reasonably be provided and are within the general expertise or service provision of the original contract. Negotiations shall not include indirect costs such as fuel or tolls. As a condition of negotiations, a contracted service provider shall reveal to the school district whether the entity has insurance coverage for business interruption covering work stoppages. A school district shall not be liable for the payment of benefits, compensation, and emoluments pursuant to the terms of a contract with a contracted service provider under this paragraph for services which otherwise would not have been provided had the school facilities remained open. Nothing in this paragraph shall be construed to require a school district to make payments to a party in material breach of a contract with a contracted service provider if the breach was not due to a closure resulting from a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer. (Emphasis supplied.)

As may be seen, the amendment to the Statute, which requires the contracted service provider to pay its employees as if the schools had remained open, is mostly redundant; the original version of the law required that payments made to service providers pursuant to it be applied to payroll and fixed expenses of the contractor, while the amendment required that the employees of the service provider be paid as if the schools had remained open. It may be noteworthy that Paterson's brief provides the Court with the text of the COVID Statute only at Pb-57.

The Department of Education issued a "Guidance" memorandum pertaining to the COVID Statute to the State's schools on May 19, 2020, which appears at Da-

1. The guidance offered is largely a recitation of the plain language of the Statute; it states that school districts "must continue to make such payments to a contracted service provider" when schools are closed for three days or more due to health-related emergencies. It also states that the payments to those service providers "must be consistent with the terms of the contact in effect on the date of the closure." It further states, consistent with the Statute's language, that "school districts are required to make reasonable efforts to renegotiate contracts subject to the law's provisions." (Emphasis supplied.) Neither the COVID Statute nor the Department of Education's guidance states that there are any conditions to be met in order for the Statute's mandate for school districts to make the required payments to contracted service providers to be legally effective; the "renegotiation" language appears to be entirely precatory.

Pritchard provided no services to Paterson for the period March 26, 2020-July 6, 2020, but, as per the COVID Statute, it invoiced Paterson $620,250 for the months of April, May and June 2020, and $591,417 for the month of July 2020. 640a. Paterson paid the May and June invoices in August 2020, as required by the Statute, but did not pay Pritchard's April 2020 invoice, and only partially its July invoice, leaving $77,141 unpaid, as a proration of the July invoice, since Pritchard had only resumed providing services on July 6. 640a. One other invoice, for janitorial supplies requested by Paterson and unrelated to Pritchard's fixed monthly services,

in the amount of $60,800, was also paid at that time, for a total of $1,301,300. 640a. These payments were made by Paterson following a board resolution approving the payments on August 12, 2020. 639a.

Upon receipt of the May and June payments, Pritchard issued payroll checks for those periods to the custodians who had been working in Paterson's schools but had been laid off as a result of the schools' closure and documented that it had done so. 640a; 655a. Paterson continued to withhold payment from Pritchard of its April 2020 invoice and the balance of its July 2020 invoice, and Pritchard continually pressed Paterson for the payment. 641a. Pritchard did not initially sue Paterson for the outstanding payments, as it continued to serve as Paterson's custodial services contractor and remained hopeful that Paterson would ultimately meet its obligation.

On September 27, 2021, over a year after it made payment to Pritchard for the May-June 2020 period, Paterson, through its counsel, sent Pritchard a letter stating that its invoices for the period of the COVID shutdown had been rejected on July 17, 2020, due to the fact that Pritchard had not rendered services during the period that Paterson's schools were closed, and asserting that Pritchard had not tendered any certified payrolls for that period as required by the parties' contract. 63a. (Since Pritchard performed no services and had laid off its employees assigned to Paterson for the period the schools were closed, it obviously had no certified payrolls to produce at the time that its invoices were first sent.) Paterson demanded return of

the $1,301,300 payment, asserting that Pritchard was in breach of its contract for failing to have performed services while the schools were closed and that it had been unjustly enriched by the payment it had received. 63a-64a. Paterson further contended, (falsely), that Pritchard had failed to apply the August 2020 payment to the wages of the custodians who had been laid off during the pandemic, and that the COVID Statute was properly construed to only allow for payment to a contractor following the renegotiation of its contract, another unfounded claim. 65a. The letter attached a "Questionnaire" for purported use in "negotiations," which is styled as litigation interrogatories. 68-72a. Pritchard did not answer Paterson's questionnaire.

Almost a year later, on July 20, 2022, Paterson passed a resolution rescinding the payments it had made to Pritchard two years earlier in the amount of $1,301,300. 847-48a. Somewhat incredibly, the resolution states that Paterson had performed an "investigation" that had "revealed" that Pritchard had not provided any services to Paterson during the period in which its schools were closed due to the COVID-19 emergency. 847a. The resolution asserted that the payments that Paterson had made to Pritchard for the May-June 2020 period were "illegal and pursuant to a breach of contract," 847a, that any resolutions approving the payments were declared null and void and that its counsel was to pursue legal action against Pritchard to recover the payments made. 848a. The resolution does not mention the COVID Statute.

Shortly afterward, Paterson filed this action against Pritchard seeking return of the payments it made for the May-June 2020 period, as well as the unrelated $60,800 payment, apparently confusing it with the payments it made for that period. Paterson's complaint consists of ten counts, which will be briefly addressed below.

Count I-Breach of Contract. 14a-25a. Here Paterson asserts, basically, that Pritchard's following of Paterson's instruction that it cease performing services in March 2020, following the Governor's Executive Order, violated various provisions of the parties' agreement. 14a-24a. It does not mention the COVID Statute which requires payment to school contractors where schools are closed due to a public health emergency.

Count II- "Statutory and Legal Violations & Impediments to Contract." 25a-34a. Here Paterson cites the COVID Statute and incorrectly asserts that it became effective on June 29, 2020, and therefore does not apply to the time period in question; in fact, as discussed above, the COVID Statute was enacted on April 14, 2020, and was amended on June 29, 2020, to add language restating that the contractor is to apply the payment to the wages of affected employees. (As will be discussed below, retroactive application of the Statute is appropriate in any event.) The Second Count also asserts, falsely, that Pritchard failed to apply the payment it received to affected employees' wages, and that Pritchard failed to renegotiate the parties' contract, as if there was a requirement that it do so. It also asserts, somewhat

incredibly, that the COVID Statute actually prohibits the enforcement of the parties' contract as written, and that it imposed upon Pritchard a requirement that it "renegotiate" the contract, although the contact was awarded through public bidding and never "negotiated" in the first place. The Second Count further asserts that the COVID Statute is an unconstitutional impairment of contract; that Pritchard violated the Public Schools Contracts Law (*N.J.S.A.* 18A:18A-40) by changing the terms of the contract; that Pritchard deprived Paterson of the right to vote on a renegotiated contract; that by requesting payment without providing services Pritchard violated the statute of frauds (*N.J.S.A.* 25:1-15); that there was a lack of consideration for the payment Paterson made to Pritchard; and that Pritchard's request for payment in accordance with the COVID Statute is unconscionable.

Count III-Unjust enrichment. 34a-37a. Here Paterson asserts that Pritchard was unjustly enriched by receiving the payment Paterson made pursuant to the COVID Statute without performing services; that Pritchard may have received proceeds from business interruption insurance or a Paycheck Protection Payment loan and that its receipt of the payment from Paterson represents "double dipping"; that the payment Pritchard received from Paterson pursuant to the COVID Statute violates public policy in general; and that the payment Paterson made to Pritchard renders their contract a "no show" contract, also in violation of public policy.

Count IV-Violation of implied covenant of good faith and fair dealing. 38a-41a. In this count Paterson asserts that the implied covenant was violated by Pritchard through its "deceptive invoices"; its request for payment before the effective date of the COVID Statute of June 29, 2020, (the Statute was actually enacted on April 14, 2020); its failure to answer Paterson's "questionnaire"; and its failure to return to Paterson the payment it made pursuant to the COVID Statute.

Count V- Promissory estoppel. 41a-42a. Here Paterson alleges that Martin represented to Paterson that upon receipt of payment for the April 1-July 6, 2020, period, Pritchard would pay the wages of its employees who were laid off during that period, and contends, (incorrectly), that it did not do so. Paterson asserts that the payment to Pritchard, (which Paterson now contends was the product of administrative error), was induced by this false assertion, (which was not false.)

Count VI-Conversion or civil theft. 42a-44a. Here Paterson asserts that by invoicing Paterson for the May-June 2020 payments and then receiving payment pursuant to the COVID Statute, Pritchard converted Paterson's funds; it also seems to contend that by receiving those funds and not applying 100% of them to the wages of the laid off custodians, the funds in excess of what was paid as wages to laid off custodians were the subject of a conversion.

Count VII-Fraud/misrepresentation. 44a-48a. This count advances the claim that by submitting invoices for "custodial services" when no such services were

rendered, and by requesting payment prior to the enactment of the COVID Statute on June 29, 2020, (although the Statute was enacted on April 14, 2020), Pritchard made false representations. (Since Paterson's payment to Pritchard did not occur until after its August 12, 2020, resolution to pay Pritchard, the latter claim seems to have an inconsistency.) This count does not allege reliance by Paterson on either representation, and Paterson seems to have been aware that its schools were closed from March 26-July 6, 2020.

Count VIII-Tortious interference with contractual relations. 48a-49a. Here Paterson contends that, through its agent, Martin, Pritchard interfered with its own contract with Paterson by not returning the payment Paterson had made.

Count IX-Punitive damages. 49a-50a. Here Paterson asserts that Pritchard's complained of conduct was actuated by malice and with wanton and willful disregard of the persons who would be harmed by it.

Count X-Indemnification. 50a-51a. So far as may be discerned, Paterson points to the indemnification provision of the parties' agreement and contends that by asserting an entitlement to retain the payment made to it by Paterson pursuant to the COVID Statute, Pritchard has made a claim against Paterson for which it must indemnify Paterson pursuant to that clause, by repaying Paterson the amount of the payment. Or something like that.

Pritchard asserted a counterclaim against Paterson for the payments due it under the COVID Statute for the April and July 1-6, 2020, periods; it asserted three counts, including breach of contract, unjust enrichment and Paterson's failure to comply with the mandate of the COVID Statute.

Pritchard filed a motion for summary judgement based upon the simple assertion that the COVID Statute required that Paterson pay it for the period that Paterson's schools were closed due to the pandemic. Through Martin, its vice president and general manager, it was explained that Pritchard had received payment from Paterson for the May-June 2020 period, that it had thereafter paid the laid off custodians it had assigned to Paterson their wages for that period, (which was documented), but that it had not been paid for April and July 1-6, 2020, and had not paid its custodians for that period. 640-41a; 655-68a.

Paterson responded with the Certification of Schafer, its superintendent, which mostly recited the allegations of Paterson's Complaint. 211a. Most of what Schafer offered in opposition to Pritchard's motion, and in support of Paterson's motion to dismiss Pritchard's counterclaim, was a discussion of how many students Paterson is responsible for and the many challenges presented to it by the closing of its schools, implementation of remote learning and meal provision to qualifying students at their homes. The Certification also devotes much text to arguing for a construction of the COVID Statute that ignores its provision mandating payment to

contracted service providers who were not providing services due to the pandemic. And Schafer advanced a contention that Pritchard failed to "file a notice of breach of contract along with a demand for payment," as if there was a requirement for some sort of notice to issue before Pritchard was permitted to file its counterclaim. 225-26a.

As to the wages that Pritchard had paid its custodians for the May-June 2020 period, Schaeffer challenged the documentation Pritchard submitted, based upon its being dated in September-October 2020, which is when Pritchard made the wage payments with the funds it received from Paterson in August 2020. 226a. And Schafer reiterated the content of a letter Paterson had received from the union local to which the custodians assigned to Paterson belong, which demanded that Paterson make the outstanding payment, but incorrectly asserted that its members were owed wages for the entire period of April-June 2020. 226a. And she asserted that something was amiss because the payment that Paterson made to Pritchard was in an amount greater than the wages paid to its custodians as documented in Martin's certification, apparently construing the COVID Statute to limit the obligation of the school district to paying the amounts due for wages to the custodians. 227a.

As stated above, the lower court entered Orders on both Pritchard's and Paterson's motions for summary judgment, and on Paterson's motion to dismiss pursuant to R. 4:6-2; however, it employed the same five page Statement of Reasons

for each. As to Paterson's motion to dismiss Pritchard's counterclaim, the lower court denied it as untimely. 165a. With respect to the parties' summary judgment motions, the lower court appeared to reject Paterson's strained construction of the COVID Statute, 167a, but accepted Paterson's argument that since Pritchard had not provided Paterson with certified payrolls along with the invoices for the period that it did not provide services due to the schools' closure, it was out of compliance with the contract provision that required them, thus entitling Pritchard to no relief. 168a. This determination also led to the lower court's granting of Paterson's motion for summary judgment and dismissal of Pritchard's counterclaim. The lower court had apparently overlooked the fact that since Pritchard had not rendered any services during the time period at issue, and had laid off its custodians for that period, there were no certified payrolls for it to produce.

Recognizing that the lower court's decision on the parties' motions was plainly the product of error, Pritchard filed a motion for reconsideration, and renewed its motion for summary judgment. Through a certification of Martin, Pritchard explained the billing process used by Pritchard and Paterson over the course of their relationship, and how Pritchard would issue an invoice at the beginning of each month and would provide its certified payrolls for the month at the end of the month. 509a. It provided an example of the certified payrolls, 524a, and described the information appearing on them. 510a. It also explained that its

invoices would be preceded by Paterson's purchase order and provided an example of one of those. 510a; 551a. It was further re-explained to the lower court that once Paterson's schools were closed in March 2020, Pritchard's custodians assigned to Paterson had been laid off, and that consequently, it had no payrolls to produce. 511a. And it explained that once Paterson paid Pritchard's May and June 2020 invoices, on October 2, 2020, it issued payroll checks for that period to all of its laid off custodians, as the COVID Statute requires, and provided the lower court once again with those payroll records. 512a; 655a. Pritchard urged the lower court to revise and reconsider its earlier Orders denying its motion for summary judgment and dismissing its counterclaim on this basis.

In its decision on this motion, the lower court adopted Pritchard's above stated position. It explained that there was no dispute regarding the process that the parties had historically employed of Pritchard issuing an invoice at the beginning of the month and following it with the certified payrolls for its custodians after the end of the month. 157a. It noted that while the schools were closed, Pritchard had no payrolls for its custodians, and thus no certified payrolls to produce to Paterson. 158a. It noted that after Paterson paid Pritchard for its May and June 2020 invoices, Pritchard had issued payroll checks to its custodians who had been laid off during that period. 157-58a. The lower court rejected Paterson's position that it needed the payrolls to determine which employees had been laid off, had collected

unemployment or had been paid with PPP loans. 158a. (This is not information that would be reflected on a certified payroll in any event.)

The lower court then construed the COVID Statute as it is worded, noting that it imposed on the school district the obligation to pay its contracted service providers, that it required the service providers to apply the funds received to payroll and fixed costs and that the COVID Statute did not empower the school district to verify how the funds it paid were applied. 158-59a. The lower court noted that the Statute required the school district to "make all reasonable efforts to renegotiate a contract in good faith", but that it did not impose such an obligation on the contractor and that Paterson's "questionnaire" did not appear to be in good faith. 159a. As to Paterson's contentions regarding the other responsibilities it was required to undertake during the pandemic, the lower court concluded that those circumstances did not excuse its non-compliance with its obligation under the COVID Statute. 159a. It accordingly entered summary judgment in favor of Pritchard and against Paterson in the amount of $697,031, per its April 28, 2023, Order. 153a. On Paterson's motion, the lower court later clarified its Order, and stated that it was intended to be a final order dismissing the Complaint as well as entering judgment on the counterclaim. 160a.

It should be noted that the COVID Statute is now three years post-enactment and affected every public school district in the State and doubtless hundreds of

contracted service providers. This Court has not had occasion to address it to date, and an internet search for lawsuits concerning it has yielded no results. The COVID Statute does not appear to have generated controversy outside of this case.

POINT I - THE LOWER COURT'S CONSIDERATION OF THE COVID STATUTE WAS NECESSARY AND APPROPRIATE

As set forth in the Statement of Facts, Pritchard tendered its invoices to Paterson for the months of April, May, June and July 2020 based upon the COVID Statute, which mandates that local school districts subject to closure due to a public health emergency pay their contracted service providers as if the school facilities had remained open. The wording of the Statute is not permissive: Rather, it provides that the school district "shall continue to make payments . . . pursuant to the terms of a contract . . . as if the services . . . had been provided." While the Statute also includes a provision requiring that "a school district shall make all reasonable efforts to renegotiate a contract in good faith . . .", the obligation on the part of the school district to make payments to the contracted service provider pursuant to the terms of their contract is not conditioned on the success (however that is to be measured) of those negotiations.

The payments that Paterson made to Pritchard in satisfaction of Pritchard's invoices for May and June 2020 were in full accord with the obligation the COVID Statute imposed upon Paterson. Notwithstanding the fact that the payments

represented exactly what the Statute required of Paterson, it later passed a resolution rescinding authority for the making of the payments, demanded of Pritchard that the funds be returned and filed suit against Pritchard seeking judgment against it for the amount of those payments, as well as punitive damages. Pritchard then had little choice but to assert its counterclaim for the amounts that Paterson had withheld from it for the periods of April and July 1-6, 2020.

It could not be more evident that, to the extent that any *bona fide* dispute exists here, the outcome of that dispute turns on whether the COVID Statute required Paterson to make the payments it did, as well as the payments for April and July 2020 which it continues to withhold, and which are represented by the lower court's judgment. The lower court, and this Court, could not possibly decide the case Paterson brought and the mandatory counterclaim Pritchard filed without consideration of the COVID Statute. The lower court afforded the COVID Statute a plain reading and concluded that the April and July 1-6, 2020, payments claimed by Pritchard were required, as well as the May and June 2020 payments which Paterson had made and seeks to claw back.

Paterson's position is that both the lower court and this Court should decide this case without consideration of the COVID Statute, due to its codification in Title 18A and the supposedly exclusive jurisdiction of the Commissioner of Education (the "Commissioner") on all matters pertaining to Title 18A. So far as Pritchard is

able to understand it, Paterson's position is that this appeal should be decided as if the COVID Statute did not exist, and that Pritchard should instead petition the Commissioner if it believes that the COVID Statute requires Paterson to have made the payments it made to Pritchard for May and June 2020, and the payments it seeks for April and July 1-6, 2020, which represent the judgment entered by the lower court in favor of Pritchard. And if the Commissioner agrees with Pritchard, he could withhold some undefined amount of state aid from Paterson should it fail to comply with his decision. And even then, if the Commissioner agreed with Pritchard, there would not be a basis upon which he could disturb the judgment that Paterson contends it is entitled to for its claw back. While Pritchard is loath to employ such language in a brief submitted to this Court, Paterson's position is, in a word, absurd.

It will be explained below that (1) it is simply not the law that the Commissioner has exclusive jurisdiction anytime a statute codified in Title 18A is implicated in a lawsuit; (2) there is nothing in the COVID Statute that requires the expertise of the Department of Education; and (3) there is no reason that the COVID Statute should be construed so as to deny a private right of action in favor a public school contractor entitled to payment under its terms. And even if Paterson were correct in any of these unfounded legal assertions, both the entire controversy doctrine and the doctrine of waiver would prohibit its taking of the position that the case it initiated should be adjudicated as if the COVID Statute did not exist.

A. The entire controversy doctrine requires that this matter be decided in a single proceeding.

The entire controversy doctrine is an equitable doctrine that is meant "to encourage comprehensive and conclusive determinations, to avoid fragmentation and to promote party fairness and judicial economy." *Bonaventure Int'l, Inc. v. Spring Lake*, 350 *N.J. Super.* 420, 440 (App. Div. 2002) (citing *Falcone v. Middlesex County Med. Soc.*, 47 *N.J.* 92 (1966)). The doctrine encompasses "virtually all causes, claims, and defenses relating to a controversy," and "all parties to a suit should assert affirmative claims and defenses arising out of the underlying controversy." *Previratil v. Mohr*, 145 *N.J.* 180, 187 (1996); *Cogdell v. Hosp. Ctr. at Orange*, 116 *N.J.* 7, 16 (1989).[1] The Supreme Court has recognized that the doctrine serves three fundamental purposes:

> (1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay.

Bank Leumi USA v. Kloss, 243 *N.J.* 218 (2020) (quoting *DiTrolio v. Antiles*, 142 *N.J.* 253, 267 (1995).

[1] In fact, under *R.* 4:30A, Pritchard would have risked losing its ability to assert its claims against Paterson if it had not filed its Counterclaim in the same action as Paterson's Complaint.

Paterson's suggestion that Pritchard may only invoke the COVID Statute in a proceeding before the Department of Education contradicts each of those fundamental purposes. First, allowing Paterson's case against Pritchard to continue before the trial court, while forcing Pritchard to seek relief elsewhere, would result in the opposite of a "complete and final" disposition. Second, Paterson's position is completely unfair to Pritchard because both Paterson's Complaint and Pritchard's Counterclaim turn on whether *N.J.S.A.* 18A:7F-9e(3) requires Paterson to make the payments under discussion here; obviously this dispute should be decided in a single forum, and obviously, the effect of the COVID Statute should be considered in that single forum. Third, the notion that two parties should litigate the same issue before two separate tribunals is the very definition of inefficiency and wastefulness.

In sum, Paterson's entire argument, which calls on this Court to force Pritchard to seek relief before the Department of Education while Paterson's case remains in the court system and the Court engages in the fiction that the COVID Statue does not exist, runs directly counter to the entire controversy doctrine. Even assuming, *arguendo*, that Paterson's argument about the Department of Education was not based on a fundamentally faulty premise, this Court should *still* ensure that Pritchard's Counterclaim remains in the same action as Paterson's Complaint based on the entire controversy doctrine – particularly since it was Paterson which chose this forum in which to litigate the matter in the first place. Accordingly, the entire

controversy doctrine, (and common sense), dictate that both the Complaint and Pritchard's Counterclaim should be resolved in Superior Court.

B. The doctrine of waiver should preclude Paterson from asserting that the Superior court lacks jurisdiction to construe the COVID Statute.

After making payment to Pritchard in satisfaction of its May and June 2020 invoices, (in a manner fully consistent with the requirements of the COVID Statute), and then demanding the return of those funds, Paterson filed suit in the Superior Court. It did so well aware of the fact that Pritchard understandably relies on the Statute in taking the positions that the payments Paterson seeks to recoup were properly made, and that Paterson owes it for its April invoice and the remaining balance of its July 2020 invoice. To the extent that Paterson actually maintains that exclusive jurisdiction over all matters falling under Title 18A lies solely with the Commissioner, it could have petitioned the Commissioner for the relief that it sought in the Law Division. But instead, Paterson filed suit in the Law Division, and upon doing so, asserted the position that the COVID Statute could not be invoked in defense of the claims that it makes, and that Pritchard's mandatory counterclaim could not raise it either. If Paterson's position regarding jurisdiction over the COVID Statute had any merit, (and it does not), Paterson should be deemed to have waived it by proceeding as it did.

Waiver "is the intentional relinquishment of a known right." *County of Morris v. Fauver,* 153 *N.J.* 80, 104-05 (1998); *West Jersey Title Guar. Co. v. Industrial Trust Co.*, 27 *N.J.* 144, 152 (1958). Waiver must be voluntary and there must be a clear act showing the intent to waive the right. *West Jersey*, 27 *N.J.* at 152. Furthermore, waiver "presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact." *Id.* at 153.

If Paterson had wanted to advance the position that the construing of the COVID Statute was within the exclusive providence of the Commissioner, it could have initiated proceedings in the Department of Education and done so there. Instead, with full knowledge of Pritchard's position that the proper construction of the COVID Statute dictated the outcome of this dispute, Paterson instead brought suit in Superior Court, where it sought to preclude Pritchard from invoking the Statute on jurisdictional grounds. By doing so, Paterson should be deemed to have waived its right to advance this argument.

C. The Commissioner's jurisdiction over Title 18A matters is not exclusive.

N.J.S.A. 18A:6-9 provides that "[t]he commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws . . ." The statute does not state that that jurisdiction is exclusive, and our courts have not held it to be so.

For example, our trial courts routinely deal with cases brought under the Public Schools Contracts Law, *N.J.S.A.* 18A:18A-1, *et. seq.*, and do not refer them to the Commissioner. See, e.g., *Dobco, Inc. v. Brockwell & Carrington Contractors, Inc.*, 441 *N.J. Super.* 148 (Law Div. 2015); *Tec Electric, Inc. v. Franklin Lakes Board of Education*, 284 *N.J. Super.* 480 (Law Div. 1995). Further, "contract claims against boards [of education] do not arise under the school laws but rather from statutory and common law." *Archway Programs, Inc. v. Pemberton Township Board of Education,* 352 *N.J. Super.* 420, 425 (App. Div. 2002), citing *Picogna v. Board of Education of Cherry Hill,* 249 *N.J. Super.* 332, 335 (App. Div. 1991). "Claims of the latter type are typically and appropriately adjudicated in the courts." *Archway, supra.*, citing *South Orange-Maplewood Educ. Ass'n. v. Board of Education of South Orange & Maplewood*, 146 *N.J. Super.* 457, 463 (App. Div. 1977). And when the question presented is solely one of law, involving statutory construction, administrative remedies need not be resorted to. *Wilbert v. DeCamp,* 72 *N.J. Super.* 60, 68 (App. Div. 1962). See also *Silverman v. Millburn Township Board of Education*, 134 *N.J. Super.* 253, 258 (App. Div. 1975). Indeed, Pritchard is unaware of any instance of a commercial dispute such as this being adjudicated in the Department of Education, with good reason.

This case concerns a contract awarded and entered into pursuant to the Public Schools Contracts Law and what is in essence a breach of contract claim, which

turns on the construction of a single statute having nothing to do with education. New Jersey law does not support the proposition that construction and application of that statute lies within the exclusive jurisdiction of the Commissioner, and Paterson's argument to that effect warrants out of hand dismissal.

D. The COVID Statute plainly contemplates a private right of action.

Paterson maintains that even to the extent that the COVID Statute is construed to require local school districts to pay their outside contractors if schools are closed for a health emergency even if the contractor does not or cannot provide the service it is contracted to provide, since the Statute does not expressly state that a contractor which a local school district refuses to pay may sue for the money due it under the Statute, the Court should conclude that no such suit should be permitted. This argument, carefully examined, makes no sense.

First and foremost, it must be remembered that local boards of education can be and are sued all the time under a variety of circumstances. If for example one of Pritchard's school board clients for which it performs custodial services should fail to pay it for the services Pritchard renders, Pritchard is free to sue it for breach of contract, in a manner no different that would be the case if the non-payer were a non-public person or entity. There is no statutory authorization required for it to do so. And in doing so, Pritchard would be free to assert any theory of damages

it sought to, just as it would be in suing a private party. And if Paterson failed to pay Pritchard for the services it rendered in the ordinary course, it would be subject to suit as well. But Paterson contends that even if it is obligated to pay Pritchard pursuant to their contract based upon the obligations imposed by the COVID Statute, Pritchard has no right to sue for that money.

While it is true that New Jersey's courts do not routinely recognize a private right of action based upon a statutory provision which does not expressly allow for one, there is a body of law addressing the circumstances where a private right of action will be found. "To determine if a statute confers an implied private right of action, courts consider whether: (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy." *Castro v. NYT Television*, 370 *N.J. Super.* 282, 291 (App. Div. 2004), citing *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 *N.J.* 255, 272 (2001). "Although courts give varying weight to each one of those factors, 'the primary goal has almost invariably been a search for the underlying legislative intent." *Castro,* 370 *N.J. Super.* at 291, *quoting Jalowiecki v. Leuc,* 182 *N.J. Super.* 22, 30 (App.Div.1981). *See also, Estate of Burns v. Care One,* 468 *N.J.*

Super. 306, 320 (App. Div. 2021). Application of these factors leads to the ready conclusion that the implication of a private right of action is warranted here.

Here, Pritchard, (and its employees who would benefit from the payment), is clearly within the class for whose benefit the Statute was enacted. That is beyond debate. As to whether there is evidence that the Legislature intended to create a private right of action, in this setting, in the absence of such a right of action, the Statute's effect is vitiated; without such a right, a statutory mandate becomes nothing more than an option on the part of the local school district. And for the same reason, there can be no doubt that allowing a contractor such as Pritchard to sue to enforce the obligations imposed by the Statute is entirely consistent with its legislative scheme; the certain intent of that scheme was to effect the transfer of funds from school districts to their contractors, (and to their employees), and affording those contractors the ability to enforce school districts' legal obligations to them fully serves that purpose. Denying the contactor which is owed money pursuant to the Statute the right to sue plainly does not.

To conclude on this point, the position being taken by Paterson with respect to the COVID Statute is, in reality, that it does not agree with its mandate and will try anything to avoid the Statute's intended effect. Its legal arguments against the Statute's application are entirely specious and should be rejected by the Court.

POINT II-THE COVID STATUTE IS NOT UNCONSTITUTIONAL

Paterson argues that the COVID Statute, as applied by the lower court, is violative of the Impairment of Contracts Clauses of both the U.S. and New Jersey Constitutions. It asserts that had the lower court employed the construction of the Statute for which Paterson argues, under which its mandate that local school districts "shall continue to make payments . . . to contracted service providers . . ." in the event of a health related school closure may be entirely ignored, this constitutional infirmity would not exist. However, given that the Statute cannot be intelligently read without giving effect to the cited language, Paterson's qualifier to its argument is fallacious. And as the Court will have noted, despite the existence of a wide body of law on the subject of the Impairment of Contracts clauses of both Constitutions, Paterson cites to no law and offers no legal test to the Court in advancing this position. Whether that failure is the result of Paterson's unawareness of that body of law, or because of its awareness that the law does not support its position, cannot be discerned from Paterson's brief. Hopefully it is the former.

In conclusory terms, Paterson states that under the parties' contract, Pritchard is required to perform services in order to receive payment from Paterson, and that under the COVID Statute, as construed by the lower court, (employing the only possible construction of its plain language), Pritchard is entitled to payment without the performance of services during the period that schools are closed due to a public

health emergency. Its analysis stops there, and it concludes that since there is an "impairment" to its contractual rights, the Statute effecting that impairment is per se unconstitutional.

"[W]henever a challenge is raised to the constitutionality of a statute, there is a strong presumption that the statute is constitutional," *State v. Muhammad,* 145 *N.J.* 23, 41 (1996), and the party "challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality." *State v. One 1990 Honda Accord,* 154 *N.J.* 373, 377 (1998). In analyzing the constitutionality of a statute, it is presumed that "the legislature acted with existing constitutional law in mind and intended the act to function in a constitutional manner." *NYT Cable TV v. Homestead at Mansfield, Inc.,* 111 *N.J.* 21, 26 (1988) (quoting *State v. Profaci,* 56 *N.J.* 346, 349 (1970)). Citing the State and Federal Constitutions, without more, cannot constitute the shouldering of the burden of establishing the unconstitutionality of the COVID Statute, and should lead to the Court's rejection of Paterson's argument out of hand. However, out of an abundance of caution, Pritchard will provide the Court with the appropriate analysis.

The Contracts Clause of the U.S. Constitution states that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." *U.S. Const.* art. I, § 10, cl. 1. New Jersey's Constitution includes a similar guarantee that "[t]he Legislature shall not pass any ... law impairing the obligation of contracts, or depriving a party

of any remedy for enforcing a contract which existed when the contract was made." *N.J. Const.* art. IV, § 7, ¶ 3; *Berg v. Christie*, 225 N.J. 245, 258-59 (2016); *see also Burgos v. State*, 222 *N.J.* 175, 193 (2015); *Fid. Union Tr. Co. v. N.J. Highway Auth.*, 85 *N.J.* 277, 299 (1981) (noting that United States and New Jersey Constitutions provide "parallel guarantees").

Contract impairment claims brought under either constitutional provision entail an analysis that first examines whether a change in state law results in the substantial impairment of a contractual relationship and, if so, then reviews whether the impairment nevertheless is "reasonable and necessary to serve an important public purpose." *Berg*, 225 N.J. at 259, citing *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 *U.S.* 1, 25, 97 *S. Ct.* 1505, 1519 (1977); *see also Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n*, 215 *N.J.* 522, 546–47 (2013) (expressing same). The first step in that analysis involves three inquiries: (1) whether a contractual right exists in the first instance; (2) whether a change in the law impairs that right; and (3) whether the defined impairment is substantial. *Berg, supra.*

When it comes to times of emergency, the government is accorded more constitutional flexibility when taking steps to cope with that emergency:

> Emergency conditions do not create new powers nor do they permit the government to transgress specific constitutional prohibitions, but they may present occasions for the appropriate exercise of powers which would otherwise remain dormant, and they ***justify flexible applications of constitutional restrictions in order to***

> ***facilitate rather than obstruct governmental steps necessary to cope with the emergency.*** (Emphasis supplied.)

Hutton Park Gardens v. Town Council of West Orange, 68 *N.J.* 543, 566 (1975) (citing *Home Building & Loan Ass'n v. Blaisdell*, 290 *U.S.* 398, 426 (1934). In *Hutton Park*, the Supreme Court recognized that in times of "great public exigency," like "periods of grave economic disturbance," certain measures, (*e.g.*, temporarily requiring landlords to keep their rents at lower-than-market rates), are necessary because the emergency requires all individuals "to make sacrifices for the common weal." 68 *N.J.* at 566-67.

Applying those principles to this case, it is clear that Paterson has presented no evidence or legal support – beyond its own unsubstantiated assertions about the Contracts Clause and "no show contracts" – to demonstrate that (i) the presumption of validity does not apply to the COVID Statute, (ii) the Statute's repugnancy to the Constitution is "clear beyond reasonable doubt," and (iii) no set of circumstances exist under which the statute would be valid.

Furthermore, the record is clear that the COVID Statute was passed during a global pandemic, which caused a "grave economic disturbance." Thus, the Statute, which expressly applies only when there is a declared public-health emergency, was a "necessary step to cope with an emergency," and the Legislature should be accorded some modicum of flexibility (as noted in *Hutton Park*) to deal with that

emergency. Paterson, however, presents its argument in a purposely misleading fashion. It suggests that the Statute will forever deprive school districts of their ability to enter into service contracts without taking into account the broader context within which the COVID Statute was enacted – to help people during a global pandemic and economic crisis.

In sum, Paterson is unable to satisfy its burden to demonstrate that the Statute is unconstitutional, particularly in light of the fact that the Statute has a strong presumption of validity and was passed as a way to cope with a global health and economic emergency. Accordingly, Paterson's constitutional argument must be rejected.

POINT III-THE COVID STATUTE SHOULD BE APPLIED RETOACTIVELY

Paterson contends in its complaint that the effective date of the COVID Statute was June 29, 2020, which is actually the date of the Statute's amendment, where the Legislature added a "belt and suspenders" clause, reiterating that contracted service providers receiving payments pursuant to its provisions are required to pay their employees as if the schools had remained open. Paterson makes an argument that boils down to this: Until this language was added, the Statute's requirement that school districts pay their service providers during health-related closures was of no force and effect, and that to require otherwise is to apply the COVID Statute retroactively. This is not a sensible argument; however, it is correct that the Statute's

effective date, April 14, 2020, does post-date the commencement of the period for which Pritchard sought payment pursuant to its counterclaim, and for that reason, retroactive application of the Statute requires some discussion.

Generally, newly enacted laws are applied prospectively. *James v. N.J. Mfrs. Ins. Co.*, 216 *N.J.* 552, 556 (2014). That approach is based on "long-held notions of fairness and due process," *Cruz v. Cent. Jersey Landscaping, Inc.*, 195 *N.J.* 33, 45 (2008), because "although everyone is presumed to know the law, no one is expected to anticipate a law that has yet to be enacted." *Maeker v. Ross*, 219 *N.J.* 565, 578 (2014) (citations omitted). That practice, however, is no more than a rule of statutory interpretation meant to "aid the court in the search for legislative intent." *Twiss v. State*, 124 *N.J.* 461, 467 (1991) (citation omitted). As such, it "is not to be applied mechanistically to every case." *Gibbons v. Gibbons*, 86 *N.J.* 515, 522 (1981) (*citing Rothman v. Rothman*, 65 *N.J.* 219, 224 (1974).

Rather, "[t]wo questions inhere in the determination whether a court should apply a statute retroactively." *Twiss*, 124 *N.J.* at 467. "The first question is whether the Legislature intended to give the statute retroactive application." *Ibid.* (*citing Gibbons*, 86 *N.J.* at 522). "If so, the second question is whether retroactive application is an unconstitutional interference with 'vested rights' or will result in a 'manifest injustice.'" *Ibid.* (*quoting State, Dep't of Envtl. Prot. v. Ventron Corp.*, 94

N.J. 473, 498–99 (1983)). Both requirements must be satisfied for a statute to be applied retroactively.

In addressing the first question, legislative intent for retroactivity can be demonstrated: "(1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant." *James*, 216 *N.J.* at 563. One of those three grounds must be present to give a statute retroactive effect. *Cruz*, 195 *N.J.* at 46.

The Legislature's expression of intent to apply a statute retroactively "may be either express, that is, stated in the language of the statute or in the pertinent legislative history, or implied, that is, retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation[.]" *Gibbons*, 86 *N.J.* at 522.

A statute is curative where its purpose is "to remedy a perceived imperfection in or misapplication of a statute and not to alter the intended scope or purposes of the original act." *Nelson v. Bd. of Educ.*, 148 *N.J.* 358, 370 (1997) (*quoting Kendall v. Snedeker*, 219 *N.J. Super.* 283, 288 (App. Div. 1987)). A curative statute may clarify, but may not change, the meaning of existing law. *Schiavo v. John F. Kennedy Hosp.*, 258 *N.J. Super.* 380, 386–87 (App. Div. 1992) (*citing Carnegie Bank v. Shalleck*, 256 N.J. Super. 23, 29–40 (App. Div. 1992)).

Finally, "in the absence of a clear expression of legislative intent that the statute is to be applied prospectively, such considerations as the expectations of the parties may warrant retroactive application of a statute." *Gibbons*, 86 *N.J.* at 523. In such circumstances, a court will look at the controlling law at the relevant time and consider the parties' reasonable expectations as to the law. *James*, 216 *N.J.* at 573. An expectation of retroactive application "should be strongly apparent to the parties in order to override the lack of any explicit or implicit expression of intent for retroactive application." *Ibid.*

Applying those principles to the present case, it is clear that the COVID Statute deserves retroactive application.

With regard to the first question, the Legislature did not expressly address retroactive application of the COVID Statute, but the context of its passage speaks volumes; it was enacted on April 14, 2020, as the reality of the pandemic's impact on society, and that it was not going to go away quickly, was first becoming apparent. It was enacted to address an acute, unanticipated and ongoing problem of significant magnitude. The Statute was given "immediate" effect on April 14, 2020, at a time when the first wave of the coronavirus was at its peak in New Jersey, and after the Governor had ordered, just three weeks earlier, that all schools in the State remain closed. Indeed, retroactive application to when the schools were closed is "necessary to make the statute workable" and "give it the most sensible

interpretation." There can be no reasonable dispute that the "most sensible" way to interpret the COVID Statute is to have it apply retroactive to the time when schools actually closed due to a health emergency.

Additionally, the reasonable expectations of the affected parties call for the COVID Statute's retroactive application. While it applies to health-related school closures of three days or more, at the time of its passage, the State was already four weeks into the mandatory closure of schools, for the first time in anyone's memory. Whether there would be another instance of a health-related school closure of three days or longer was unknown; it would thus be within the expectation of affected contractors that the COVID Statute would be retroactively applied to the only historic instance of its applicability.

With regard to the second question, applying the COVID Statute to the time when Paterson schools closed nineteen days earlier does not interfere with Paterson's vested rights, nor does it result in a manifest injustice. There is no injustice in ensuring that contractors be paid starting at the time when a health-related closure occurred, rather than two weeks later. The clear intent of the COVID Statute is that there be no break in payment on school contracts, so that contractors and their employees continue to receive their regular income.

In sum, all factors point to the conclusion that the COVID Statute should apply retroactive to the date when Paterson closed its schools because of the declared

public health emergency and state of emergency in New Jersey, and the effective date of a statute passed in the throes of an unanticipated public health emergency should not create a window during which the outcome decreed by the Legislature should not be had.

POINT IV-A CLAIM FOR MONEY DAMAGES IS NOT AN ACTION IN LIEU OF PREROGATIVE WRITS AND IS NOT SUBJECT TO THE LIMITATIONS PERIOD OF R. 4:69

Paterson argues at Pb-31 that since Pritchard relies on the authority of the COVID Statute in asserting that Paterson has an obligation to pay it for the period it was unable to provide services due to the statewide closure of schools at the outset of the pandemic, it is in fact seeking a writ of *mandamus*, and that pursuant to R. 4:69-6(a), it is thus subject to a limitations period of 45 days, which expired long before Pritchard's counterclaim was filed. Paterson does not offer a position as to when that limitations period commenced to run, or cite to any cases that hold that actions for money damages against governmental entities constitute such actions. Given the spuriousness of this position and Paterson's failure to support it with any form of legal authority, a discussion of its lack of foundation may be seen as unnecessary, however, Pritchard will address it notwithstanding those shortcomings.

A *mandamus* action is an action brought to compel a government official to perform a ministerial duty. *Selobyt v. Keough-Dwyer Correctional Facility*, 375 *N.J. Super.* 91, 96 (App. Div. 2005), citing *McKenna v. N.J. Highway Auth.*, 19 *N.J.*

270, 275 (1955). Such actions are brought to challenge the inaction of an agency or public official, where the inaction is the non-performance of a mandated ministerial obligation. *Cohen v. Univ. of Medicine and Dentistry*, 240 *N.J. Super.* 188, 199 (Ch. Div. 1989), citing *Equitable Life Mort. v. N.J. Div. of Taxation*, 151 *N.J. Super.* 232, 238 (App. Div. 1977). The making of a decision as to whether to pay a contractor is hardly tantamount to the performance of a ministerial duty, and actions seeking money damages against a governmental agency have never been treated as governed by the 45 day limitations period of R. 4:69-6. As with its argument for the unconstitutionality of the COVID Statute, Paterson's failure to support its novel argument with any citation to case law supporting its conclusion should lead to the rejection of its position.

Paterson's unsupported argument to the effect that Pritchard is precluded from raising its counterclaim following its being sued by Paterson is meritless and demands rejection out of hand.

POINT V – SUMMARY JUDGMENT WAS PROPERLY GRANTED

Paterson challenges the lower court's granting of summary judgment to Pritchard on multiple grounds. None of these can withstand scrutiny.

A. Lack of discovery.

Paterson maintains that summary judgment should have been denied due to its not having had discovery. Generally, summary judgment is premature when

the opposing party has not yet had an opportunity to conduct discovery and develop the facts on which it intends to base its claims. *Friedman v. Martinez*, 242 *N.J.* 449, 472 (2020) (cautioning against granting summary judgment when discovery is incomplete and "critical facts are peculiarly within the moving party's knowledge") (quoting *James v. Bessemer Processing Co.*, 155 *N.J.* 279, 311 (1998)). However, "'summary judgment is not premature merely because discovery has not been completed, unless the non-moving party can show with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.'" *Ibid.*, (first quoting *Badiali v. N.J. Mfrs. Ins. Grp.*, 220 *N.J.* 544, 555 (2015); then quoting *Wellington v. Estate of Wellington*, 359 *N.J. Super.* 484, 496 (App. Div. 2003)).

Paterson identifies exactly two challenges it advanced to the Statement of Material Facts upon which Pritchard relied in asserting its entitlement to summary judgment, appearing at Pb-45-46. The first is Pritchard's contention that it sent invoices to Paterson for the months of April, May and June 2020 "so that it could pay its employees" for those periods. There is no honest dispute here as to the invoices being sent, and that Pritchard's custodians assigned to Paterson were paid for the period May-June 2020 once Pritchard received Paterson's payment for those months, the same payments which Paterson seeks to claw back in this action. Paterson contends that "per the Complaint and Shafer Cert., the invoices were

fraudulent and deceitful, and there is evidence that the money was used for other unlawful purposes. The Board is entitled to discovery to check the veracity of these claims."

The forgoing discussion makes plain that there was nothing the least bit "fraudulent" or "deceitful" about the invoices; they were sent in accordance with the COVID Statute, which required Paterson to pay Pritchard for the period during which its schools were closed due to the pandemic as if they were open and the services had been rendered. As to "evidence that the money was used for unlawful purposes," this appears to be part of Paterson's contention that the COVID Statute requires that service providers receiving payments pursuant to it pay the wages of the employees who were laid off as a result of the school closures, and that any other application of the funds paid is "illegal." Of course, the COVID Statute says nothing of the sort; it requires that the school district make payments "pursuant to the terms of a contract . . . as if the school facilities had remained open." The Statute further requires that the payments "shall be used to meet the payroll and fixed costs obligations of the contracted service provider." It is in no way "illegal" for the contracted service provider to apply the payment received to fixed expenses other than wages. And in any event, the Statute does not charge the board of education with policing how the funds that it is required to pay its contracted service providers are applied.

The other purported "factual issue" raised by Paterson is its contention that it is entitled to discovery to "check the veracity" of Pritchard's contention that while the parties' contract required the production of certified payrolls prior to payment issuing, for the period that Paterson's schools were closed and Pritchard was not rendering services, Pritchard could not provide certified payrolls as they did not exist. This statement by Pritchard is not and cannot honestly be disputed; Paterson does not contend that Pritchard performed services while its schools were closed, and it cannot contend that Pritchard incurred payroll for its laid off custodians. And in any event, none of this relates in any way to the mandate imposed by the Statute that local school districts continue to pay contracted service providers during periods that schools are closed for health emergencies.

There were no material facts in dispute below, and if Paterson is contending that summary judgment should not have been entered due to a lack of discovery on its part, it has an obligation to identify what might possibly have been established through that discovery that would have disentitled Pritchard to the relief that it sought. Since it failed to do so, the lower court's entry of summary judgment was eminently correct.

B. Credibility determinations.

Paterson argues at Pb-48-49 that it challenges the credibility and truthfulness of Martin's certifications and the payroll documentation attached to them

establishing that Pritchard paid its laid off custodians for the months of May and June 2020 upon receipt of payment from Paterson for that period. But it does not identify a single statement made by Martin that it questions, or what it is about Pritchard's payroll documentation that it questions. And as to the latter issue, the fact is that the COVID Statute imposed upon Paterson an obligation to make the payments, and upon Pritchard to pay its laid off workers upon receipt of the payments. It certainly does not authorize a school district to police the contractor's compliance with its own statutory obligation. This "fact issue" not only lacks any substance, but any relevance.

Paterson finally takes issue with the lower court's statement in its decision that "[s]ending a Questionnaire and demand for production of Pritchard's payroll records, as Paterson did in the present case, does not strike this Court as being in good faith," arguing that this conclusion should not have been reached without the lower court receiving testimony from a Paterson employee on the subject. However, the lower court's determination in no way turned on this assessment by it; rather, its decision was based upon the mandate of the COVID Statute that school districts are required to pay their contracted service providers when schools are closed due to a public health emergency as if they had been open, and nothing more. A finding by the lower court that Paterson made a good faith effort at renegotiating the parties'

contract would not have impacted its basic conclusion that the COVID Statute means what it says.

The lower court did not make any credibility determinations in deciding Pritchard's motion and there is no basis for setting aside the judgment as a result of its doing so.

C. There was no bona fide dispute as to the amount due.

As Paterson notes at Pb-50, Pritchard's claim for $697,301 is comprised of two components: Its regular monthly payment of $620,250 for the month of April 2020, and $77,141 representing the proration of Pritchard's July 2020 payment, acknowledged by Paterson at Pb-51. While it knows that a payment it made in the amount of $60,800 was for a separate and unrelated invoice, Paterson appears to be trying to muddy the water by suggesting that it is entitled to a credit in that amount against the other amounts it owes.

Pritchard tendered to Paterson an invoice for $620,250 for the month of April 2020. 647a. Paterson did not pay it. There is no dispute about that. Pritchard tendered to Paterson an invoice for $591,417 for the month July 2020; Paterson prorated it, paying $514,276, and leaving $77,141 unpaid. There is no dispute about this either. These are the two components of the judgment entered by the lower court. Paterson knows this very well, and the fact that it paid a couple of unrelated invoices does not change the analysis.

There was no bona fide factual dispute before the lower court, and that court recognized that all Paterson has tried to do is to craft any possible argument it can to avoid application of the COVID Statute. So far as can be discerned, every other public school district in the State recognized the obligation imposed by the Statute and met it. The only feature unique to the relationship between Pritchard and Paterson among those between school districts and their contracted service providers is that Paterson refuses to do so.

CONCLUSION

For the forgoing reasons, Pritchard submits that the Court would act properly in rejecting Paterson's spurious arguments as to why it should be excused from compliance with the plain language of the COVID Statute and affirm the trial court's entry of judgment in favor of Pritchard.

s/Patrick T. Collins
PATRICK T. COLLINS

Dated: April 10, 2024

PATERSON BOARD OF EDUCATION, Plaintiff-Appellant, v. PRITCHARD INDUSTRIES, INC., and THOMAS MARTIN, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A – 003079 – 22T2 **Appeal from court orders dated February 17 / April 28 / June 9, 2023, granting reconsideration and summary judgment, by Hon. Vicki A. Citrino, J.S.C., Superior Court of New Jersey, Passaic County, Law Division, Civil, Dkt. No. PAS–L–2013–22** **Submitted to Appellate Division on April 24, 2024**

PLAINTIFF-APPELLANT'S REPLY BRIEF SUPPORT OF APPEAL

SOUDER SHABAZZ & WOOLRIDGE LAW GROUP, LLP
Attorneys for Plaintiff-Appellant, Paterson Board of Education
570 Broad Street
15th Floor
Newark, New Jersey 07102
Phone: (973) 500 – 2030
Fax: (973) 484 – 7464
E-Mail: bhorsley@sswlawgroup.com
E-Mail: kshabazz@sswlawgroup.com

Bryant Lawrence Horsley, Jr., Esquire (017222006)
Of Counsel and On the Brief

Khalifah Shabazz-Charles, Esquire (007132005)
Of Counsel

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REPLY POINT ONE
(Addressing Pritchard's Entire Controversy Doctrine and Prerogative Writ Arguments in Point I. A. and Point IV; Db23–Db25; Db40 – Db41)

Pritchard's misplaced reliance on the Entire Controversy Doctrine does not save its Counterclaim from dismissal because the Doctrine: 1) does not supersede the Commissioner's jurisdiction or the court's lack of jurisdiction; 2) does not resurrect Pritchard's Counterclaim's dismissal for failure to comply with the statute of limitations; 3) does not excuse Pritchard's requirement to exhaust administrative remedies; and 4) is inapplicable.

Pritchard's entire controversy doctrine argument lacks merit for at least the following four reasons.

A. The Entire Controversy Doctrine does not supersede the court's lack of subject matter jurisdiction to hear this matter, nor does it supersede the Commissioner's jurisdiction to hear and determine school law controversies under *N.J.S.A.* 18A:6-9.

"[O]ridinarily, the [entire controversy] doctrine does not apply to a second suit involving the same issues and parties instituted in one forum while the first suit is pending in another forum".[1] This means that Pritchard could have indeed brought its school law claims before the Commissioner of Education, and thereafter raised them in Superior Court as a Counterclaim – but it did not. Here, the Board's breach of contract claims required to be brought in Superior Court certainly are not the same issue as whether the Board violated a school law statute under the Commissioner's jurisdiction. The claims brought by the Board for breach of contract and fraud were

[1] *Pressler, Rules Governing the Superior Court, comment* 3.5 to *R.* 4:30A

properly brought before the Superior Court. On the other hand, Pritchard's Counterclaim that the Board violated an education law statute under the Commissioner of Education's jurisdiction, was required to be brought before the Commissioner under *N.J.A.C.* 6A:3-1.1, *et seq.* Pritchard's claims as to the Entire Controversy Doctrine is nonsense because nothing stopped Pritchard from seeking redress from the Commissioner of Education, and the matters could certainly have been dealt with simultaneously.

"Lack of subject matter jurisdiction is a nonwaivable defense" and a "finding that the court lacked subject matter jurisdiction at the time of the entry of the order…will render that order void from its inception".[2] Pritchard's Entire Controversy Doctrine is belied by "the principle…that a court cannot hear a case as to which it lacks subject matter jurisdiction".[3] Since subject matter jurisdiction is a threshold justiciability matter, Pritchard has not, nor cannot, cite to any case or law where the Entire Controversy Doctrine supersedes a court's lack of subject matter jurisdiction, and somehow magically confers subject matter jurisdiction upon a court. The Commissioner of Education's plenary jurisdiction under *N.J.S.A.* 18A:6-9 to hear all disputes arising under Title 18A school laws also is not superseded by the Entire Controversy Doctrine.

[2] *Muller v. Muller*, 212 N.J. Super. 665, 678 (Ch. Div. 1986)
[3] *Murray v. Comcast Corp.*, 457 N.J. Super. 464, 470 (App. Div. 2019), quoting, *Peper v. Princeton Univ. Bd. of Trs.,* 77 N.J. 55, 65-66 (1978)

B. The Entire Controversy Doctrine does not resurrect a party who failed to comply with the statute of limitations.

Although the Superior Court lacks jurisdiction to hear Pritchard's school law claims under Title 18A reserved for the Commissioner of Education, for the sake of argument, the only *conceivable* way that Pritchard's Counterclaim seeking to enforce compliance with N.J.S.A. 18A:7F-9(e)(3) can be properly brought before the Superior Court is under *R.* 4:69-1, *et seq.* by filing a complaint in lieu of prerogative writ. Under that scheme, *R.* 4:69-6(a) ("Limitation on Bringing Certain Actions"; "General Limitation") states, "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed". Thus, Pritchard's Counterclaim filed over 2-years after the non-payment of the April / May / June 2020 invoices are barred by the statute of limitations. Also, with the 90-day statute of limitations under *N.J.A.C.* 6A:3-1.3(i) to bring disputes under Title 18A statutes before the Commissioner, and being that Pritchard admittedly never sent a notice of breach of contract or sought redress through the Commissioner, the doctrine of laches bars Pritchard's suit.

Hence, Pritchard has not, nor cannot, cite to any precedent where the Entire Controversy Doctrine supersedes the applicable statute of limitations on its claims. The Entire Controversy Doctrine does not magically make Pritchard's untimely-filed Counterclaims timely.

C. The Entire Controversy Doctrine does not excuse a party's requirement to exhaust administrative remedies.

Again, although the Superior Court lacks jurisdiction to hear Pritchard's school law claims under Title 18A reserved for the Commissioner of Education, for the sake of argument, the only conceivable way that Pritchard's Counterclaim seeking to enforce compliance with *N.J.S.A.* 18A:7F-9(e)(3) can be properly brought before the Superior Court is under *R.* 4:69-1, *et seq.,* where a complaint in lieu of prerogative writ is required to force a public entity to comply with a statute. However, even under that mechanism, *R.* 4:69-5, entitled, Exhaustion of Remedies, provides, "Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted". Here, the Commissioner of Education certainly is endowed with the authority to adjudicate Pritchard's accusations that the Board failed to comply with *N.J.S.A.* 18A:7F-9(e)(3), and can redress or remediate the claim by ordering the Board to pay Pritchard a sum certain.

Pritchard has not, nor cannot, cite to any precedent where the Entire Controversy Doctrine supersedes the requirement to exhaust administrative remedies before it seeks redress through Superior Court. Nothing has stopped Pritchard from seeking redress under *R.* 4:69-1, *et seq.,* and the Entire Controversy Doctrine does not extinguish this requirement.

D. Pritchard's failure to exhaust its administrative remedies means that the Entire Controversy Doctrine defense is inapplicable to Pritchard.

The Appellate Division discussed the Entire Controversy Doctrine's purposes:

> The entire controversy doctrine requires a party to litigate all aspects of a controversy in a single legal proceeding. The doctrine's purposes are (1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay. The application of the doctrine requires that a party who has elected to hold back from **the first proceeding** a related component of the controversy be barred from thereafter raising it in a subsequent proceeding [emphasis supplied].[4]

Here, the Appellate Division's discussion obliterates Pritchard's reliance on the Entire Controversy Doctrine because there was never a first proceeding as required by *N.J.A.C.* 6A:3-1.1, *et seq.* (adjudication of school law disputes) or *R.* 4:69-5 (Exhaustion of Remedies). Pritchard never brought its school law claims before the Commissioner of Education, nor did it ever seek enforcement of the statute through the complaint in lieu of prerogative writ procedures. Had Pritchard done so, and there was an adjudication that the statute required the Board's payment to Pritchard despite its breach of contract and failure to enter into a renegotiated contract, then the Counterclaim would have been resolved. But Pritchard's failure to exhaust its administrative remedies means that it "has elected to hold back from the first [non-

[4] *Kaselaan & D'Angelo Assocs., Inc. v. Soffian,* 290 N.J. Super. 293, 298–99 (App. Div. 1996) (internal quotations and citations omitted)

existent] proceeding", meaning that it cannot rely on the Entire Controversy Doctrine to save its Counterclaim.

REPLY POINT TWO

(Addressing Pritchard's Waiver and Jurisdiction Arguments in Point I. B. and Point I. C. of Opposition Brief; Db25–Db26; Db26–Db28)

Lack of subject matter jurisdiction is a non-waivable defense. Pritchard fails to establish that the Superior Court, Law Division, retains jurisdiction to adjudicate Pritchard's Counterclaim for enforcement of an 18A statute applicable only to school districts and thus under the Commissioner's jurisdiction. To the contrary, the Commissioner retains jurisdiction over Pritchard's attempt to adjudicate its school law claim under Title 18A.

Pritchard's Opposition argues that the doctrine of waiver precludes the Board from asserting that the Superior Court lacks jurisdiction over the COVID statute. That argument should be rejected for at least four reasons:

1) "Lack of subject matter jurisdiction is a nonwaivable defense" and a "finding that the court lacked subject matter jurisdiction at the time of the entry of the order…will render that order void from its inception"[5];

2) Pritchard never made this argument in the trial court, so this court should reject Pritchard's attempt to raise it for the first time in the Appellate Division;

3) The trial court never concluded that the Board waived the subject matter jurisdiction ; and

4) The Complaint is for breach of contract, which is undisputedly properly brought before the Superior Court, and, unlike Pritchard, the causes of action do not ask the Superior Court to adjudicate a dispute under *N.J.S.A.* 18A:7F-9(e)(3).

[5] *Muller v. Muller*, 212 N.J. Super. 665, 678 (Ch. Div. 1986)

Also, Pritchard's Opposition is devoid of any meritorious argument that the Commissioner lacks jurisdiction, or that the Superior Court, Law Division, somehow has jurisdiction to adjudicate Pritchard's purely education law claim under 18A. It is impossible to argue, without being frivolous, that the 18A school law statute, *N.J.S.A.* 18A:7F-9(e)(3), which exists only under 18A and applies only to public school districts, is not a school law under the Commissioner of Education's jurisdiction. It is not as if the Legislature mistakenly put the statute under Title 18A school laws when it explicitly refers only to public school districts. Pritchard's argument that the trial court is capable of interpreting *N.J.S.A.* 18A:7F-9(e)(3) is irrelevant when the court lacks subject matter jurisdiction over that school law statute, and cannot grant the express remedy in the statute (*i.e.,* reduction of State aid) as that relief is only within the authority of the Commissioner of Education.

REPLY POINT THREE

(Addressing Pritchard's Private Right to a Cause of Action Argument in Point I. D. of Opposition Brief – Db28–Db30)

Pritchard's Opposition fails to establish that it has a private right to a cause of action to sue the Board in Superior Court for a violation of an 18A school law statute. Without any express or implied private right to a cause of action to sue the Board for purported violations of *N.J.S.A.* 18A:7F-9(e)(3), the Counterclaim fails and must be dismissed as a matter of law.

Pritchard's Opposition fails to posit meritorious arguments that it has a private right to a cause of action to sue the Board in Superior Court. The Legislature enacted at least 59 separate Titles of statutes, which contains multiple thousands of statutes

and subsections, and not to mention the thousands of regulations under the Administrative Code to implement the statutes. Title 18A school laws are robust with at least 15 subtitles, 75 chapters, and thousands of individual statutes and subsections of statutes, in addition to the 33 chapters of Title 6A regulations within the Administrative Code. That does not account for the scores of other non-18A statutes and non-6A regulations governing public school districts, such as Title 10's civil rights statutes, Title 47's public records statutes, and Title 59's tort statutes, to name a few. With the default sovereign immunity of public school districts, and the court's gatekeeper status to protect public entities from unnecessarily litigating claims from private persons, just because a subsection of a statute exists, it does not mean that any person can sue any public entity for any statutory violation. But that is exactly what Pritchard suggests should happen here.

Here, unlike the express rules, limitations, and procedures the Legislature provides private persons seeking to sue public entities for torts and civil rights violations, Pritchard cannot overcome the undisputed fact that the Legislature never expressed a private right to a cause of action to sue the Board in Superior Court for alleged violations of *N.J.S.A.* 18A:7F-9(e)(3). That right to seek redress of the 18A violation, of course, already exists under the Commissioner of Education's petition of appeal procedures in *N.J.A.C.* 6A:3-1.1, *et seq.* Pritchard also cannot overcome the fact that with the existence of available administrative remedies, the Legislature

never intended for school districts to be sued in Superior Court for violations of the 18A school law statute, *N.J.S.A.* 18A:7F-9(e)(3), so there is no implied private right to a cause of action for Pritchard to sue the Board in Superior Court for alleged violations of *N.J.S.A.* 18A:7F-9(e)(3).

The Commissioner certainly has the authority to order the Board to comply with the statute and order payment to Pritchard, and can also levy a remedy under the statute that withholds State (monetary) aid from the Board. But that remedy is available to the Commissioner, and is not a private remedy available to Pritchard, nor can a Superior Court judge implement it. The lack of an available private remedy bolsters the fact that there is no implied private right to a cause of action for Pritchard to sue the Board in Superior Court for alleged violations of *N.J.S.A.* 18A:7F-9(e)(3).[6]

REPLY POINT FOUR

(Addressing Pritchard's Unconstitutionality Argument in Point II of Opposition Brief – Db31–Db35)

The Board is not challenging the constitutionality of *N.J.S.A.* 18A:7F-9(e)(3). However, Pritchard's Counterclaim, to be successful, requires the court to *interpret N.J.S.A.* 18A:7F-9(e)(3) in a manner that violates the Impairment of Contracts clauses in the U.S. and New Jersey Constitutions. Pritchard's arguments that the Board failed to establish the unconstitutionality of the statute is misplaced and should be rejected.

[6] *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271–72 (2001)

Pritchard's Opposition totally obfuscates the Board's legal argument in its Motion to Dismiss and Cross-Motion, and incorrectly characterizes the Board as challenging the constitutionality of *N.J.S.A.* 18A:7F-9(e)(3). The Board's constitutional claim is prominently featured and explained in detail under Count Two of the Complaint, yet Pritchard never pleaded any affirmative defenses related to those claims. The entirety of Pritchard's attempt for the court to reject the Board's constitutional argument is based on their objectively false assertion that the Board is challenging the constitutionality of *N.J.S.A.* 18A:7F-9(e)(3) – which, of course, has never been the argument by the Board. The *actual* argument of the Board is stated in the point heading and throughout the analysis, which is, "The legal basis for the Counterclaim requires the court to **interpret** *N.J.S.A.* 18A:7F-9(e)(3) in a manner that violates the Impairment of Contracts Clauses under the U.S. Constitution and New Jersey Constitution" [emphasis supplied].

As with all services contracts, the vendor is required to perform services as a prerequisite for payment. School districts obviously could not enter into a contract to pay millions of dollars to a vendor on a services contract who never performed any services. Thus, the basic obligation of the parties' contract was for Pritchard to perform custodial services, and the District was to pay for those services actually rendered. What enables *N.J.S.A.* 18A:7F-9(e)(3) to be constitutional and avoid impairing the parties' obligations of a services contract is the State's allowance for

the parties to enter into a renegotiated contract that excuses performance as a prerequisite for payment, and grants the vendor an ability to obtain a reduced payment without performing services. So to *interpret N.J.S.A.* 18A:7F-9(e)(3) as not requiring a renegotiated contract is tantamount to interpreting the statute as violating the Impairment of Contracts clauses of the U.S. and New Jersey Constitutions because it effectively impairs and extinguishes Pritchard's basic contractual obligation to perform services as a prerequisite for payment, and impairs and extinguishes the Board's obligation to pay for actual services rendered.

It is undisputed that the parties never entered into a renegotiated contract that allowed Pritchard to be paid despite performing no services, so the only contract between the parties required Pritchard to perform services as a prerequisite to payment. The success of Pritchard's Counterclaim requires the court to *interpret N.J.S.A.* 18A:7F-9(e)(3) as not requiring a renegotiated contract – and if the court *interprets N.J.S.A.* 18A:7F-9(e)(3) as not requiring a renegotiated contract, then it has interpreted *N.J.S.A.* 18A:7F-9(e)(3) in a way that would make it unconstitutional.

POINT FIVE

(Addressing Pritchard's Retroactive Application of Statute Argument in Point III of Opposition Brief – Db35–Db40)

The effective date of the amendment authorizing Pritchard to pay its employees from the Board's money is June 29, 2020. As with all statutes, *N.J.S.A.* 18A:7F-9(e)(3) must be given prospective application, which negates all of Pritchard's claims for payment on its April / May / June 2020 invoices. The Legislature undisputedly did not express retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).

Under the two-prong implied retroactive application test, the court cannot apply retroactive application of the statute because 1) the Legislature never intended to give the statute retroactive application; and 2) the retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice. Pritchard's claims, which are based on the retroactive application of the statute, thus fails, requiring a denial of its motion for summary judgment.

A. Statutes by default have prospective application.

Statutes by default have prospective application. Our Supreme Court in *Ardan v. Bd. of Rev.* discussed when a statute may have retroactive application:

> Settled rules of statutory construction favor prospective rather than retroactive application of new legislation. Those rules are based on our long-held notions of fairness and due process. We consider (1) whether the Legislature intended to give the statute retroactive application and (2) whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice.[7]

B. The statute amendment relied upon by Pritchard in claiming that it could lawfully convert the Board's money to pay its employees became effective June 29, 2020, which negates any legitimate claim for payment of the April / May / June 2020 invoices.

The April 14th version of *N.J.S.A.* 18A:7F-9(e)(3) did not include the language, "and employees of the contracted service provider shall be paid as if the school facilities had remained open and in full operation".[8] It was added later and became effective June 29, 2020. This is the portion Pritchard relies upon as justification to keep and use the money to pay its employees.

[7] *Ardan v. Bd. of Rev.*, 231 N.J. 589, 609–10 (2018) (internal quotations and citations omitted)
[8] Pa233 – Pa259

Pritchard's claim for payment is based on a *contested* fact that it paid its employees assigned to the Board. But that statutory authorization did not become effective until June 29, 2020, when the Legislature added, "employees of the contracted service provider shall be paid as if the school facilities had remained open and in full operation". The effective date no doubt blows up Pritchard's claim that it was entitled to payment so that it could pay its employees who did no longer worked at the Board's buildings.

C. Legislature undisputedly did not express retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).

Pritchard's Counterclaim and summary judgment motion for payment of the April / May/ June 2020 invoices presuppose the retroactive application of *N.J.S.A.* 18A:7F-9(e)(3), since all three months occurred prior to the June 29, 2020, effective date of the statute. It is undisputed that the Legislature never expressed the retroactive application of application of *N.J.S.A.* 18A:7F-9(e)(3), so the default rule is that it must have prospective application, *i.e.,* on and after June 29, 2020. If the Legislature wanted retroactive application of the statute, then it could have easily done so with a one-sentence statement that the statute is to have retroactive effect – but it did not. The Board had no obligation to pay Pritchard based on a statute that was never effective at the time Pritchard originally claimed payment in April 2020, which negates the entire Counterclaim and request for summary judgment.

D. Under the first prong of the implied retroactive application test, Pritchard's claims fail because the Legislature never intended to give *N.J.S.A.* 18A:7F-9(e)(3) retroactive application.

Without the Legislature's express retroactive application of the statute, the court would have to rule, in the absence of evidence, that "(1) whether the Legislature intended to give the statute retroactive application and (2) whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice".[9] Under the **first prong**, "whether the Legislature intended to give the statute retroactive application", that answer is clearly "No". A review of the Legislative history reveals multiple Legislative sources establishing that the Legislature never intended to give retroactive application to *N.J.S.A.* 18A:7F-9(e)(3):

1) Of the two versions of the bill that were adopted and made effective April 14, 2020, and June 29, 2020, none of those versions discuss retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).[10]

2) *N.J.S.A.* 18A:7F-9 underwent nine bill drafts, with the final eight occurring on or after March 23, 2020. None of the nine bill drafts discuss retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).[11]

3) Between January 11, 2022, and March 7, 2022, there were six proposed bills to amend *N.J.S.A.* 18A:7F-9. None of these proposed bills discuss retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).[12]

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[9] *Ardan v. Bd. of Rev.*, 231 N.J. 589, 609–10 (2018) (internal quotations and citations omitted)
[10] Pa233 – Pa259
[11] Pa261
[12] Pa263

4) Of the 15 Legislative history materials, inclusive of proposals, Assembly statements, and Governor's veto comments, none of the history discusses retroactive application of *N.J.S.A.* 18A:7F-9(e)(3).[13]

E. Under the second prong of the implied retroactive application test, Pritchard's claims fail because the retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice.

As to the **second prong, "**whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice", that answer is "Yes".

1. Unconstitutional interference with vested rights

First, the argument that the interpretation of *N.J.S.A.* 18A:7F-9(e)(3) as allowing payment to Pritchard without a renegotiated contract violates the Impairment of Contracts Clause under the U.S. and New Jersey Constitutions is detailed under Point Eight of the Cross-Motion for Summary Judgment as to the Counterclaim Only, and is thus incorporated by reference as if fully set forth at length herein. Second, another unconstitutional interference with vested rights of the Board is under the *New Jersey Constitution,* Art. 8, § IV, ¶ 1, where school districts must provide for a "thorough and efficient" education. The Board is able to carry out this duty through *N.J.S.A.* 18A:11-1(d), where the Board "shall" "Perform all acts and do all things, consistent with law and the rules of the state board, necessary for

[13] Pa265–Pa266

the lawful and proper conduct, equipment and maintenance of the public schools of the district". A major focus of the Board during the pandemic was to preserve and reserve funding and resources to thoroughly execute remote instruction and combat learning loss from remote instruction, so the Board prioritized its resources toward that end. It would have a detrimental impact on budgeting, planning, and financial resources, and by extension, negatively impact the Board's ability to provide the constitutional "thorough and efficient" education, if the statute was applied retroactively where the Board is forced to spend exorbitant amounts of money on a for-profit private company who, at the time, provided no benefit to its students. In this new budget year, and as the Board plans the next budget year, the Board needs those funds to deliver the necessary education programs to combat learning loss caused by the pandemic. Applying the statute retroactively thus unconstitutionally interferes with the Board's rights to ensure efficient spending of public taxpayer money for the lawful and proper conduct of the school district. Thus, even if Pritchard did have a right to be paid under *N.J.S.A.* 18A:7F-9(e)(3), this court cannot give the statute retroactive application. Without retroactive application, Pritchard's claim for payments of the April / May / June 2020 invoices fail.

2. Manifest injustice

In prior Board meetings, the Board engaged in lengthy and robust public discussions about Pritchard's custodial services and whether to renew / extend

Pritchard's contract. A renegotiated contract to pay Pritchard under *N.J.S.A.* 18A:7F-9(e)(3), if any, would have been first discussed at a Board committee meeting, and then would have to be placed on a public agenda, and voted on at an open public meeting, before funds were dispersed to Pritchard.

The Counterclaim does not establish that the parties entered into a renegotiated contract. The contents of a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), if any, would have been available for public consumption prior to the Board's discussion and vote. By not entering into a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), the public was deprived of its right to government transparency and to engage in public comment on the merits of approving the renegotiated contract, if any. The Board could have engaged in a private and public discussion at an open public meeting about the merits of approving a renegotiated contract, if any, under *N.J.S.A.* 18A:7F-9(e)(3). By not entering into a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), the Board was deprived of its right to publicly or privately discuss the merits of approving the renegotiated contract, if any.

All contracts are subject to Board approvals by a roll call majority vote. By not entering into a renegotiated contract under *N.J.S.A.* 18A:7F-9(e)(3), the Board was deprived of its right to vote "Yes" or "No" to enter in to the renegotiated contract, if any.

It is certainly a manifest injustice to retroactively apply a law that would put a public school district on the hook for a $1.9-million obligation Pritchard attempts to collect on. The rights of the public and Board (*N.J.S.A.* 18A:11-1) were not preserved, resulting in a manifest injustice. Hence, the unconstitutional interference with vested rights, and manifest injustice, means that the second prong of the retroactive application test fails. The failure to satisfy both prongs of the retroactive application test means that the court should not rule that *N.J.S.A.* 18A:7F-9(e)(3) is to be given retroactive application, requiring the denial of Pritchard's summary judgment motion. Thus, a substantial portion of the trial court's money judgment must be reduced accordingly.

REPLY POINT SIX

(Addressing Pritchard's Proper Summary Judgment Arguments in Point V of Opposition Brief – Db41–Db47)

Genuine issues of material facts were in dispute as to the money paid and owed, as well as the 10-count Complaint. The court committed reversible error by a wholesale dismissal of the 10-count Complaint several months before the discovery end date, without any argument or analysis whatsoever of the elements to the causes of action pleaded. The court committed reversible error in serving as a juror by resolving a factual dispute on the money paid and owed related to the Counterclaim. Summary judgment in favor of Pritchard should have been denied.

Pritchard frivolously argues that no discovery or credibility determinations were necessary to adjudicate a ten-count lawsuit alleging fraud, deceit, conversion, civil theft, misrepresentation, and breach of contract. Paragraphs 47–170 (15 pages

total) of Superintendent Shafer's certification articulates copious **issues of material facts in dispute**, on topics related to:

1) Pritchard's deceptive and disputed invoices (Par. 47–71)

2) the District's rejection of Pritchard's invoices (Par. 72–77)

3) whether Pritchard unlawfully pocketed the money and did not actually pay its employees (Par. 92–98)

4) the amount of payments rendered on Pritchard's invoices (Par. 104–127)

5) Pritchard's violations of *N.J.S.A.* 18A:7F-9(e)(3) (Par. 128–146)

6) Pritchard's misstatements of fact and public policy contested by the Board related to whether Pritchard was entitled to the funding; and

7) the Board's need for discovery (Par. 168–170).[14]

For the sake of brevity, rather than copy and paste Superintendent Shafer's certification, it is hereby incorporated by reference, as if fully set forth at length herein.[15]

Superintendent Shafer's disputed facts directly contradicted the self-serving certification of Pritchard's co-defendant, Tom Martin, meaning that his credibility was directly in question, and required the court to not play the role of the jury by rendering a final judgment as to the money owed by accepting Martin's contested certification. No filing from Pritchard ever analyzed the elements or merits of any

[14] Pa211 – Pa231

[15]

of the ten counts in the Complaint, nor did the trial court. Instead, several months before the discovery end date, without any discovery responses that the Board propounded upon from Pritchard (Pa279 – Pa331), without any depositions, with a dispute of the alleged money owed, and an issue of fact as to whether Pritchard pocketed the money or sent to their employee, in reliance on a contested, self-serving certification from Pritchard, without any analysis whatsoever of the elements and proofs in a ten-count complaint alleging fraud, civil theft, conversion, misrepresentation, and breach of contract, the trial court inexplicably rendered a wholesale dismissal of the Board's 10-count complaint. Nothing in the trial judge's opinion discussed the merits of why the Board's 10-count Complaint deserved a wholesale dismissal, and the trial court's final judgment on the amount owed under the Counterclaim was impermissible when there were clearly disputes of fact on that issue.

CONCLUSION

In sum: **1)** Pritchard's Entire Controversy Doctrine defense does not supersede the trial court's lack of subject matter jurisdiction, nor does it revive it from being untimely under the statute of limitations argument or excuse Pritchard's requirement to exhaust administrative remedies; **2)** Pritchard failed to establish that this court retains jurisdiction over its 18A school law claims falling under the jurisdiction of the Commissioner of Education; **3)** Pritchard fails to establish that

there exists an express or implied private right to a cause of action to sue the Board in Superior Court for a violation of a purely school law statute existing only under Title 18A within the Commissioner's jurisdiction; **4)** Pritchard's disingenuous obfuscation of the Board's constitutional argument should be rejected by the court, and this court cannot *interpret* and apply *N.J.S.A.* 18A:7F-9(e)(3) in a manner that violates the Impairment of Contracts clauses in the U.S. and New Jersey Constitutions; **5)** a substantial portion of the trial court's money judgment must be reduced because *N.J.S.A.* 18A:7F-9(e)(3) has prospective, and not retroactive application; and **6)** with material facts in dispute, summary judgment dismissing the Complaint and granting the Counterclaim was not warranted.

Hence, the Appellate Division should reverse the decision to dismiss the Board's 10-count complaint, and remand to the trial court, and reinstate the trial court's originally-correct decision to dismiss the Pritchard's Counterclaim with prejudice.

Respectfully Submitted,

SOUDER SHABAZZ & WOOLRIDGE LAW GROUP, LLP
Attorneys for Plaintiff / Counterclaim Defendant,
Paterson Board of Education

*/s/ Bryant Lawrence Horsley, Jr.*_____ Dated: April 24, 2024
Bryant Lawrence Horsley, Jr., Esquire