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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0407-23**

**GEORGINA C. SANDOVAL and  
TODD M. NORTH, on behalf of  
themselves and those similarly  
situated,**

**Plaintiffs-Appellants,**

**v.**

**MIDLAND FUNDING, LLC  
and MIDLAND CREDIT  
MANAGEMENT, INC.,**

**Defendants-Respondents.**

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Argued March 20, 2024 – Decided June 19, 2024

Before Judges Vernoia, Gummer and Walcott-  
Henderson.

On appeal from an interlocutory order of the Superior  
Court of New Jersey, Law Division, Hudson County,  
Docket No. L-2920-22.

Philip D. Stern argued the cause for appellants (Kim  
Law Firm LLC, attorneys; Yongmoon Kim and Philip  
D. Stern, on the briefs).

Han Sheng Beh, argued the cause for respondents (Hinshaw & Culbertson LLP, attorneys; Han Sheng Beh, on the brief).

#### PER CURIAM

By leave granted, plaintiffs appeal from a June 9, 2023 order of dismissal of their class-action claim. Plaintiffs sought relief for violations of the Fair Debt Collections Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692(p), on behalf of the named plaintiffs and a putative class who had been sent debt-collection form letters about potential consequences of defaulting on their debt by defendants Midland Funding, LLC and Midland Credit Management, Inc. Plaintiffs also appeal from an August 4, 2023 order denying their motion for reconsideration.

Plaintiffs first alleged violations of the FDPCA in a complaint filed in federal court. The federal court initially denied plaintiffs' request for class certification and later dismissed plaintiffs' case based on a determination the court lacked subject-matter jurisdiction because the individual plaintiffs lacked standing.

Plaintiffs refiled their complaint in state court. Defendants moved to dismiss both the class and individual claims on statute-of-limitations grounds. The court dismissed plaintiffs' putative class-action claims as untimely under the one-year statute of limitations for FDPCA claims. 15 U.S.C. § 1692k(d).

However, the court allowed plaintiffs' individual claims to proceed based on equitable-tolling principles, finding the federal court had dismissed the class claims fourteen months prior to the individual claims and, as result, the refiling of the claims more than a year later was untimely.

Plaintiffs argue the court erred by failing to apply wrong-forum tolling principles to their class-action claims. We reverse and remand for the reasons stated below.

## I.

We summarize the relevant factual and procedural history. Defendants are engaged in the purchase and collection of defaulted consumer debts owed to other entities. Plaintiffs are consumers whose debt accounts were owned and serviced by defendants.<sup>1</sup> Plaintiffs alleged that in an attempt to collect past-due debts, defendants had sent them a form collection letter purporting to warn them of the consequences of defaulting on their existing debts after defendants had already reported their debts to various credit reporting agencies. Each of the form collection letters included the following statement: "You are hereby notified that a negative report on your credit record may be submitted to a credit

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<sup>1</sup> Pursuant to 15 U.S.C. § 1692(a)(3), the term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

reporting agency if you fail to meet the terms of your credit obligations." Plaintiff Georgina Sandoval was last sent a letter with the collection language on May 17, 2017, while plaintiff Todd North was last sent a similar letter on June 1, 2017.

FDCPA claims must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). "[A]bsent the application of an equitable doctrine, the statute of limitations in § 1692k(d) begins to run on the date on which the alleged FDCPA violation occurs, not the date on which the violation is discovered." Rotkiske v. Klemm, 589 U.S. 8, 10 (2019) (emphasis added).

On May 17, 2018—the last day under the statute of limitations for plaintiff Sandoval's FDCPA claims—plaintiffs filed the federal court complaint against defendants, asserting their individual claims and claims on behalf of a putative class of accountholders who had been sent the same collection letter.<sup>2</sup> Plaintiffs alleged the statement in the collection letters is misleading and was intended to coerce payment by leading its recipients to believe that a prompt payment would

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<sup>2</sup> The FDCPA regulates consumer reporting agencies that compile and disseminate personal information about consumers. 15 U.S.C. §§1692-1692(p). FDCPA also creates a cause of action for consumers to sue and recover damages for certain violations. 15 U.S.C. §§1692(k).

protect their credit when, in fact, "[d]efendants had already reported the debts to the leading credit reporting agencies." Plaintiffs also alleged defendants had violated 15 U.S.C. § 1692(e) (which bars debt collectors from using any false, deceptive, or misleading representations or means to collect a debt) and 15 U.S.C. § 1692(f) (prohibiting debt collector from using unfair or unconscionable means when attempting to collect debts) by "falsely threatening" to transmit a negative credit report to various credit-reporting agencies.<sup>3</sup>

Plaintiffs moved under Federal Rule of Civil Procedure 23(b)(3) to certify a putative class of "approximately 11,212 accountholders in the State of New Jersey" who had received the same form collection letter from defendants between May 17, 2017, and January 7, 2019, and for appointment as class representatives. Because the alleged violations began on May 17, 2017, the last date on which a timely complaint covering all the claims could have been filed under FDCPA's statute of limitations was May 17, 2018, which was the date plaintiffs filed their complaint.

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<sup>3</sup> Plaintiffs subsequently amended their complaint, and, thus, it was plaintiffs' second amended class action complaint that was eventually dismissed by the federal court. We have summarized the allegations in plaintiffs' second amended complaint because that was the operative complaint when, as we explain, the court dismissed plaintiffs' federal action.

In an opinion dated July 7, 2021, the federal court denied plaintiffs' motion for class certification, finding that under Federal Rule of Civil Procedure 23(a), plaintiffs' proposed class did not meet the required elements of commonality and predominance, superiority, typicality, and adequacy. See generally Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 179 (3d Cir. 2014) (explaining the criteria for class certification under Federal Rule of Civil Procedure 23(a)).

On June 25, 2021, however, the United States Supreme Court had decided TransUnion LLC v. Ramirez, holding there was no concrete injury for Article III standing purposes for a proposed class of 6,332 members who had asserted claims under the FDCPA based on misleading alerts in their internal credit files they claimed exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm. 594 U.S. 413, 435 (2021).

In Ramirez, the Court held that neither the "misleading information in the internal credit files itself constitutes a concrete harm," nor did it constitute a "risk of future harm." Id. at 437. Thus, the Court held that lacking any claim they had suffered a concrete harm, the plaintiffs did not have standing to bring suit. Ibid.; see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (stating that an "injury in fact" that is both "concrete and particularized" and "actual or

imminent" is an element of the "irreducible constitutional minimum of standing[.]").

Relying on the Court's decision in Ramirez, defendants moved for summary judgment, arguing plaintiffs did not have standing to assert the remaining individual claims. Plaintiffs cross-moved for dismissal of the second amended complaint, without prejudice, arguing that the federal court was not permitted to issue a substantive ruling on defendants' motion for summary judgment because it lacked subject-matter jurisdiction under Ramirez. In making the motion, plaintiffs conceded they had not claimed they had suffered any concrete injury as a result of defendants' alleged violations of the FDCPA.

On June 10, 2022, the federal court, in a written opinion, granted summary judgment in favor of defendants and dismissed plaintiffs' second amended complaint. The court denied defendants' application for sanctions as well as plaintiffs' cross-motion for dismissal of their second amended complaint without prejudice. In its order, the court acknowledged:

[c]learly, in light of Ramirez, [p]laintiffs have suffered no concrete harm. Plaintiffs have conceded that their only alleged injury, 'invasion of [p]laintiffs' substantive rights protected by the FDCPA,' is no longer sufficient to confer Article III standing because there is 'no allegation or facts showing a physical, monetary, or intangible harm as expressed in Ramirez.' . . . Thus, even assuming [p]laintiffs could establish a violation of

the law, the [p]laintiffs in this case, like those in Ramirez, simply have suffered no concrete harm sufficient to confer standing—an alleged statutory violation alone does not cut it. Having asserted only an alleged statutory violation that resulted in no 'downstream consequences' or 'adverse effects' caused by said statutory violation, [p]laintiffs fail to meet their burden of establishing the elements of standing and summary judgment is therefore warranted.

[(Citations omitted).]

Citing Ramirez, the federal court further concluded "the record evidence unequivocally establishes that [p]laintiffs have suffered no concrete harm sufficient to confer Article III standing[.]" Thus, despite its dispositive ruling on plaintiffs' lack of standing, the court nevertheless granted defendants' motion for summary judgment, expressly stating it was "well within its parameters to issue a substantive ruling on [d]efendants' [m]otion for [s]ummary [j]udgment." The court, however, did not address, clarify, or reference its earlier July 7, 2021 order and opinion denying plaintiffs' motion for class certification.

Plaintiffs moved for reconsideration of the court's June 10, 2022 order. On September 1, 2022, the federal court issued its third and final order, dismissing plaintiffs' second amended complaint without prejudice and vacating its June 10, 2022 order while not addressing its July 7, 2021 class certification order or the impact of the Ramirez decision on it. Importantly, the court



explained it had determined it lacked subject matter jurisdiction to address or decide plaintiffs' claims, stating:

upon further consideration, this Court finds that it lacked subject-matter jurisdiction to address the merits of the Complaint because [p]laintiffs lacked standing under Article III;

. . .

A plaintiff must demonstrate (1) 'that he [or she] suffered a[n] injury in fact that is concrete, particularized, and actual or imminent;' (2) 'that the injury was likely caused by the defendant;' and (3) 'that the injury would likely be redresses by judicial relief.' Here, [p]laintiffs suffered no concrete harm sufficient to confer Article III standing. Thus, the Court lacked subject-matter jurisdiction to [adjudicate] the merits of [p]laintiffs' Complaint. . . .

[(Citations omitted).]

Based on those findings, the court vacated its June 10, 2022 order granting defendants summary judgment on plaintiffs' individual claims and instead dismissed the complaint without prejudice for lack of subject-matter jurisdiction, while not addressing its prior order on the certification of the class.

On the same day, plaintiffs filed their complaint in state court, asserting the same individual and class claims against defendants as they had in federal court. Defendants moved for dismissal of the complaint for failure to state a claim upon which relief may be granted under Rule 4:6-2(e), arguing that

plaintiffs' class and individual claims were barred by the FDCPA's one-year statute of limitations, and that plaintiffs, who had not appealed the federal court's class certification denial entered on July 7, 2021, were not entitled to equitable tolling of the one-year statute of limitation on either their class or individual claims. Plaintiffs opposed the motion, asserting application of class-action or equitable tolling principles rendered their claims timely filed.

In a June 9, 2023 order, the court dismissed plaintiffs' putative class claims but denied defendants' motion to dismiss plaintiffs' individual claims, allowing the individual claims to proceed based on its determination that equitable tolling applied to preserve the individual claims but not the class claims. The court found the federal court's unappealed July 7, 2021 order denying class certification was a "dispositive" and "binding ruling," even though the federal court subsequently recognized it lacked subject matter jurisdiction over the case based on Ramirez, 594 U.S. at 435. Based on the July 7, 2021 order, which the federal court had no jurisdiction to issue, the court reasoned plaintiffs' class claims had been filed beyond the one-year limitations period.

Noting plaintiffs had not refiled their complaint until September 1, 2022, the court held the "tolling period for Class Certification" ended on July 7, 2022—one year after the federal court's July 7, 2021 order denying class certification.

Without explaining its calculation that plaintiffs would have a year after the July 7, 2021 order to file their class claims, the court concluded that "[e]ven if this [c]ourt were to assume that tolling applied to [p]laintiffs' class claims, the statute of limitations bars such claims . . . ."

With respect to plaintiffs' individual claims—which were also subject to the FDCPA's one year statute of limitations—the court concluded "[t]hat period is, however, subject to equitable tolling" because:

[u]ntil the [Ramirez] [o]pinion (in June of 2021), it was not as clear as [d]efendant argues that [] [p]laintiff lacked the type of injury justifying subject matter jurisdiction . . . [a]nd it was not until [the federal court] was presented with the motions in 2022 that the issue was addressed. The federal case was not dismissed until June of 2022. Until that date, the individual [plaintiffs] had engaged in extensive litigation with [] [d]efendants and mediation and while the [Ramirez] [o]pinion of June of 2021 might have raised questions as to subject matter jurisdiction in the federal court, as the matter was not dismissed without prejudice until September of 2022, [p]laintiff[s] [were] reasonably pursuing the individual claim which had been filed in federal court.

Plaintiffs moved for reconsideration and reasserted their position that the statute of limitations had been tolled as to all their claims because the initial complaint had been timely filed in the federal court. The court reiterated its earlier decision that the federal court's substantive ruling on class certification

"was not a nullity" and "the essence of [its] finding" was that the issue of class certification "was already decided" and thus "would not be re-addressed in this case." The court further noted that the issue of wrong-forum tolling was not properly before it because the federal court "had not found or dismissed the federal case because it was filed in the 'wrong forum.'"

On appeal, plaintiffs present the following arguments for our consideration:

POINT I

THE STANDARD OF REVIEW ON APPEAL.

POINT II

WHEN PLAINTIFFS SUED IN FEDERAL COURT, THEY SUBSTANTIALLY COMPLIED WITH THE STATUTE OF LIMITATIONS. THEREFORE, THEIR CLAIMS—BOTH INDIVIDUAL CLAIMS AND CLASS CLAIMS—WERE TOLLED UPON THE COMMENCEMENT OF THE FEDERAL ACTION.

POINT III

THE TRIAL COURT MISTAKENLY IGNORED WRONG-FORUM TOLLING AND RELIED ON A VOID NON-APPEALABLE INTERLOCUTORY ORDER TO CONCLUDE THAT ALL FORMS OF TOLLING WERE FORECLOSED WHEN THE FEDERAL COURT DENIED CLASS CERTIFICATION.

## POINT IV

### PLAINTIFFS BROUGHT THEIR CLAIMS PRIOR TO THE [RAMIREZ] DECISION.

#### II.

Plaintiffs argue that the correct standard of review is de novo, given the dismissal pursuant to Rule 4:6-2(e). Substantively, they also argue that to preserve their class claims, a form of tolling applies—class-action tolling—to bring the fourteen-month delay between the denial of the class certification and their filing in state court within the applicable one-year statute of limitations. They further argue that wrong-forum tolling, a form of equitable tolling, applies and the court erred in applying equitable tolling to preserve the individual claims but not the class-action claims.

Defendants contend the correct standard of review is abuse of discretion. Defendants also challenge every aspect of plaintiffs' arguments that tolling should be applied. They argue the court did not abuse its discretion when it found plaintiffs' class claims were not timely filed under equitable-tolling principles and the court was not required to ignore the federal court's denial of class certification when considering whether equitable tolling applied to the class claims. Defendants further contend that plaintiffs failed to recognize the impact of the Ramirez decision on the class-certification order and, further, that

plaintiffs' lack of diligence resulted in the lapse or passage of fourteen months between the dismissal of the class claims on July 7, 2021, and the filing of their complaint in state court on September 1, 2022.

Defendants also assert that plaintiffs engaged in "gamesmanship" by moving to dismiss their own federal case, in an attempt to revive the class claims in state court. Defendants further argue, "[e]quitable tolling is applied only under very limited circumstances and only where plaintiffs show that they acted with diligence" and "[p]laintiff bears a heavy burden (especially on appeal) if they wish to establish equitable tolling."

We conclude the applicable standard of review is de novo as the court's dismissal of the complaint under Rule 4:4-2(e) and abuse of discretion as to the court's application of equitable tolling under wrong-forum tolling principles. "Determining whether a cause of action is barred by a statute of limitations is a question of law that we review de novo." Save Camden Pub. Sch. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 487 (App. Div. 2018) (quoting Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div. 2016)); see also Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) ("An appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e).")) (quoting Stop &

Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017)).

However, in applying an equitable remedy to a time-barred claim, we review a court's decision for an abuse of discretion. See Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354 (1993) (reiterating that "equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use," while reviewing them for abuse of discretion.). Thus, both standards of review are implicated here.

### III.

With these standards in mind, we consider whether the court erred in dismissing plaintiffs' class-action claims based on its finding it was "bound" to follow the federal court's ruling dismissing the class claims pursuant to Federal Rule of Civil Procedure 23(a)—despite the federal court's later finding it lacked subject-matter jurisdiction over the claims in the complaint. We also consider whether the court further erred in finding that the class claims had been barred by the statute of limitations or abused its discretion in finding the class claims were not subject to any form of equitable tolling, while allowing the individual claims to proceed.

In addressing these issues, we first determine that because plaintiff Georgina Sandoval was sent a collection letter with the disputed language on May 17, 2017, the accrual date of her claim is May 17, 2017—based on the date of the alleged FDCPA violation. Plaintiffs filed their operative federal complaint on May 17, 2018, and the purported class plaintiffs attempted to certify was a class of accountholders who had been sent collection letters between May 17, 2017, and January 7, 2019. As such, all the claims included in the federal-court complaint were timely filed on the last day of the statute of limitations because the complaint had been filed within one year of the oldest of the claims—Georgina Sandoval's claim based on a May 17, 2017 letter from defendants. And, as a result, all the claims based on letters from defendant dated on and after May 17, 2017, were timely as well.

Following the federal court's denial of class certification on July 7, 2021, 421 days passed until the federal court's dismissal without prejudice of the complaint and plaintiffs' refiling of their complaint in state court. Taking into account that plaintiffs had originally filed in federal court on the last day of the statute of limitations for their class, May 17, 2018, a total of 786 days had elapsed from the May 17, 2017 earliest alleged violation of the statute to the refiling of the complaint, including the class-action claims, in state court.



The court erred in dismissing the class claims based on the entry of the federal court's order denying class certification that had been void when entered because the federal court had lacked subject-matter jurisdiction over the complaint based on the Supreme Court's decision in Ramirez. It is undisputed the federal court's order on class certification was entered July 7, 2021, following the Court's decision in Ramirez, 594 U.S. at 413, which made clear the federal court lacked subject-matter jurisdiction over the case. See McCray v. Fidelity Nat. Title Ins. Co., 682 F.3d 229, 243 (3d Cir. 2012) ("Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims[.]").

Moreover, the court erred in finding plaintiffs are "bound by that finding despite [the federal judge] deciding in 2022, that the [f]ederal [c]ourt lacked subject matter jurisdiction because of plaintiff[s]' inability to prove a concrete injury" and in finding that the issue of class certification "was already decided." The court also inexplicably determined that the "tolling period for Class Certification ended on July 7, 2022; one year after the date class certification was denied" and "[e]ven if [the court] were to assume that tolling applied to [p]laintiffs['] class claims, the statute of limitations bars such claims . . . ."

We are unaware on what basis the court decided "the statute of limitations bars such claims under the above analysis" or how the "tolling period" for plaintiffs' class claims would end on July 7, 2022, as the court fails to explain its reasoning. We note the statute of limitations for FDCPA claims is one year—based on the date of violation, see Rotkiske, 589 U.S. at 10. Again, the purported class is composed of 11,212 accountholders in the State of New Jersey who received form collection letters from defendants between May 17, 2017, and January 7, 2019. The matter was filed in federal court on May 17, 2018, the last date of the original statute of limitations. The denial of class certification by the federal court on July 7, 2021, would not have resulted in an extension of the relevant statute of limitations on plaintiffs' class claims to July 7, 2022.

We are further persuaded that the court abused its discretion by failing to find plaintiffs' class-action claims were tolled under wrong-forum tolling, a subset of general equitable tolling.<sup>4</sup> Those claims had been timely filed in federal court even though that court later determined it did not have subject-matter jurisdiction following the Ramirez decision. We further conclude the

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<sup>4</sup> As we further explain, the parties' arguments on which form of tolling applies, whether it be class-action tolling, wrong-forum tolling, and equitable tolling—are all based on the concept of equity.

motion court's equitable tolling of the individual claims but not the class claims—both based on same violation date—also constitutes an abuse of discretion.

Equitable tolling affords relief from inflexible, harsh, or unfair application of a statute of limitations, but it requires the exercise of reasonable insight and diligence by a person seeking its protection. Villalobos v. Fava, 342 N.J. Super. 38, 52 (App. Div. 2001). A court may equitably toll a statutory limitations period "under very limited circumstances." Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). The remedy may be appropriate "(1) [if] the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum." Ibid. (alterations in original) (quoting F.H.U. v. A.C.U., 427 N.J. Super. 354, 379 (App. Div. 2012)). Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in the pursuit of their claims. Barron, 472 N.J. Super. at 577; see also Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 255-57 (2016) (reiterating that diligence "covers those affairs within the litigant's control," while extraordinary circumstances "by contrast, is meant to cover matters outside its control."); China Agritech,

Inc. v. Resh, 584 U.S. 732 (2018);<sup>5</sup> Williams v. Tech Mahindra (Americas) Inc., 70 F.4th 646, 651 (3d Cir. 2023) (holding that not every "poor choice by a lawyer or law firm that lands a party in the wrong forum merits equitable tolling.") (quoting Doherty v. Teamsters Pension Tr. Fund of Phila. & Vicinity, 16 F.3d 1386, 1394 (3d Cir. 1994)).

Plaintiffs argue the class claims were timely filed in state court under wrong-forum tolling principles. They contend they are entitled to wrong-forum tolling because it applies "if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum," Barron, 472 N.J. Super. at 577. Plaintiffs assert they had timely filed their class claims in the complaint prior to the Supreme Court's decision in Ramirez; the federal court did not have subject matter jurisdiction when it issued any of the orders, including the denial of class certification; and the clock on the one-year statute of limitations for the class

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<sup>5</sup> As explained in China Agritech and American Pipe & Const. Co. v. Utah, 414 U.S. 538, 553 (1974), there is an alternative form of equitable tolling—class-action tolling. However, plaintiffs aver that "class-action tolling never applies to a putative class representative's assertion of class claims which was confirmed by the U.S. Supreme Court when it resolved a split among the circuit courts in [China Agritech, Inc.]" And, "any discussion of class-action tolling is purely academic here because [p]laintiffs do not turn to class-action tolling to preserve any claims—they rely on the distinct considerations which establish wrong-forum tolling." As plaintiffs do not rely on this form of tolling, we do not need to address its application here.

claims should be tolled, like the individual claims, until the federal court's order dismissing the case for want of standing.

The question here is whether plaintiffs were diligent in pursuing their class claims following dismissal of those claims by the federal court in July 2021 or whether plaintiffs' filing of the class claims in the state-court complaint more than one year later evidences a lack of diligence. Plaintiffs explain that they were unable to file the state-court action until the federal court's dismissal of the rest of the case, which did not occur until months later. Plaintiffs claim they were disinclined to appeal to the Third Circuit only a portion of their case, in effect to litigate their claims in a piece-meal manner. Defendants dispute plaintiffs' contention that they were sufficiently diligent and question why plaintiffs failed to appeal the federal district court's dismissal of the class claims in July 2021.

Our court rules provide that a denial of class certification is automatically appealable as a matter of right. See R. 2:2-3(b) ("Final Judgments: Certain Orders Appealable as of Right. Final judgments of a court, for appeal purposes, are judgments that finally resolve all issues as to all parties, except the following are also appealable as of right . . . (9) orders granting or denying as a final matter class certification, R. 4:32.").

In contrast, no such right exists federally. Instead, an appeal of a denial of class certification in a federal action is considered interlocutory and highly discretionary:

A [Federal Rule of Civil Procedure] 23(f) appeal is a specific type of interlocutory appeal, and the courts of appeals have very broad discretion in deciding whether to grant permission to pursue a [Federal Rule of Civil Procedure] 23(f) appeal. See Fed. R. Civ. P. 23(f) advisory committee's note. According to the Advisory Committee's Note, which was appended to [the Rule] following the 1998 adoption of [Federal Rule of Civil Procedure] 23(f), "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Id. As the Note further states, "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Id.

[Gutierrez v. Johnson & Johnson, 523 F.3d 187, 192 (3d Cir. 2008); accord Nutraceutical Corp. v. Lambert, 586 U.S. 188, 196 (2019).]

We conclude the court abused its discretion by failing to apply equitable tolling to plaintiffs' class claims. We reject defendants' argument that plaintiffs' failure to file an interlocutory appeal from the federal court's order denying of class certification constituted a lack of diligence inconsistent with application of wrong-forum tolling. Plaintiffs chose to remain in federal district court to continue to litigate their remaining individual claims—where on reconsideration

the federal court acknowledged a lack of Article III standing—rather than immediately appeal.

Given the applicable federal standard, we remain unpersuaded by defendants' argument that plaintiffs' failure to pursue an interlocutory appeal of the dismissal their class claims indicates a lack of diligence.<sup>6</sup> Plaintiffs successfully litigated and secured the federal court's reconsideration of the order granting defendant's summary-judgment motion and the federal court dismissed the case without prejudice, finding it lacked subject matter jurisdiction.

While their individual claims remained pending, plaintiffs had cross-moved for dismissal of their complaint without prejudice based on the court's lack of subject-matter jurisdiction, and after a ruling in defendants' favor, plaintiffs successfully sought reconsideration of the dismissal of their claims on that basis. In doing so, the federal court, agreeing with plaintiffs, found it lacked

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<sup>6</sup> As part of their argument as to why the remaining individual claims were not addressed until several months after the class action was denied, plaintiffs maintained there was a lack of clarity as to the effect of Ramirez which created a circuit split on standing, see Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 144-45 (3d Cir. 2024) (stating "In sum, judges on our sister circuits have interpreted [Ramirez] in two different ways. Some espouse an element-based approach, wherein a plaintiff's alleged harm must not lack any element of the comparator tort that was essential to liability at common law. . . . Others compare the kind of harm a plaintiff alleges with the kind of harm caused by the comparator tort. . . . We view the second method as more faithful to [Ramriez].").

subject-matter jurisdiction and dismissed plaintiffs' individual claims without prejudice. Plaintiffs filed the operative complaint in state court the same day. That does not bespeak of a lack of diligence.

We therefore consider wrong-forum tolling appropriate here. We reach this determination based on the undisputed fact that plaintiffs filed a timely class-action complaint in federal court, they continued to pursue their claims following the denial of their motion for class certification, the subsequent dismissal of its individual claims following the Ramirez decision, and our determination that plaintiffs were diligent in pursuing their claims in federal court up to the date of dismissal of their complaint. Additionally, we consider significant that plaintiffs filed their current complaint in state court on the same day the federal complaint was dismissed. Moreover, we do not view as dispositive or binding the order denying class certification when, as subsequently found, the federal court lacked subject-matter jurisdiction, as made clear in the Supreme Court's decision in Ramirez, to issue that or any other substantive order in the case.

For these reasons, we reverse that portion of the June 9, 2023 order dismissing with prejudice plaintiffs' putative class claims and the August 4, 2023 order. We remand the case for proceedings consistent with this opinion. We



offer no position on the underlying merits of plaintiffs' claims. We do not retain jurisdiction.

Reversed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION