SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.

Plaintiff/Appellant, R.J., a Minor, by his Guardian Ad Litem, PENNYANNE SIMONS-JACKSON vs. *Defendants/Respondents*, ALEX R. BROWN-ESKENGREN; JAKE JOSEPH JACOBSON; N.D., ANTHONY VELTRI; RICHARD VELTRI; LISA VELTRI; RAY BROWN; NICHOLAS DINAPOLI; and JESSICA DINAPOLI	On Appeal From Interlocutory Order entered in the Superior Court, Law Division, Monmouth County *Sat Below:* Honorable Linda Grasso Jones, J.S.C. Monmouth County Superior Court Docket No. MON-L-001952-22

BRIEF ON BEHALF OF DEFENDANT, ALEX BROWN-ESKENGREN

.

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PROCEDURAL HISTORY

This matter arises from an alleged assault that occurred on or about May 21, 2022. [Da1-Da29; Da93-Da124] The plaintiff Penny Simons-Jackson asserts that her minor son, R.J., was assaulted in part by defendant Alex-Brown Eskengren. [Da1-Da29; Da93-Da124]

On or about January 2, 2024, defendant Alex Brown-Eskengren pled guilty to assault in the 3rd degree as a pre-condition to be accepted into pre-trial intervention ("PTI"). [Da233-Da256] As part of that guilty plea, defendant Alex Brown-Eskengren provided a factual basis for the charge of assault in the 3rd degree. [Da233-Da256] On March 8, 2024, Alex Brown-Eskengren was accepted into the PTI program. [Da428-Da443].

On May 13, 2024, during the civil deposition of defendant Alex Brown-Eskengren, plaintiffs' counsel sought to question and cross-examine him with statements made during the guilty plea. [Da306-Da324] Counsel for Defendant Alex Brown-Eskengren disagreed that plaintiffs' counsel was permitted to do so pursuant to the holding of State v. Lavrik, 472 N.J. Super. 192 (App. Div. 2022), which held that a guilty plea entered as a condition of admission to PTI shall be held in an inactive status pending termination of the supervisory treatment and therefore, the guilty plea has no force or effect, unless PTI is violated. [Da306-Da324] Plaintiffs' counsel contacted the court, and the court

heard oral argument during the deposition. [1T4-1 to 1T13-11]. The Court concluded there was no applicable privilege and plaintiff could proceed with questioning Alex Brown-Eskengren on his guilty plea and plea allocation. [1T13-12 to 1T21-9] Thereafter, due to potential Fifth Amendment concerns, the deposition was discontinued by defendant Alex Brown-Eskengren's counsel despite plaintiffs' counsel's protest. [Da229-Da230; Da416]

Thereafter, plaintiff filed a motion to enforce litigant's rights against defendant Alex Brown-Eskengren. [Da226-Da441] Defendant Alex Brown-Eskengren filed a cross-motion to have the Court memorialize its oral decision of May 13, 2024 so he could seek an interlocutory appeal as well as requesting a civil stay of the court's decision while interlocutory appeal was sought. [Da412-Da426]

On July 19, 2013, the Court heard additional argument and issued an order capturing its oral decision of May 13, 2024. [2T22-21 to 2T29-25; Da444-Da447]. The Court granted and denied plaintiff's motion in part, denying plaintiff's request for sanctions and compelling defendant Alex Brown-Eskengren's deposition within 45 days. [2T22-21 to 2T29-25; Da444-Da445]. The Court granted defendant's order with some minor revisions to memorialize the court's oral decision of May 13, 2024 and denied defendant's cross-motion for a civil stay. [2T22-21 to 2T29-25; Da446-Da447].

Defendant Alex Brown-Eskengren now files this motion seeking leave to file an interlocutory appeal of the trial court's orders dated July 19, 2014 enforcing litigant's rights and compelling him to answer questions at the continuation of his deposition regarding his criminal plea allocution made as a precondition to being admitted to pretrial intervention.

STATEMENT OF FACTS

This matter arises from an alleged assault that occurred on or about May 21, 2022. The plaintiff Penny Simons-Jackson asserts that her minor son, R.J., was assaulted in part by defendant Alex-Brown Eskegren. [Da1-Da29; Da93-Da124]. On or about January 2, 2024, defendant Alex Brown-Eskengren pled guilty to aggravated assault in the 3rd degree as a pre-condition to be accepted into pre-trial intervention ("PTI"). [Da223-Da256] As part of that guilty plea, defendant Alex Brown-Eskengren had to provide a factual basis for the charge of third degree aggravated assault. [Da223-Da256]

On May 13, 2024, during the civil deposition of defendant Alex Brown-Eskengren, plaintiffs' counsel sought to question and cross-examine him with statements made during the guilty plea. [Da306-Da324] Defense counsel disagreed that plaintiffs' counsel was permitted to do so pursuant to the holding of State v. Lavrik, 472 N.J. Super. 192, 215-217 (App. Div. 2022), which held that a guilty plea entered as a condition of admission to PTI is in inactive status and considered nonevidential. [Da306-Da324] Plaintiffs' counsel contacted the court and the court heard oral argument. The Court concluded there was no applicable privilege and plaintiff could proceed with questioning Alex Brown-Eskengren on his guilty plea and factual allocation. [1T13-12 to 24; 1T21-7 to 9] The court reserved on the issue of admissibility.

[1T13-12 to 24; 1T1-7]. As counsel had potential Fifth Amendment concerns, the deposition was stopped and adjourned by defendant Alex Brown-Eskengren's counsel over protests of plaintiffs' counsel. [Da229-Da230; Da416]

Thereafter, plaintiffs filed a motion to enforce litigant's rights against Alex Brown-Eskengren to compel the continuation of his deposition and to answer questions concerning his criminal plea allocution [Da226-Da411], and defendant Alex Brown-Eskengren filed a cross-motion for an order to memorialize the court's decision of May 13, 2024 and for a civil stay while interlocutory appeal was sought. [Da412-Da426] The Court heard additional oral argument on July 19, 2024. In deciding the motions, the court enlarged its reasoning of its earlier decision to permit plaintiff's counsel to question defendant Alex Brown-Eskengren regarding his criminal plea allocution. First, the Court took the position that under State v. Lavrik, that the statements made during the plea allocution were not evidentiary until defendant completed PTI and the charge is dismissed. [2T15-3 to 2T19-12]. The Court also took also took the position that discovery is liberal under R. 4:10-2 and the standard is one cannot object on admissibility if the inadmissible evidence is reasonably calculated to lead to admissible discovery. [2T14-6 to 15; 2T24-8 to 12].

The Court then denied the motion for a civil stay. [2T29-1; Da446-Da447]. The court found the potential loss of insurance coverage would not be considered irreparable harm. [2T25-4 to 20]. The Court also found that interference with his rehabilitation and therapy was not irreparable harm. [2T26-11 to 21] The Court also expressed concerning about shielding such testimony from defendant's insurance carrier. [2T25-1 to 2T26-10].

Defendant Alex Brown-Eskengren now seeks interlocutory review of the Court's decision of May 19, 2024 and further expanded upon on July 19, 2024, that granted plaintiffs' application because it violates the tenants of State v. Lavrik, 472 N.J. Super. 192 (App. Div. 2022) that is now memorialized in the court's order of July 19, 2024. [Da446-Da447]

LEGAL ARGUMENT

POINT I

THE COURT SHOULD GRANT LEAVE TO APPEAL IN THE INTEREST OF JUSTICE AND TO CORRECT CLEAR LEGAL ERROR (Not raised below)

The Court should grant leave to appeal in the interest in justice pursuant to R. 2:2-4. Leave to appeal from interlocutory orders is granted only "sparingly" and "in the interest of justice". See State v. Reldan, 100 N.J. 187, 205 (1985). This case calls for relief because the trial court's orders allowing Defendant's plea of guilty to failure to report an accident to be admitted in evidence at trial were errors of law that possess a clear capacity to produce an unjust result. To allow the plea to be admitted in evidence in this case effectively destroys Defendants' defense to liability.

In Brundage v. Estate of Carambio, 195 N.J. 575, 598-600 (2008), the Supreme Court explained that:

> [L]eave to file an interlocutory appeal of a trial court's order is permitted only 'in the interest of justice.' R. 2:2-4. …
>
> As our Appellate Division has recognized, an interlocutory appeal is not appropriate to 'correct minor injustices ….' Romano v. Maglio, 41 N.J. Super. 561, 567, 125 A.2d 523 (App. Div.), denied, 22 N.J. 574, 126 A.2d 910 (1956), cert. denied, 353 U.S. 923, 77 S. Ct. 682, 1 L. Ed. 2d 720 (1957). Rather, when leave is granted, ***it is because there is the possibility of 'some grave damage or injustice' resulting from the trial court's order***. Id. at 568, 125 A.2d 523. ... Regardless of the specific basis asserted, however, the moving party must establish, at a minimum, that the

> desired appeal has merit and that 'justice calls for [an appellate court's] interference in the cause.' Romano, supra, 41 N.J. Super. at 568, 125 A.2d 523.
>
> The Appellate Division enjoys considerable discretion in determining whether the 'interest of justice' standard has been satisfied and, as a result, whether to grant a motion for leave to file an interlocutory appeal. ... ***The Appellate Division has, for example, granted review of interlocutory orders that actually or effectively dismiss a party's claims or defenses***. See, e.g., Fid. Union Bank v. Hyman, 214 N.J. Super. 177, 179, 518 A.2d 764 (App. Div. 1986); Hamilton v. Letellier Constr. Co., 156 N.J. Super. 336, 337, 383 A.2d 1168 (App. Div. 1978). It has also granted leave to review orders concerning novel questions of law ... and has even intervened to resolve certain discovery disputes, See e.g., Klimowich v. Klimowich, 86 N.J. Super. 449, 450, 207 A.2d 200 (App. Div. 1965)..

[Emphasis added and citations omitted in part].

Brundage indicates that interlocutory review is appropriate to prevent "grave damage" or "injustice resulting from the trial court's order." Brundage, supra, 195 N.J. at 599. This includes review of interlocutory orders that "actually or effectively dismiss a party's claims or defenses". Id. at 599. That is essentially what happened in this case. The Order in question is tantamount to a dismissal of the Defendant Alex Brown-Eskengren's defense because admission of a guilty plea to aggravated assault in the third degree and the corresponding factual allocution will not only destroy Alex Brown-Eskengren's defense but will almost certainly result in loss of his insurance coverage.

The Court has also granted interlocutory appeal applications in those instances where the issues involved would significantly affect a public interest or invokes rights to important to be denied. See in Re Guardianship of Gotson, 72 N.J. 112, 115, 116 n.1 (1976); Township of Chester v. Panicucci, 62 N.J. 94, 98 n. 3 (1973); In re Pennsylvania R.R., 20 N.J. 398, 409 (1956)(citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L.Ed. 1536 (1949).

In the present matter, the defendant Alex Brown-Eskengren pled guilty to third degree aggravated assault, N.J.S.A. 2C:12-1(b)7, on January 2, 2024, and in doing so, provided a factual allocution to the charge as a pre-condition of being admitted to PTI. During defendant Alex Brown-Eskengren's discovery deposition on May 13, 2024, plaintiff's counsel sought to question him about statements made regarding his plea allocution. [Da306-Da324] Counsel for Defendant Alex Brown-Eskengren took the position that such questioning was not permitted based upon the holding in State v. Lavrik, 472 N.J. Super. 192, 215-217 (App. Div. 2022), which held the conviction is "inactive" and "non-evidential" pending defendant's completion of his pre-trial term and does not constitute a judgment of conviction or an adjudication, and, thus, plaintiffs' counsel should not be permitted to question him about the same unless he violates his PTI terms and the conviction gets entered. [Da306-

Da324] The trial court disagreed, interpreting Lavrik to mean defendant Alex Brown-Eskengren's guilty plea and plea allocution was not evidential until after he completes PTI and his criminal charge is dismissed. [1T14-7 to 12; 2T15-3 to 16] That contradicts the Appellate Division's decision in Lavrik, which held the guilty plea and factual plea allocution are not evidential and inadmissible until a defendant who pled guilty as a pre-condition to PTI fails to complete his or her PTI term, and the conviction gets reinstated. 472 N.J. Super. at 215-217.

Defendant Alex Brown-Eskengren submits this is an issue subject to be repetition. The Court can only imagine how many first offenders get admitted into some form of pre-trial intervention every year that are defendants in a pending or subsequent civil lawsuit where they could potentially be cross-examined on their guilty plea and factual plea allocution while they complete their pre-trial intervention term. State v. Lavrik never determined that admissibility should hinge on the civil tort case proceeding to trial before the PTI term is completed. Rather Lavrik stands for the position that the conviction and factual basis remain non-evidential if and until premature discharge from the PTI program and the convicted gets reinstated. Id. Knowing this could happen might motivate more defendants to go to trial because a finding of guilt or innocence after a criminal trial is never

admissible. See State v. LaResca, 267 N.J. Super. 411, 417 (App. Div. 1993); State v. Humphrey, 183 N.J. Super. 580, 586-590 (Law Div. 1982) aff'd, 209 N.J. Super. 152 (App. Div. 1986). This also defeats the state's current approach of rehabilitation over incarceration and leads more backlogged courts and much higher costs in housing incarcerated individuals.

There are also varied reasons why people plead guilty other than guilt, such as avoiding a harsh sentence or avoiding agony and expense to the defendant and his family. See State v. Boone, 66 N.J. 38, 49 (1974)(citing Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)). Furthermore, avoiding the stigma associated with a criminal record may also a primary motivator to seek PTI. See State v. Bell, 217 N.J. 336, 346 (2014). We all know that many employers are not be keen on hiring individuals with criminal records or may prevent someone from obtaining certain types of employment such as positions of law enforcement and many public service jobs.

Thus, there is a grave injustice raised by permitting questioning of defendants about their guilty pleas and factual allocutions supporting the same while they complete PTI. Defendant Alex Brown-Eskengren respectfully

requests that the Court entertain his interlocutory appeal in the interest of justice.

POINT II

THE TRIAL COURT ERRED WHEN IT GRANTED PLAINTIFF'S COUNSEL'S ORAL MOTION THAT DEFENDANT ALEX BROWN-ESKENGREN COULD BE QUESTIONED REGARDING HIS CRIMINAL GUILTY PLEA AND CORRESPONDING FACTUAL ALLOCUTION PURSUANT TO *STATE V. LAVRIK* (2T22-1 to 2T29-25; Da444-Da447)

In State v. Lavrik, 472 N.J. Super. 192 (App. Div. 2022), the defendant pled guilty to second-degree endangering the welfare of a child as a precondition to be admitted to PTI. Id. at 199. At the plea hearing, the defendant made an admission that he "knowingly engage[d] in a verbal conversation with [her] that was sexual in nature, which would impair or debauch her morals." Id. at 200. While the primary issue on appeal concerned whether the Court improperly granted a civil reservation, the Court found the civil reservation was akin to putting a cart before the horse because there had been no conviction under the defendant's admission to PTI:

> Lastly, we consider the effect of defendant's guilty plea as a condition of PTI on the practical application of the civil reservation order. Pursuant to N.J.S.A. 2C:43-13(b), a guilty plea entered as a condition of admission to PTI "shall be held in an inactive status pending termination of the supervisory treatment," under subsection (d) (successful completion of the program, resulting in dismissal of the charges) or (e) (dismissal from the program, thereby reactivating the charges); see also N.J.S.A. 2C:43-12(g)(3). "Therefore, the guilty plea has no force or effect, unless PTI is violated. It is neither a judgment of conviction nor an adjudication. If a defendant successfully completes the program, the charges are dismissed." Attorney General, Uniform Guidelines on the Pretrial Intervention Program (March 1, 2016) (Directive

2016-2); see also R. 3:28-7(b) (addressing the available dispositions following conclusion of the court-ordered PTI term).

It is therefore axiomatic should defendant successfully complete PTI, the child endangerment charge will be dismissed and, as such, the fact that defendant pled guilty and any statements pertaining to his guilty plea are not evidentiary in a civil proceeding — irrespective of the civil reservation order. See Maida [v. Kuskin], 221 N.J. [112,] [ ] 125, 110 A.3d 867 [(2015)]; [Eaton v. Eaton], 119 N.J. [628,] [ ] 643-44, 575 A.2d 858 [(1990)]; [State v.] LaResca, 267 N.J. Super. [411,] at 418 n.4, 631 A.2d 986 [(App. Div. 1993)]. ***Because defendant's inactive guilty plea in this PTI matter is non-evidentiary in any civil action pending unsuccessful termination from supervisory treatment, the court's order was premature.***

We recognize the Rules of Court do not address the effect of an inactive plea on a civil reservation order. Further, Rule 3:9-2 instructs the trial court to enter the order "in accepting a plea of guilty." However, in those cases, where PTI is not a condition of defendant's guilty plea, the civil reservation generally is ordered at sentencing and included in the judgment of conviction. See [State v.] Faunce, 244 N.J. Super. [499,} [ ] 500-01, 582 A.2d 1268 [(App. Div. 1990)]. That procedure permits the court to consider the victim's impact statement, see N.J.S.A. 52:4B-36; N.J.S.A. 2C:44-6(b), and the defendant's financial circumstances and other good cause at the time the civil reservation is considered. Thus, the sentencing judge is then in a better position to decide whether a civil reservation should be entered.

In those cases where the judge determines the defendant has not satisfied his burden, the defendant should be allowed to rescind the guilty plea — if the civil reservation was a condition thereof. That, of course, is not the case here. Only the financial consequences of defendant's civil reservation application are at play. In our view, delaying the decision until sentencing affords the judge a better picture of defendant's then-present financial circumstances.

Because defendant was not yet — and may never be — sentenced on the present charges, the trial court should have delayed consideration of defendant's application until the completion of his PTI term. Should defendant successfully complete PTI, the endangerment charge will be dismissed, thereby mooting defendant's application for a civil reservation. On the other hand, if defendant is unsuccessfully terminated from the program, a judgment of conviction will be entered on the charge, and defendant may renew his application, with notice to the victim, prior to sentencing. That process will enable the court to determine whether defendant can establish "good cause," including whether he faces the potential for devastating financial loss, where the civil reservation was not part of plea negotiations. Conversely, in those cases where the civil reservation is part of the plea agreement and necessary "to remove an obstacle to a defendant's pleading guilty to a criminal charge," State v. Haulaway, Inc., 257 N.J. Super. 506, 508, 608 A.2d 964 (App. Div. 1992), the order should be stayed pending the conclusion of the defendant's PTI term.

We recognize our prior decision in McIntyre-Caulfield disagreed with the trial court's finding that the defendant's request was premature because she had not yet completed her three-year PTI term. 455 N.J. Super. at 10-11, 187 A.3d 171. We cited the defendant's speedy trial rights, faded witness memories in the criminal and civil actions, and financial and emotional costs to the litigants. Id. 455 N.J. Super. at 11, 187 A.3d 171. While we are sensitive to these concerns, ***a defendant's inactive guilty plea nonetheless is non-evidential while the plea remains inactive.*** Indeed, our trial courts liberally grant stays in civil matters, pending sentencing of a defendant, where the defendant's Fifth Amendment rights are implicated. See Whippany Paper Bd. Co. v. Alfano, 176 N.J. Super. 363, 373-74, 423 A.2d 648 (App. Div. 1980); see also Byrd v. Manning, 253 N.J. Super. 307, 317, 601 A.2d 770 (App. Div. 1992). We therefore discern no disadvantage in delaying consideration of defendant's application until he completes PTI under the circumstances presented here — or staying the court's order unless and until a defendant is terminated from PTI when the civil reservation removes an impediment in plea negotiations and is incorporated in the plea agreement.

[Lavrik, supra, 472 N.J. Super. at 215-217.] (emphasis added)]

In the present matter, the defendant Alex Brown-Eskengren pled guilty to third degree aggravated assault, N.J.S.A. 2C:12-1(b)7, on January 2, 2024 and in doing so, provided a factual allocution to the charge. [Da233-Da256] This guilty plea was done as a prerequisite of admission to PTI. [Da233-Da256]. During his discovery deposition on May 13, 2024, plaintiff's counsel sought to question defendant Alex Brown-Eskengren regarding his guilty plea and factual plea allocution. [Da306-Da324] Counsel for Defendant Alex Brown-Eskengren took the position that based upon the holding in Lavrik, plaintiff was not permitted to question him about the same unless he violates his PTI terms and was ultimately convicted. [Da306-Da324; 1T8-2 to 1T9-15; 1T13-2 to 11]. The trial court disagreed, stating that plaintiffs' counsel could question defendant Alex Brown-Eskengren regarding his guilty plea and the plea allocution with admissibility to be determined at a later date. [1T13-12 to 1T14-24: 1T20-8 to 1T21-9]. The Court based its decision on that admissibility was contingent upon defendant completing PTI and the criminal charges formally dismissed. This position is in direct contravention of Lavrik, which was explicit that the defendant has to fail to complete PTI and the conviction gets reinstated for his statements to become evidential. 472 N.J. Super. at 215-217.

Although not mentioned by the Court in Lavrik, the Appellate Division's holding that the plea is neither a judgment of conviction nor an adjudication and being non-evidentiary in a civil proceeding is also consistent with N.J. Rule of Evidence 410(a), which bar statements made during a guilty plea, if a guilty plea is later withdrawn, from being admitted in a civil case. If defendant Alex Brown-Eskengren is successfully discharged from PTI, then it will have the same effect as a successfully withdrawn guilty plea as set forth in N.J. Rule of Evidence 410(a).

A Plaintiff's ability to admit a criminal plea and the associated factual allocution should not be conditioned upon the timing of civil litigation predating the completion date of the defendant's term of pre-trial intervention. To do so would create a loophole to the rule that the guilty plea is neither a conviction, an adjudication and deemed non-evidential while the guilty plea is inactive. The trial court's decision clearly violated the Appellate Division's holding set forth in Lavrik that the guilty plea is inactive and not considered a conviction or an adjudication and non-evidential while the plea remains inactive.

To permit such questioning regarding his criminal plea and factual allocution could have dire consequences for defendant Alex Brown-Eskengren. He already had his insurance coverage disclaimed once and later reinstated

under reservation of rights. Coverage was only reinstated after Alex Brown-Eskengren's then-counsel was able to convince his liability insurers that the statements made during the plea allocution were inadmissible unless he violates PTI and ultimately gets convicted under Lavrik, supra. Permitting plaintiffs' counsel to question him about his criminal plea and related allocution could likely lead to loss of insurance coverage again. The carriers previously revoked coverage and it was only reinstated under a reservation of rights after personal counsel convinced the carriers that Alex Brown-Eskengren's guilty plea and factual basis were inadmissible or non-evidential pursuant to the court's holding in Lavrik. [2T12-5 to 2T13-6] Furthermore, plaintiff's counsel opined that defendant Alex Brown-Eskengren may have violated his PTI terms [1T10-13 to 14], and questioning him about this plea allocution further raises Fifth Amendment concerns.

The Court further based its decision on the broadness of discovery under R. 4:10-2, which provides no objection can be made on admissibility if the discovery sought is reasonably calculated to lead to admissible discovery. [2T14-6 to 2T15-15] The Court based its rationale on the belief that the defendant had to complete PTI and obtain a dismissal of the charges held in abeyance ***before*** the guilty plea and factual basis are be deemed inadmissible or non-evidential. However, it is clear from Lavrik that until defendant Alex

Brown-Eskengren is prematurely discharged from PTI, his guilty plea and criminal plea factual allocution are in "inactive status" and remains inadmissible or non-evidential in any civil proceeding. 472 N.J. Super. at 215-217. Defendant Alex Brown-Eskegren has not been prematurely discharged from PTI. Therefore, the guilty plea and factual allocution remain inadmissible. If the guilty plea and plea allocution are inadmissible, then the plaintiff and/or the Court must demonstrate that the questioning is likely to lead to admissible information as required by Rule 4:10-2. There was no proffer by the plaintiff or the Court as to how this information was likely to lead to admissible evidence at the time of trial. All plaintiff could point to was inconsistent testimony but that hinges on the statements made at the guilty plea being admissible.

CONCLUSION

Based upon the foregoing, Defendant's Motion for Leave to Interlocutory Appeal should be granted and the Trial Court's order and decision permitting the plaintiff to question defendant Alex Brown-Eskengren about his criminal plea and factual plea allocution should be vacated and reversed.

Respectfully submitted,

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By: *Frank J. Caruso /s/*
Frank J. Caruso

Dated: August 8, 2024

R.J., a Minor, by his Guardian Ad Litem, PENNYANNE SIMONS-JACKSON Plaintiff/Respondent, v. ALEX R. BROWN-ESKENGREN; JAKE JOSEPH JACOBSON; N.D.; ANTHONY VELTRI; RICHARD VELTRI; LISA VELTRI; RAY BROWN; NICHOLAS DINAPOLI; and JESSICA DINAPOLI, Defendants/Movants.	**Superior Court of New Jersey, Appellate Division** **Docket No. AM-000632-23** **M-006697-23, M-006700-23** On Defendants' Motions for Leave to Appeal from the July 19, 2024 Interlocutory Orders of the Superior Court of New Jersey, Law Division, Monmouth Vicinage and for a Stay Trial Court Docket No: Docket No. MON-L-001952-22 Sat Below (Trial Court): Hon. Linda Grasso Jones, J.S.C.

BRIEF AND APPENDIX (Pa1-Pa11) ON BEHALF OF PLAINTIFF R.J., A MINOR, BY HIS GUARDIAN AD LITEM PENNYANNE SIMONS-JACKSON IN OPPOSITION TO DEFENDANT ALEX BROWN-ESKENGREN'S MOTIONS (1) FOR LEAVE TO APPEAL AND (2) FOR A STAY

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[1] "1T" refers to the transcript of the May 13, 2024 "emergent call" during the deposition of Defendant Brown-Eskengren; "2T" refers to the transcript of the July 19, 2024 oral argument and statement of reasons by the trial court.

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PRELIMINARY STATEMENT

Defendant Alex Brown-Eskengren pled guilty to committing third-degree aggravated assault upon minor Plaintiff R.J. In support of his guilty plea, Brown admitted, under oath and in open court, that after having a verbal disagreement with R.J. that turned physical, he assaulted R.J. by shoving him to the ground in an attempt to cause R.J. significant bodily injury, at which point a co-defendant repeatedly kicked the defenseless R.J. in the head and face. R.J. suffered severe injuries, including the fracture of his orbital bone, requiring the surgical implantation of metal hardware. A few months after pleading guilty and being admitted to a two-year term of PTI (Pretrial Intervention), Brown appeared at his discovery deposition in this civil litigation arising from the attack upon R.J. At his deposition, Brown testified to a completely different version of events that contradicted his prior, sworn testimony at the time of his guilty plea. Brown claimed that he never had a verbal altercation with R.J. and that R.J. simply lost his balance and fell to the ground. When Plaintiff's counsel attempted to cross-examine Brown with the transcript of his prior inconsistent statements from the time of his guilty plea, Brown's counsel instructed him not to answer, even though the prior statements were not protected by a privilege or civil reservation.

The trial court correctly ruled that cross-examining Brown with his prior inconsistent statements was well within the realm of discoverability. The trial

court further held that the separate question of whether Brown's statements in support of his guilty plea would ultimately be admissible at trial would be answered at a later time, pending further developments such as whether Brown ultimately succeeded in completing PTI and whether Brown ultimately applied for or obtained a civil reservation. The trial court therefore ordered Brown to complete his deposition by September 2, 2024 and to answer Plaintiff's questions regarding the statements he made to support his plea.

Defendant Brown's present motions for leave to appeal and to stay the trial court's legally correct discovery ruling should be denied. Brown's prior inconsistent statements at his plea hearing regarding the incident that forms the basis of this civil litigation are firmly within the scope of discoverability. No civil reservation, court order, or legal privilege applies to these statements. Even if a civil reservation were to be entered in the future, a civil reservation is not a license to commit perjury or to proffer a fraudulent defense in a civil action without being subject to cross-examination. That said, the trial court's present order is limited to requiring Brown to answer questions regarding his prior statements at his discovery deposition. No ruling has been made regarding the ultimate admissibility of those prior statements. Interlocutory review of the trial court's narrowly-tailored, legally correct discovery order is unwarranted and Brown's motions for leave to appeal and for a stay should be denied.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY[2]

A. The May 21, 2022 Attack And Beating Of Minor Plaintiff R.J.

This litigation arises from a May 21, 2022 incident in which moving Defendant Alex Brown-Eskengren ("Brown"), along with co-defendants Jake Jacobson and Anthony Veltri, brutally attacked and beat the minor Plaintiff R.J. See generally Plaintiff's amended complaint, Da94-8. As a result of Defendants' attacks, R.J. sustained severe injuries, including, but not limited to, a fractured orbit/facial bone requiring the implantation of surgical hardware, a concussion/traumatic brain injury, and severe emotional distress. Da98, ¶ 19.

On May 21, 2022, R.J. and his girlfriend went to a party at a home owned by Defendants Richard and/or Lisa Veltri, which was being attended by minors and non-minors, including current and former students from local high schools. Da94-6, ¶¶ 1-2, 11. Alcohol was served or provided to the underaged guests at the Veltri party. Da95, ¶ 8. Some of the underaged attendees, including the ones who attacked R.J., had previously been provided, served, and/or permitted to consume alcohol by Defendants Ray Brown (Brown's father) and/or Nicholas and Jessica DiNapoli (Defendant N.D.'s parents). Da120, ¶ 4; Da122, ¶ 7.

[2] Because they are closely related, the statements of procedural and factual history are being combined to avoid repetition and for the Court's convenience. "1T" refers to the transcript of the May 13, 2024 "emergent call" during the deposition of Defendant Brown; "2T" refers to the transcript of the July 19, 2024 hearing.

At the Veltri house party, R.J. was confronted by N.D., who falsely accused R.J. of inappropriately touching N.D.'s girlfriend. Da95, ¶ 9. Although R.J. attempted to explain that N.D. was mistaken, N.D. shoved/pushed R.J. and began to shout racial epithets at R.J., who is biracial. Da96, ¶ 10. Fearing for his safety, R.J. and his girlfriend exited the Veltri house, while N.D. and others continued to shout racial slurs. Da96, ¶¶ 11-12.

While R.J. and his girlfriend waited outside for their Uber ride to arrive, he was again approached by N.D., along with Brown and Jacobson. Da96-7, ¶¶ 15-17. N.D. began to physically attack R.J., who attempted to defend himself. Id. Brown and Jacobson then attacked R.J. from behind, causing him to fall to the ground. Id. While R.J. lay defenseless on the ground, he was repeatedly kicked in the head and the rest of his body, causing the fracture of his orbit/facial bone and other severe injuries. Id. After this vicious attack, while R.J. attempted to leave, Defendant Anthony Veltri shoved R.J. into the bushes. Da97, ¶ 18.

B. The Claims Set Forth In Plaintiff's Complaint

Plaintiff R.J.'s mother and guardian ad litem filed the initial complaint in this matter on July 19, 2022. Da1. Plaintiff's amended complaint was filed on July 7, 2023. Da93. As to Defendant Brown, Plaintiff alleges that: (1) Brown negligently, carelessly, and/or recklessly injured R.J. (Da98-9); (2) in the alternative, Brown intentionally, willfully and wantonly injured R.J. (Da99-

100); and/or (3) that Brown engaged in racially motivated attack (Da101-2). Similar claims are asserted against co-defendants Jacobson (Da102-6), N.D. (Da106-110), and Anthony Veltri (Da110-4). Plaintiff has also asserted claims against Defendants Richard and Lisa Veltri, Ray Brown and Nicholas and Jessica DiNapoli for negligently providing, serving and/or allowing underaged persons to consume alcohol and/or for negligent supervision. Da114-122.

C. The Criminal Charges Against Defendants Brown And Jacobson

Brown was initially charged with simple assault as a result of the May 21, 2022 attack. Pa4. The Monmouth County Prosecutor's Office ultimately charged him with second-degree aggravated assault, later amended to third-degree. See Da235, 3:3-20; Da237, 5:16-18. Defendant Jacobson was also charged with third-degree aggravated assault. Pa4. Co-defendant Anthony Veltri was charged with simple assault and N.D. with a juvenile offense. Id.

On March 6, 2023, the trial court in this civil action, the Honorable Linda Grasso Jones, J.S.C., entered an order providing that, in light of the pending criminal matter, Brown's deposition should not be taken for 180 days, with the stay to expire earlier if the criminal charges resolved sooner. Pa8-9

D. Brown's Sworn Statements At The Time Of His Guilty Plea

On January 2, 2024, Brown appeared before the Honorable Chad N. Cagan, J.S.C., and pled guilty to an amended charge of third-degree aggravated

assault under N.J.S.A. 2C:12-1(b)(7), with his plea being conditioned upon his admission to PTI. Da233, Da234-5 (3:3-4:7). The plea agreement also required the following, as set forth by the assistant prosecutor on the record:

> **[D]efendant [Brown] is going to be providing a truthful factual basis to the crime**. In addition, he will also be agreeing to provide truthful testimony against the Co-defendant Jake Jacobs[o]n, if there is a trial, at that trial. Therefore, meaning he would have to take the stand. He would actually have to answer questions on direct and he would have to answer questions on cross regarding that, and **he would be bound by his actual factual basis about what had happened and what he had saw.**
>
> [Da236, 4:8-17 (emphasis added).]

Brown's criminal defense attorney confirmed Brown's understanding of the plea agreement's terms. Da237 (5:13-23); Da238-9 (6:15-7:1).

Brown himself was then placed under oath, Da239 (7:10-11) and confirmed he understood his obligation to testify truthfully:

> COURT: You have now been sworn in to tell the truth, so in answering the Court's questions, **if you say something that's not true or is a lie, you will have committed perjury or false swearing; do you understand that?**
> BROWN: **Yes, Your Honor.**
> COURT: These are separate crimes under the New Jersey Criminal Code for which you could be separately charged. **Do you understand the Court's caution to you as to what may happen to you if you do not answer the Court's questions truthfully?**
> BROWN: **Yes, Your Honor.**
>
> [Da240 (8:2-15) (emphasis added).]

Brown confirmed that he knowingly and voluntarily signed the plea agreement form, which he reviewed and understood. Da242-4 (10:15-12:22). Brown specifically confirmed the following conditions of the plea agreement:

> COURT: ["]Defendant to provide truthful factual basis. Defendant agrees to provide truthful testimony against Co-defendant Jake Jacobson at trial." Did I read all of that correctly sir?
> BROWN: Yes, Sir.
>
> [Da246 (14:10-14).]

Brown admitted he was guilty of aggravated assault, Da247 (15:1-3), and gave the following sworn factual basis:

> Def Atty.: Alex, let's go back to May 21st of 2022, you were in Oceanport that evening?
> BROWN: Yes, sir.
> Def. Atty.: And at some point in time you encountered an individual whose initials are R.J.?
> BROWN: Yes, sir.
> Def. Atty.: And you knew who R.J. was?
> BROWN: Yes, sir.
> Def. Atty.: **And at some point in time, did you have a verbal disagreement with him [R.J.]?**
> BROWN: **Yes, sir.**
> Def. Atty.: **And that verbal disagreement actually turned physical?**
> BROWN: **Yes, sir.**
> Def. Atty.: **And you actually assaulted him by shoving him to the ground?**
> BROWN: **Yes, sir.**
> Def. Atty.: **And in doing so, you attempted to cause him significant bodily injury?**
> BROWN: **Yes, sir.**

Def. Atty.: **And I explained to you that's called an aggravated assault and that's why you are pleading guilty to a third-degree aggravated assault?**
BROWN: **Yes.**

[Da249-250 (17:7-18:5) (emphasis added).]

Brown then testified that he saw Jacobson kick R.J. in the face "several times". Da250 (18:6-19). Based on Brown's sworn testimony, Judge Cagan accepted his plea to aggravated assault. Da251 (19:13-23).

E. Brown Is Admitted To PTI And Confirms That His Guilty Plea Was *Not* Conditioned On Receiving A Civil Reservation

On March 8, 2024, Brown appeared before Judge Cagan to be admitted into PTI. Da428, 430 (3:12-19). Defense counsel advised Judge Cagan that Brown intended to formally move in the future for a civil reservation, on notice to civil counsel for R.J., but that he did not want the civil reservation issue to delay his admission to PTI. Da431 (4:14-24). Judge Cagan carefully confirmed that Brown wanted to be sentenced to PTI in accordance with the plea agreement regardless of whether a civil reservation was ultimately entered later on:

COURT: I want to make clear that the entry, the application for entry into PTI is **not** conditioned upon the granting of a civil reservation, correct?
Def. Atty.: That's my understanding.
COURT: **Whether that's granted or denied, this defendant wishes to be admitted into PTI.**
Def. Atty.: **He is ready to be admitted today.**

[Da432 (5:2-8) (emphasis added).]

Brown then testified that he understood the conditions of PTI, including the requirement that he "must testify truthfully against Co-defendant Jake Jacobs[o]n if the matter proceeds to trial." Da433 (6:15-16); Da440 (13:6-14).

F. Brown's Legal Representation In This Civil Matter

Defendant Brown was initially represented in this civil matter by Frank Caruso, Esq. of the Hoagland Longo firm, who was assigned by AIG, the homeowner's insurance carrier of Defendant Brown's father, and/or Allstate, his father's umbrella insurance carrier. Da206 (¶¶ 4, 7), Da212-3 (¶¶ 4, 7). Following Brown's January 4, 2024 guilty plea to aggravated assault, both AIG and Allstate withdrew their defenses in this civil action. Id. Mr. Caruso withdrew as counsel for Brown on February 28, 2024 and Brian Ansell, Esq., personal counsel, took over his civil defense. Da187. On March 19, 2024, Brown filed a third-party complaint against AIG and Allstate seeking the reinstatement of a defense under the subject insurance policies. Da205-Da217.

Mr. Caruso has represented that AIG and/or Allstate agreed to reinstate coverage after Mr. Ansell "was able to convince [the] liability insurers that the statements made during [Brown's] plea allocution were inadmissible unless he violates PTI and ultimately gets convicted under [the case of State v. Lavrik, 472 N.J. Super. 192 (App. Div. 2022)]." Db18. Mr. Caruso further represented that coverage for Brown "was only reinstated under a reservation of rights after

personal counsel conviced the carriers that Alex Brown-Eskengren's guilty plea and factual basis were inadmissible or non-evidential pursuant to the court's holding in Lavrik." Db18 (citing 2T12:5-13:6). On April 9, 2024, Mr. Caruso, the insurance-carrier-provided defense counsel, substituted back in as Brown's attorney and on April 10, 2024, the third-party insurance coverage complaint was voluntarily dismissed without prejudice. Da224-5.

G. Brown Contradicts His Prior Testimony During His Deposition

On March 15, 2024, as Brown had now pled guilty and entered PTI, Judge Jones ordered Brown's discovery deposition to occur by May 24, 2024. Pa10. On May 13, 2024, Brown was placed under oath for his discovery deposition and confirmed he understood his obligation to tell the truth. Da265 (8:1-3); Da267 (10:5-15). Brown then proceeded to contradict the version of events he had given in his sworn guilty plea factual basis before Judge Cagan.

First, contrary to his sworn admission that he had a "verbal disagreement" with R.J. that "actually turned physical", Da249 (17:10-20), Brown now denied ever having a verbal disagreement with R.J. and claimed the only thing he told R.J. was to "calm down". Da299-300 (42:23-43:3); Da329-330 (72:15-73:10).

Brown then contradicted his sworn testimony that he had "actually assaulted [R.J.] by pushing him to the ground" and that in doing so he had "attempted to cause [R.J.] significant bodily injury[.]" Da249-250 (17:21-18:1).

At his deposition, Brown denied intentionally shoving R.J. to the ground and claimed that R.J. simply "lost his balance" and "fell":

> Q: How did [R.J.] end up on the ground?
> A: We were going back and forth, like grappling. And we kind of like lost our balance. **And he fell to the ground.**
> [….]
> Q: **And you threw [R.J.] on the ground or did you just slam him?**
> A: **He fell to the ground.**
> Q: **He fell to the ground.**
> A: **Yes.**
> Q: **Do you know what caused him to fall?**
> A: Well, it was like a weird gravely area. I was about to fall to. **But he kind of lost his balance.**
> Q: **He lost his balance?**
> A: **Yes.**
>
> **[**Da300-1 (43:19-44:12) (emphasis added).]

* * *

> Q: [D]id you shove [R.J.] to the ground because you were bigger than him with the intent to cause him injury?
> A: No.
> [….]
> Q: So it was not your intention to cause [R.J.] serious bodily injury or significant bodily injury, correct?
> A: My sole intention was to stop the fight.
>
> [Da330-1 (73:11-14; 74:4-8).]

In light of Brown's self-contradictory testimony, Plaintiff's counsel sought to cross-examine Brown with the transcript of his prior inconsistent statements from the time of his guilty plea, in which he admitted, under oath, that he shoved R.J. to the ground in an attempt to cause serious bodily injury.

See Da306 (49:15-19); Da249-250 (17:7-18:5). Brown's attorney objected to any questions regarding the sworn statements Brown made at the time of his guilty plea, arguing that the statements are inadmissible because if Brown successfully completes PTI, the conviction would be "gone" and, even if he did not successfully complete PTI, the trial court may decide to grant a civil reservation in the future. Da306-7 (49:20-50:12). Plaintiff's counsel noted that there was no basis under R. 4:14-3 to instruct Brown not to answer questions, since no privilege was being asserted, no civil reservation had been entered, and no Court order permitted him to refuse to answer questions about his prior sworn statements. Da310 (53:17-25); Da314 (57:3-9). Defense counsel persisted in instructing Brown not to answer any questions about the sworn statements he made at the time of his guilty plea. Da315-324 (58:22-67:17); Da327-9 (70:12-72:11); Da331-4 (74:12-77:2).

H. The Trial Court's Telephonic May 13, 2024 Ruling

During a break in the May 13, 2024 deposition, Judge Jones heard telephonic arguments regarding the propriety of defense counsel's instruction that Brown not answer questions regarding the statements made at the time of his guilty plea. See 1T6:22-7:10. After hearing the parties' positions, Judge Jones ruled that Brown "has to answer the questions" regarding the statements he made at the time of his guilty plea because "there's no privilege associated

with this at this point in time in the proceedings" and "[t]here's not a civil reservation in place at this point in time." 1T13:12-15; 1T20:21-22. Judge Jones noted that "[i]t's not like you're asking for something that's covered by the attorney/client privilege where once it's out you can't shove it back into the bottle." 1T13:15-17. Judge Jones ruled that the ultimate admissibility of Brown's prior statements was a separate issue, but "everyone knows what he said at the allocution in his plea, and he absolutely can be asked questions about it" at his discovery deposition. 1T13:18-24. Judge Jones further found that the defense's reliance on the case of State v. Lavrik and the possibility of a future civil reservation being granted were all issues going to the ultimate admissibility of Brown's prior statements at the time of trial and were therefore not dispositive of whether he could be asked about them in a discovery deposition. 1T14:7-24. Following Judge Jones's ruling, Brown's counsel unilaterally terminated the deposition for the stated reason of moving for leave to appeal. Da229-230 (¶ 6).

I. The Trial Court's July 19, 2024 Orders

On June 5, 2024, Plaintiff moved for an order requiring Brown to complete his deposition and to answer questions regarding his guilty plea allocution in accordance with Judge Jones's May 13, 2024 ruling. Da230. Brown cross-moved for the entry of a written order memorializing the May 13, 2024 oral ruling and for a stay while he moved for leave to appeal. Da412.

On July 19, 2024, following oral argument, Judge Jones reaffirmed her May 13, 2024 decision and ordered that Brown appear for his deposition within 45 days (i.e., by September 2, 2024) to answer questions regarding "the facts set forth on the record at the time of his criminal plea allocution[.]". Da444, 446. Judge Jones's narrowly-tailored order provided that the ultimate "admissibility" of Brown's prior statements would be "reserved for a later date". Da446.

Judge Jones's decision was based upon R. 4:10-2, which provides for broad discovery and that "[i]t is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[.]" 2T14:9-25. Judge Jones concluded that the Lavrik case relied upon by Brown did not preclude the taking of discovery regarding statements made during a guilty plea proceeding; rather Lavrik addressed whether the guilty plea statements would ultimately be "evidentiary" or "admissible" at trial. See 2T15:1-16:5; 2T28:21-23. Brown's prior statements were within the scope of discoverability under R. 4:10-2 since they were "directly on point to […] what happened that night." See 2T15:1-16:5. "[U]ltimately, the admissibility of this thing, of this testimony, would be decided later, but I don't see a basis under the court rule for not allowing the questions." 2T17:24-18:2. Judge Jones made clear that "I'm not deciding admissibility here. [….] I'm deciding do they get to ask

the questions and I don't see Lavrik as saying they can't ask the questions because" Lavrik deals with admissibility, not discoverability. 2T18:14-19.

Judge Jones also denied Brown's cross-motion for a stay. Da446. Brown's counsel argued that a stay was warranted because Brown may lose his insurance coverage if he is required to testify at his deposition regarding the sworn statements he made when he pled guilty to assault. 2T12:5-13:6. Judge Jones rejected this argument, stating:

> [Y]ou can't be saying to me, okay he lied when he was in criminal court and so he's committing a fraud on the insurance carrier and, Judge, I want you to be in lockstep with that. I'm committing fraud on the insurance carrier so don't make him testify the stuff that's going to show that he's committing a fraud on the insurance carrier. [….] you're asking me to like engage in a coverup of something which feels pretty uncomfortable and it's not appropriate.
>
> [2T13:7-23.]

Brown has now moved for leave to appeal and for a stay before this Court. For the reasons set forth below, both of Brown's motions should be denied.

STANDARD OF APPELLATE REVIEW

"A trial court's resolution of a discovery issue is entitled to substantial deference and will not be overturned absent an abuse of discretion." State v. Stein, 225 N.J. 582, 593 (2016).

LEGAL ARGUMENT

POINT I

DEFENDANTS' MOTION FOR LEAVE TO APPEAL THE TRIAL COURT'S LEGALLY CORRECT DISCOVERY RULING SHOULD BE DENIED. (Da444-7)

The Appellate Division "will rarely grant interlocutory appeal in relation to orders dealing with discovery." Klimowich v. Klimowich, 86 N.J. Super. 449, 450 (App. Div. 1965). In general, this Court harbors an "inhospitable attitude toward most interlocutory appeals" because they run counter to the judicial policy favoring "uninterrupted proceeding at the trial level with a single and complete review" post-judgment. See State v. Reldan, 100 N.J. 187, 205 (1985) (internal citations omitted). The grant of leave to appeal pursuant to R. 2:2-4 is "highly discretionary" and is "exercised only sparingly" when the interest of justice so requires. Id. Leave should only be granted where there has been a showing that "the desired appeal has merit" and that "justice calls" for immediate review due to factors such as "some grave damage or injustice" resulting from the trial court's order or when the appeal, if sustained, would terminate the litigation. Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) (internal citations and quotation marks omitted).

Here, none of the circumstances warranting interlocutory review are met. Defendant Brown seeks leave to appeal from orders dealing with discovery,

which is disfavored. See Klimowich, 86 N.J. Super. at 450. Judge Jones's July 19, 2024 order is limited to permitting Plaintiff to question Brown regarding his sworn statements at the time of his guilty plea during his discovery deposition, "with admissibility of the same reserved for a later date." Da446. As set forth in Point II, below, Judge Jones correctly decided that cross-examining Brown with his prior inconsistent statements falls within the bounds of permissible discovery under R. 4:10-2. Even assuming arguendo Judge Jones's ruling were erroneous, there would be no "grave damage or injustice" from allowing the deposition questioning to go forward, particularly since Judge Jones has not ruled on admissibility. Da446. Interlocutory review at this juncture is thus unwarranted.

Moreover, Brown's sworn statements supporting his guilty plea were made in open court and all parties have the transcript thereof. This case does not involve the risk of irreversibly revealing allegedly privileged information. In contrast, as Judge Jones observed, everyone already knows what Brown said at the time of his guilty plea. See 1T13:18-24. Allowing Brown to be cross-examined regarding the inconsistencies between his on-the-record guilty plea colloquy and the contradictory version he testified to at his civil deposition will not reveal any privileged information or cause the type of undue harm that warrants interlocutory review. Accordingly, this Court should deny Brown's motion for leave to appeal the trial court's legally correct discovery ruling.

POINT II

THE TRIAL COURT CORRECTLY HELD THAT CROSS-EXAMINING DEFENDANT BROWN WITH HIS PRIOR INCONSISTENT STATEMENTS FALLS WITHIN THE SCOPE OF DISCOVERABILITY (Da444-7)

Judge Jones's narrowly-tailored discovery order correctly required Defendant Brown to answer questions at his deposition regarding his prior inconsistent statements, which were not protected by any privilege or court order, while reserving the ultimate issue of admissibility for a later date.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action [….]" R. 4:10-2(a). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[.]" Id. Evidence is generally admissible if relevant, meaning it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See N.J.R.E. 401 and 402. Thus, the scope of discoverability is broader than admissibility.

It is axiomatic that witnesses may be cross-examined with prior inconsistent statements to impeach their credibility. State v. Silva, 131 N.J. 438, 444 (1993). This Court has called "the use of prior inconsistent statements to discredit witnesses" "one of the most valued tools of litigation[.]" Matter of Wolf, 231 N.J. Super. 365, 372 (App. Div.), certif. den., 117 N.J. 138 (1989).

"What a witness said on a prior occasion compared with his testimony at trial will often significantly aid the trier of fact in determining the truth." Stewart v. Dexter, 218 N.J. Super. 417, 421 (Law Div. 1986) (ordering the disclosure of grand jury testimony to be used to assess the credibility of witness testimony in a related civil matter). "The aim of our judicial system is to ascertain the truth so that justice will be done." Id. Prior statements are particularly relevant for impeachment purposes when they "contradict or call into question the defendant's version of events[.]" State v. Burris, 145 N.J. 509, 535 (1996).

Accordingly, "extrinsic evidence relevant to the issue of credibility" may be introduced "[f]or the purpose of attacking or supporting the credibility of the witness[.]" N.J.R.E. 607(a). A witness may be "subject to cross-examination about a prior otherwise admissible statement" that "is inconsistent with the declarant-witness's testimony at the trial or hearing[….]". N.J.R.E. 803(a)(1).

Here, Judge Jones correctly ruled that it was well within the bounds of discoverability for Plaintiff to question Brown at his deposition regarding the prior inconsistent statements he made in support of his guilty plea. See 2T15:1-16:5. In pleading guilty to aggravated assault before Judge Cagan, Brown testified under oath that he had a verbal disagreement with R.J. that turned physical, he "actually assaulted [R.J.] by shoving him to the ground", and that "in doing so [Brown] attempted to cause him significant bodily injury." Da249-

50 (17:7-18:5). At his civil deposition just a few months later, Brown, also under oath, contradicted his prior testimony, denied he ever had a verbal disagreement with R.J., denied shoving R.J. to the ground, claimed that R.J. simply "lost his balance" and "fell to the ground", and denied attempting to injure R.J. Da299-301 (42:23-43:3; 43:19-44:12); Da329-331 (72:15-73:14; 74:4-8). Cross-examining Brown on his inconsistent testimony as to the central events in this litigation is relevant to his credibility and within the scope of discoverability.

Judge Jones also correctly concluded that there was no privilege or other basis to justify defense counsel's instructions to Brown not to answer questions regarding the prior statements he made in open court. R. 4:14-3(c) provides that "an attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order." As Judge Jones found, there is no privilege applicable to Brown's prior sworn statements, nor are those statements confidential, as they were made publicly in open court. No civil reservation or other court order has been entered precluding the admissibility of Brown's guilty plea, and the fact that a civil reservation may be applied for in the future, and may or may not be granted, is irrelevant to the present posture of this matter.

Brown's reliance on State v. Lavrik, 472 N.J. Super. 192 (App. Div. 2022) is unavailing. Lavrik's holding has nothing to do with whether the sworn

statements made by a defendant at the time of his guilty plea may be the subject of questioning during a discovery deposition in a related civil matter. Rather, Lavrik involved the issue of whether the victim has standing to appeal from the granting of a civil reservation. Id. at 198. The Court in Lavrik also held that the trial court should have delayed consideration of the defendant's application for a civil reservation until the completion of his PTI term. Id. at 217. The Lavrik decision did not hold that a defendant may refuse to answer questions at his civil deposition about the sworn statements he made at the time of his guilty plea.

Brown's position herein is based upon taking statements from the Lavrik decision out of context and conflating the separate concepts of admissibility versus discoverability. It is true that guilty pleas made as a condition of entry into PTI are held in an "inactive status" pending the termination of PTI and that they do not constitute "a judgment of conviction nor an adjudication." Lavrik at 215-216 (quoting N.J.S.A. 2C:43:-13(b) and Attorney General, Uniform Guidelines on the Pretrial Intervention Program (March 1, 2016) (Directive 2016-2)). The Court in Lavrik therefore noted that "should defendant successfully complete PTI, the […] charge will be dismissed and, as such, the fact that defendant pled guilty and any statements pertaining to his guilty plea are not **evidentiary** in a civil proceeding—irrespective of the civil reservation order." Id. at 216 (emphasis added). Consistent with Lavrik, N.J.R.E. 410(a)(1)

and (2) bars the admission of "a guilty plea, which was later withdrawn; or […] any statement made in the course of that plea proceeding."

However, none of the foregoing statements from Lavrik regarding the ultimate admissibility or evidentiary value of statements made at the time of a guilty plea applies to the circumstances of the instant matter, where the only issue is whether questioning regarding such prior statements are within the scope of discoverability. Judge Jones did not rule upon whether Brown's statements at the time of his guilty plea will ultimately be "evidentiary" or admissible at trial. See 2T15:1-16:5. Judge Jones simply ruled that no privilege, court order, or other principle shielded Brown from having to answer questions regarding his prior inconsistent statements at his discovery deposition. Lavrik has no bearing on the issue at hand, which turns on discoverability, not admissibility.

Brown's argument that he may be granted a civil reservation in the future pursuant to R. 3:9-2 is also unavailing. No civil reservation has been granted and one may never be entered. Moreover, even a civil reservation would not necessarily prevent Brown from being cross-examined with his prior inconsistent statements. "Statements made under oath by a defendant in the proceedings leading up to his entry of a guilty plea may be admissible against him in a later proceeding under N.J.R.E. 803(a)(1) even if an order barring admission of the plea itself was entered by the judge who accepted it." Biunno,

Weissbard & Zegas, 2024-2025 N.J. Rules Of Evidence (Gann), comment 1.2 to N.J.R.E. 803(a)(1), p. 876 (citing Kohrherr v. Ferreira, 215 N.J. Super. 123, 130 (App. Div. 1987)). In a similar context, this Court has held that the immunity provided by a civil reservation "is not available to prevent impeachment which may uncover the perjurious basis of a criminal defendant's civil claim." Stone v. Police Dep't of Borough of Keyport, 191 N.J. Super. 554, 558 (App. Div. 1983). When a criminal defendant testifies in support of his claim in a related civil action in a manner that "is inconsistent with the sworn testimony he gave to support his plea, the protection of the [civil reservation] immunity has been waived." Id. In other words, a civil reservation is not a license to commit perjury. Even if Brown had obtained a civil reservation, which he has not, the principles set forth above would still permit him to be cross-examined with his prior inconsistent statements at the time of his guilty plea, since a civil reservation does not permit a defendant to construct a civil defense based on perjury. At the very least, cross-examination regarding the prior inconsistent statements is an appropriate area for questioning during a discovery deposition.

Thus, Judge Jones correctly ordered Defendant Brown to answer questions at his discovery deposition regarding the prior, sworn, inconsistent statements he made at the time of his guilty plea, which statements are not subject to any privilege or civil reservation.

POINT III

DEFENDANT BROWN'S MOTION FOR A STAY SHOULD BE DENIED (Da444-7)

This Court should deny Defendant Brown's motion to stay the July 19, 2024 order requiring him to appear for his deposition within 45 days (i.e., by September 2, 2024) and to answer questions regarding the prior statements he made in support of his guilty plea. Da444. Brown's application for a stay will be moot if this Court denies his motion for leave to appeal by September 2. That said, as Judge Jones found, no stay is warranted. See 2T25:13-29:21.

"A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the 'relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.'" See Garden State Equality v. Dow, 216 N.J. 314, 320 (2013) (citing, inter alia, Crowe v. De Gioia, 90 N.J. 126 (1982))

Here, Judge Jones correctly concluded that Brown will suffer no "irreparable harm" or undue hardship from having to truthfully answer questions in a discovery deposition regarding prior sworn statements that he made in support of his guilty plea. The transcript of Brown's prior testimony, given in open court, is already in the possession of the parties herein. The argument that Brown would be irreparably harmed if he loses insurance coverage when his

insurance company hears the truth, that he admitted under oath to assaulting R.J., does not justify the granting of a stay. Judge Jones properly rejected this argument, which treads perilously close to involving the Court in a "coverup" by assisting Brown in improperly obtaining insurance coverage by keeping the truth from his insurance carrier. 2T13:7-23. Like Judge Jones, this Court should reject Brown's troubling, apparent invitation to assist in concealing the truth from his insurance carrier. Brown's argument that being required to testify truthfully at his deposition will interfere with his rehabilitation process is equally baseless. New Jersey Courts do not recognize having to tell the truth as a form of undue harm; to the contrary, our Courts have held that "The truth is always the truth, and telling the truth will not hurt anyone except insofar as he ought to be hurt." In re Vince, 2 N.J. 443, 457 (1949) (internal citation and quotation marks omitted). As to the remaining Crowe factor, as set forth in Point II, Brown's proposed appeal of Judge Jones's narrowly-tailored discovery order lacks merit. Accordingly, Brown's motion for a stay should be denied.

CONCLUSION

For the foregoing reasons, Defendant Brown's motions for leave to appeal and for a stay should be denied.

Respectfully submitted,

By: /s Jacqueline DeCarlo, Esq.
Dated: 8/18/2024 Counsel for Plaintiff