**FILED,** Clerk of the Appellate Division, October 29, 2021, **A-002208-20**

# Superior Court of New Jersey

## Appellate Division

Docket No. A-002208-20

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| JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC,<br><br>*Plaintiffs-Respondents,*<br><br>vs.<br><br>GREENBERG FARROW ARCHITECTURE INCORPORATED, ESMAIL GHADRDAN and KEITH JOHNSTON,<br><br>*Defendants-Appellants.* | : | CIVIL ACTION<br><br>ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MONMOUTH COUNTY<br><br>DOCKET NO. MON-L-1021-17<br><br>Sat Below:<br><br>HON. OWEN C. MCCARTHY, J.S.C. |

**BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS AND APPENDIX VOLUME 1 OF 2 (Pages Pa1 to Pa184)**

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[1] The briefs are included as allowed by the Court Rules, because the question of whether an issue was raised in the trial court is germane to the appeal. See R. 2:6(a)(2).

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## PRELIMINARY STATEMENT

Plaintiffs-Respondents Jaclyn Flor and ENGenuity Infrastructure, LLC ("ENGenuity" and together with Ms. Flor, collectively, "Plaintiffs") submit this brief in opposition to Defendant-Appellant Greenberg Farrow Architecture Incorporated's ("Defendant") appeal of: (i) the trial court's April 4, 2019 Order denying Defendant's motion for summary judgment; (ii) the trial court's January 29, 2021 Order denying Defendant's motions for judgment notwithstanding the verdict, a new trial or, in the alternative, remittitur; and (iii) the trial court's January 29, 2021 Order granting Plaintiffs' cross-motion for declaratory relief disassociating Defendant as a member of ENGenuity on October 3, 2016, without payment or consideration of the underlying membership interests.

Dissatisfied with the results of the trial court's 2019 Order denying it summary judgment for breach of contract and 2021 Order denying its several post-trial motions and granting Plaintiffs' cross-motion, Defendant hopes to avoid a unanimous jury verdict of $904,000.00 (or as its brief confirms $599,000.00 of that verdict). Defendant presents a "kitchen-sink" approach to its appeal: rehashing page-after-page of identical arguments that were previously briefed and rejected by the trial court below; raising arguments on appeal that were not presented to the trial court; doubling down on vague and erroneous damages theories; and, importantly, not making a single reference to any of the extensive trial testimony adduced during a seven-day trial in 2019 that provides clarity and substantial support for the Orders that are the subject of appeal.

Defendant's simplified argument is this: before the motion court there was no enforceable contract and, before the trial court, there was an enforceable "employment agreement" but, somehow, also an "unenforceable partnership agreement." It is a puzzling argument. In any event, if Defendant must pay for its breach, it asks this Court to fashion an equitable remedy *for Defendant* that rewards its 2016 breach with membership in the 2021 company it voluntarily withdrew from five years ago, despite its proven *pre*-termination and *post*-termination misconduct and harm. A closer review of the trial record will immediately show that the court below did not err in its rulings.

The trial court, per The Honorable Owen C. McCarthy, J.S.C., properly denied Defendant's motion for summary judgment, determining that a jury should resolve issues of fact as to whether an enforceable contract existed and was breached given the record evidence then before it. The court also correctly denied Defendant's post-trial motions and granted Plaintiffs' cross-motion after surveying the entire trial record of testimony and exhibits. That testimony was not sparse. The transcript alone is over 1,060 pages. The record evidence also included 57 exhibits.

The evidence strongly supports the jury's unanimous verdict on the breach of contract claim and damages. The trial court's Statement of Reasons that accompanies the January 29, 2021 Order is 23 pages and details the considerable fact record. It is entitled to deference unless Defendant is able to establish that the trial court erred. This, Defendant has failed to do.

As such, for the above reasons, and as is further demonstrated herein, the trial court's Orders should be affirmed.

## COUNTER-STATEMENT OF PROCEDURAL HISTORY

Plaintiffs adopt Defendant's Statement of Procedural History at Points I, II, V and VI as set forth more fully in Defendant's brief at Pages 13-16 and 26, but not Points III or IV, which misstate facts, present such misstatements out of context and in incomplete form and advance erroneous legal arguments in lieu of procedural history, at Pages 16-20 and 22-26. Plaintiffs respectfully refer the Court to the transcripts for true, correct and complete statements of facts regarding the substantial record evidence the motion court received (see 1T. 4-77; Da3Da14) and the jury received at trial (see 2T.–8T.) and the trial court received at oral argument on the post-trial motions that are the subject of Defendant's appeal. See 9T.4-85.

## COUNTER-STATEMENT OF FACTS

Plaintiff Jaclyn Flor is a licensed engineer, certified municipal engineer, and licensed professional planner with an office in Red Bank, New Jersey. Da105. Ms. Flor is also the sole member, President and Chief Executive Officer of ENGenuity, a full service engineering, planning and environmental consulting firm that focuses on public and private infrastructure, transportation, streetscapes, utilities, public facilities, parks, waterfront structures, storm hardening and preparedness, urban planning and infrastructure, site design and redevelopment projects for municipalities, counties, public corporations and state agencies throughout New Jersey. Id. Through approximately mid-2016, Ms. Flor was employed at a regional firm with a significant public sector engineering presence in New Jersey. Da106. She was a Vice-President and, for the preceding five (5) years, an equity shareholder. Id. Ms. Flor was also a top revenue producer for her firm, and as of 2016, she was being groomed and mentored for a leadership position within her employer. Id.

Defendant is a global architecture, engineering, planning, landscape architecture and development services firm with various offices throughout the United States, Mexico and China, with its headquarters in Atlanta, Georgia. Da105-106. In 2016, Defendant's business was almost exclusively focused on private sector project work. Da106-107. Defendant initiated contact with Ms. Flor in 2015-2016 to explore how it could tap into New Jersey's lucrative public sector with her. Id. Defendant had no experience in New Jersey's public works sector or familiarity with New Jersey's various, municipal, city, county and state government agencies and public corporations. Da336[1] (at 26:2-23.) Esmail Ghadrdan ("Ghadrdan") was, at all times relevant to this action, Defendant's President and Chairman of the Board of Directors. Da106. Keith Johnston ("Johnston") was Defendant's Chief Operating Officer and its managing principal in New Jersey. Id.

After some back and forth, in or around May 2016, Mr. Ghadrdan verbally presented Ms. Flor with an offer from Defendant to leave her then-current employer and: (1) become an at-will employee of Defendant; or (2) form a new limited liability company that would also seek Woman Business Enterprise ("WBE") certification. See 4T. 69:7-71:11; Da107-Da109. Under that second option, Ms. Flor would own 51% of the new entity and serve as its controlling member and employee, and Defendant would own 49% of the new entity provide guaranteed compensation to Ms. Flor, and pay for all operating expenses to the entity. Id. As the only person working for the new entity, Defendant's funding of the operating capital would allow Ms. Flor to get the business off the ground: leasing, equipment, hiring, payroll, administrative, contracts and insurance. The parties proceeded with the second option. Id.

[1] As the deposition transcript of Mr. Johnston on June 7, 2018 (Da329) annexed to Defendant's Appendix contains a "mini" or "compressed" transcript, Plaintiffs also provide citations to the specific compressed pages for ease of reference.

On or about June 3, 2016, Mr. Johnston emailed Ms. Flor a draft offer, which stated that it was a "preliminary agreement" that would be subject to a "final, formal partnership and/or operating agreement." Da122-128. That offer was rejected, and after some additional discussions and negotiations at arm's length, a final contract was extended to Ms. Flor containing certain revised and material terms:

- The parties shall form a new limited liability company.
- Ms. Flor shall be its sole employee and controlling member.
- Ms. Flor shall own 51% of its membership interests and Defendant will own 49% of its membership interests.
- The limited liability company shall pursue certification as a WBE and Defendant alone shall pay for the legal costs and certifications of such designation.
- Defendant shall pay directly to Ms. Flor, each year for two years, $175,000.00, which obligation is "guaranteed and unconditional and irrevocable."
- Defendant shall fund the limited liability company to pay for Ms. Flor's monthly car allowance for two years, four (4) weeks of equivalent paid vacation time and signing bonus.
- Defendant shall pay for the operational expenses of each employee of the limited liability company, including for human resources management, payroll, accounting, IT and marketing, at the same levels that it pays for such services for its own employees, pay for office rental space with all necessary equipment and software for the limited liability company during this period of time and to pay for the necessary professional liability insurance required by local, state and federal laws and any requests for qualification and requests for proposal that the new limited liability company would pursue during this same period.
- Defendant shall engage counsel to formulate the LLC. Defendant shall provide "initial business unit support to the WBE LLC, including but not limited to

human resource management, payroll, accounting, IT, and marketing."

- Defendant shall provide professional office space and technical equipment and software.

Da108-110, Da130-131.

Importantly, the contract also removed all references to a "preliminary agreement" that would be subject to a "final, formal partnership and/or operating agreement." Da130-132. Both Messrs. Ghadrdan and Johnston understood and agreed that Defendant would fund the start-up for its initial two years, which included its operating expenses and Ms. Flor at $175,000.00 per annum. Da 338, 353. The parties understood and agreed that that Defendant would fund the start-up's operating expenses for the initial two years of approximately $2,000,000.00 to $2,300,000.00. Da353, Da1012-1020. The parties executed the contract and started performing under its terms. 5T. 149:7-21.

On July 27, 2016, Mr. Johnston, without any prior discussion with Ms. Flor, emailed her a one-sentence email stating: "Jaclyn, the LOI is attached." Da111, Da148. Attached to that email was a five-page Letter of Intent ("LOI") dated July 26, 2016, which Mr. Johnston had electronically pre-signed. Da149-153. In its initial form, the draft and non-binding LOI contained 22 terms the parties had never previously discussed, and which were not referenced, or even alluded to, in the contract executed in June 2016. Da111-112. Those terms included provisions:

- Prohibiting Ms. Flor, on behalf of ENGenuity, from entering into any contract in excess of $250,000, or $125,000 within the calendar year, without unanimous consent of Defendant.
- Prohibiting Ms. Flor, on behalf of ENGenuity, from purchasing, leasing, or selling any real or personal property valued at $5,000 or greater, without consent of Defendant.
- Inserting call options into the parties' relationship whereby certain events would trigger Defendant's option to purchase Ms. Flor's interest in ENGenuity.
- Inserting a put option into the parties' relationship that, after 2 years, could require Ms. Flor to purchase Defendant's membership interest in ENGenuity—and to do so within ninety days if its value was less than $500,000.
- Requiring ENGenuity to pay "management fees" to Defendant for the very payroll, accounting and operating costs Defendant had previously agreed to provide to ENGenuity under the contract.
- Requiring Plaintiffs to enter into an employment agreement, a management agreement, a promissory note and an operating agreement.

Da112, Da148-153.

The proposed draft LOI's terms utterly handcuffed Ms. Flor and her ability to operate and direct ENGenuity as its purported majority owner, and made it virtually impossible for ENGenuity to obtain WBE certification. Da921-Da922. Despite Defendant's "minority" ownership in ENGenuity, it also demanded control over the new entity's operations, books and records, and finances. Da148-Da153.

With regard to the LOI, the trial court subsequently confirmed as follows:

> Shortly after J2's execution, Defendant forwarded Flor a series of documents attempting to usurp control of ENGenuity from Flor and place control with GreenbergFarrow. The improper attempt to seize control of day-to-day operations is most clearly demonstrated in

> the Letter of Intent, setting forth twenty-two categories of decision making that were being transferred from Flor to GreenbergFarrow. The enumerated items were never discussed by the parties during the negotiations preceding the execution of J2. Moreover, Flor and Mr. Johnson [*sic*] testimony confirmed the execution of the Letter of Intent would have essentially shifted control from the majority member to the minority member.
>
> Contrary to J2 which confirmed *that* Flor would be the majority and managing member, the additional documents prepared by GreenbergFarrow sought an improper transfer of control to GreenbergFarrow.

Da37.

Nonetheless, Ms. Flor continued to uphold her portion of the contract: sourcing, negotiating and servicing sub-contracts; developing clients; and marketing and promoting ENGenuity's business and brand. Da308[2] (at 64:1-9.), Da351 (at 86:19-87:2.) Defendant, however, would not relent on its LOI demands. Da308 (64:11-18.)

At the same time, at least through September 9, 2016, Ms. Flor still had not been paid her salary, allowances, or bonuses pursuant to the contract. Da113, Da308 (at 63:14-19.) Critical operating expenses for the start-up, including insurance to pursue public sector project work, went unpaid. <u>See</u> 5T. 97:13-20; Da912-Da913. On September 9, 2016, without warning, Mr. Johnston advised Ms. Flor, by email copying various officers of Defendant, including

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[2] As the deposition transcript of Ms. Flor, on June 6, 2018 (Da292) annexed to Defendant's Appendix contains a "mini" or "compressed" transcript, Plaintiffs also provide citations to the specific compressed pages for ease of reference.

Mr. Ghadrdan, that Defendant had "decided not to pursue a minority partnership with the potential [*sic*] WBE entity at this time." Da179.

Although the non-binding LOI had nothing to do with the contract or the ongoing operations of ENGenuity, Defendant decided to breach the contract and, once and for all, end its membership with Plaintiffs. See 7T. 153:22-154:8. On October 3, 2016, Defendant notified Plaintiffs that it was terminating its relationship and withdrawing permanently from ENGenuity. See 4T. 227:7-18. Defendant cut-off all communications and contact with Plaintiffs and stopped cooperating with pending RFQs, RFPs and sub-contracts Ms. Flor had secured and/or was servicing for ENGenuity. See 4T. 225:7-227:18. On November 14, 2016, Defendant caused ENGenuity to wire payments out of ENGenuity's account that was exclusively controlled by Defendant to "reimburse" Defendant for certain operating expenses of ENGenuity. See 7T. 7:23-11:17. Also on November 14, 2016, Mr. Ghadrdan directed Defendant to wire $83,318.82 from ENGenuity's account to Defendant's account. See 7T. 7:23-11:17, Da1009-1011. Defendant recorded its deposits to ENGenuity's account as "loans." Id. Defendant's last withdrawal left ENGenuity penniless and without any operating capital and Ms. Flor without any income. See 4T. 235-7-12.

Plaintiff Flor left her job of fifteen years, relinquished her equity in her prior employer and agreed to myriad restrictive covenants just so the start-up could compete in the same New Jersey public sector market as Plaintiff Flor's prior employer. See 4T. 52:9-13, 183:16-184:6; 5T. 69:8-22. Defendant's abrupt termination and withdrawal left Plaintiffs immediately scrambling for revenue and operating capital after October 3, 2016. See 4T. 226:8-227:6, 238:10-25.

In all of the years that subsequently elapsed, Defendant never again communicated with, supported or contacted Plaintiffs. See 4T. 227:7-18. As a result of Defendant's breach, Plaintiffs suffered damages of $599,000.00 in ENGenuity's initial two years. See 4T. 249:11-255:16 (discussing Dca237-Dca797); 5T. 10:22-21:24 (discussing Da1012-Da1020); 6T. 33:9-14, 34:11-24; Pa185-Pa202.

## ARGUMENTS

## POINT I

### THE TRIAL COURT'S DENIAL OF SUMMARY JUDGEMENT FOR BREACH OF CONTRACT IN FAVOR OF DEFENDANT SHOULD BE AFFIRMED

It is well established that the appellate court's review of a summary judgment ruling is *de novo*, applying the same standard as the trial court. See Townsend v. Perre, 221 N.J. 36, 59 (2015). Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2). As the Court has observed, "[i]n reviewing a grant of summary judgment, 'we apply the same standard governing the trial court—we view the evidence in the light most favorable to the non-moving party.'" Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 350 (2016) (quoting Qian v. Toll Bros. Inc., 224 N.J. 124, 134-35 (2015)).

On appeal, the Court considers the factual record and the reasonable inferences that can be drawn from those facts, "in the light most favorable to the non-moving party" to decide if the moving party was entitled to judgment. IE Test, LLC v. Carroll, 226 N.J. 166, 184 (2016) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). No "special deference" is given to a trial court's review of the record evidence. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Where both parties filed competing motions for summary judgment, the mere filing "do[es] not preclude the existence of issues of fact." O'Keefe v. Snyder, 83 N.J. 478, 487 (1980). Instead, the motion court is required "to engage in the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Brill, 142 N.J. at 540. This is so, because "[i]t is critical that a trial court ruling on a summary judgment motion not 'shut a deserving litigant from his [or her] trial.'" Id. (internal citations omitted).

When interpreting a contract, the court should consider the plain language of the contract, the circumstances surrounding the contract, and the contract's purpose. Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 115-16 (2006); see also Celanese Ltd. v. Essex Cty. Improvement Authority, 4040 N.J. Super. 514, 600-601 (App. Div. Jan. 16, 2009) ("In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain."). "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Brill, 142 N.J. at 541.

Defendant begins its objection to the trial court's ruling on summary judgment by simply rehashing large portions of its motion as to why there was no "meetings of the minds," but with a curious new twist. Defendant contends that the trial court's April 4, 2019 Order (Da1-14), denying judgment as to the breach of contract claim should be reversed on appeal, because "the parties never entered into a binding and enforceable partnership agreement." Db. 27-28 (bolding removed). Stated differently, Defendant no longer argues, as it did below, that there was no enforceable contract. In fact, Defendant now concedes its payment obligations to

Plaintiff Flor under the contract. See Db. 7 (at fn.2.) Instead, Defendant's *new* appellate argument focuses on whether the contract "evidences an intent by the parties to be bound in a partnership agreement, as the parties made clear they intended to be bound by a subsequent, formal partnership agreement." Db. 33.

Contrary to Defendant's appellate argument, however, based on the evidential materials then available, the parties tendered to the motion court competing proofs as to their respective intents and whether there was a "meeting of the minds" such that an enforceable contract was entered into between them. See Da101-623. In his pre-trial deposition, Mr. Johnston gave the following sworn testimony:

> Q: So Greenberg Farrow was to fund the operating expenses of the company?
> A: Correct.

Da338. (at 37:15-17.)

> Q: What were the LOI discussions?
> A: The negotiation there was going to be a cash set aside.
> Q: Oh, the timing of when the monies would be released?
> A: Correct.
> Q: Not if the monies were going to be released?
> A: Correct.

Da353 (at 97:8-16.)

> Q: So what was your expectation as to how the operating expenses which were documented in the various operating expense reports and revenue projections that you had solicited of Miss Flor, how were those going to be paid for?
> A: Initially funded by Greenberg Farrow.

357a (at 111:11-16).

In his pre-trial deposition, Mr. Ghadrdan gave the following sworn testimony:

> Q: How did you contemplate this start-up company paying for these outside services?
> A: ·GreenbergFarrow would pay for it.
> Q: So GreenbergFarrow was going to pay for any of the expenses outside of the categories that you intended the company to provide directly to the new entity?
> A: Yes.

Da279 (at 98:24-99:6.)[3]

> Q: With respect to the new company, Engenuity Infrastructure, entering into new contracts, as the CEO of GreenbergFarrow, why would Mr. Johnston be copied in these sorts of transactions?
> A: Because we're funding the company. We need to be aware of what's going on in the company.· We don't need to approve, but we need to be aware.

Da289 (at 138:1-9.)

The foregoing deposition testimony submitted by Plaintiffs in opposition to Defendant's motion for summary judgment raised issues of fact regarding the parties' "meetings of the minds" generally and agreement that Defendant would fund the operations of ENGenuity in its initial two years specifically that raised issues of fact.

Defendant argues, as it did below, that the parties' discussions concerning the draft, non-binding LOI, which *post*-dated the contract execution and start of ENGenuity, "demonstrates that the parties did not intend to be bound in a formal partnership

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[3] As the deposition transcript of Mr. Ghadrdan on June 5, 2018 (Da254) annexed to Defendant's Appendix contains a "mini" or "compressed" transcript, Plaintiffs also provide citations to the specific compressed pages for ease of reference.

by the one-and-a-half-page Letter." Db. 35. The LOI, however, did not contain language stating that the parties' legal rights and obligations shall only be those that are set forth in an executed LOI or other definitive transaction document executed by all parties. Defendants' moving papers did not explain why a LOI, which the parties expressly agreed would *not* bind them, was never referred to in the contract given the importance that document ostensibly held for Defendant. The appeal sheds no new light on the limits of Defendant's rehashed argument that the contract was a mere "agreement to agree."

As Plaintiffs argued below, "[i]t is not necessary for a writing to contain every possible contractual provision to cover every contingency in order to qualify as a completed, binding agreement." <u>Berg Agency v. Sleepword-Willingboro, Inc.</u>, 136 <u>N.J. Super.</u> 369, 377 (App. Div. 1975). Indeed, "[i]t is well-settled that parties may bind themselves by an informal memorandum where they agree upon the essential terms of the contract, and intend to be bound by the memorandum, even though they contemplate the execution of a more formal document." <u>Id.</u> at 373-74, <u>accord</u>, <u>Comerata v. Chaumont, Inc.</u>, <u>52 N.J. Super.</u> 299, 305 (App. Div. 1958) ("the fact that parties who are in agreement upon all necessary terms may contemplate that a formal agreement yet to be prepared will contain such additional terms as are later agreed upon, **will not affect the subsistence of the contract as to those**

**terms already unqualifiedly agreed to and intended to be binding**.”) (emphasis added). Further, even if Defendant had intended to create an even “more formal” contract, which was Defendant’s contention, the clear terms of the contract and the deposition testimony that supported Plaintiffs’ opposition to Defendant’s motion for summary judgment, presented sufficiently conflicting issues of fact before the motion court that it could not resolve. In pertinent part, the trial court ruled:

> Here, a genuine issue of material fact exists whether the parties intended to be bound by the Letter sufficient to render the same a valid contract. Additionally, a rationale [*sic*] finder of fact could reach either position advanced by the parties negating summary judgment.
>
> While the Letter was executed by the parties and contained essential terms; the Letter also contained limiting language indicative of an intent not to be bound, such as ‘[t]he purpose of this letter is to formally offer this opportunity to you and outline the following basic principles of employment for [the LLC] with the understanding that certain, additional transactional documents will be executed by and between the parties under separate cover that address the items below.’ (See Mot. Exh. B.) Moreover, the subsequently executed LOI differed in many respects from the Letter, as it contained much more extensive and perhaps even inconsistent terms. (Id. Exh. H.) The inability of the parties to agree to the terms of the LOI after fairly easily agreeing to the terms of the Letter speaks to the differences between the two documents. Despite several weeks of negotiations with the assistance of counsel, the parties continued to negotiate the terms of the agreement.
>
> Nevertheless, the Letter identifies and set [*sic*] forth with specificity various obligations of the parties concerning the creation of the new LLC along with financial responsibilities and compensation. When

> giving Plaintiffs the benefit of all favorable inferences drawn from the Letter, it is possible that a jury could determine that Letter satisfies each element of a contract. Moreover, the facts as alleged by the Plaintiffs, and if accepted by jury, may provide the foundation for the jury's determination that Plaintiffs have proven each and every element of Model Jury Charge 4.10- Existence of a Legally Enforceable Contract and are entitled to compensation for the breach of contract.
>
> Based upon the foregoing, a reasonable jury could find for either party concerning the existence of a valid contract and whether or not a 'meeting of the minds' to be bound has been proven which precludes this Court from granting summary judgment to either party.

Da3-7.

As there was a genuine issue of fact, this Court should affirm the trial court's ruling on the law. See Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N. J. 608 (1998).[4]

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[4] Although the motion court was initially unable to resolve conflicting proofs that raised various issues of fact as to the existence of an enforceable contract and the parties' intent, the jury was able to reach a different result after seven days of trial testimony and receiving dozens of exhibits in the record. As discussed further below, the record evidence included a *first draft* of the contract that expressly conditioned the contract on the parties also entering into "formal partnership and/or operating agreement." See Da626-632. As the jury learned, these very conditions were in fact removed *before* the final contract was executed. See 5T. 144:22-145:12; Da633-634.

Further, with regard to the LOI, the trial court noted, "[s]hortly after J2's execution, Defendant forwarded Flor a series of documents attempting to usurp control of ENGenuity from Flor and place control with GreenbergFarrow. The improper attempt to seize control of day-to-day operations is most clearly demonstrated in the Letter of Intent, setting forth twenty-two categories of decision making that were being transferred from Flor to GreenbergFarrow. The enumerated items were never discussed by the parties during the negotiations preceding the execution of J2.

## POINT II

## THE COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

On an appeal of a motion for judgment notwithstanding the verdict, the Court applies the following standard of review:

> "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied...."

Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 415 (1997) (quoting Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969) (citations omitted)). "[T]hat standard ensures that appellate tribunals will not overstep their bounds by usurping the jury's task of assessing the credibility of the witnesses." Id. at 416. An appellate court will disturb a jury's verdict "only if [it finds] that the jury could not have reasonably used the evidence to reach its verdict." Id.

During oral argument on Defendant's post-trial motion for judgment notwithstanding the verdict, Defendant curiously argued

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Moreover, Flor and Mr. Johnson testimony confirmed the execution of the Letter of Intent would have essentially shifted control from the majority member to the minority member. Contrary to J2 which confirmed that Flor would be the majority and managing member, the additional documents prepared by GreenbergFarrow sought an improper transfer of control to GreenbergFarrow. Da37.

that it never believed that there was an actual contract between the parties. Therefore, Defendant maintained that it was free to walk away from ENGenuity, cut-off funding and relations with it and withdraw from membership forever. See 9T 72:14-73:2. The trial evidence, however, removed any doubts whatsoever. Perhaps not surprisingly, Defendant's brief, at Pages 43-52, simply lifts the verbatim arguments that it first unsuccessfully presented to the trial court in support of judgment notwithstanding the verdict at Pages 31-38 without demonstrating how the trial court erred in its ruling based on the proofs. Like its briefing before the trial court, Defendant's appellate brief also ignores the the trial record.

### A. The Record Evidence Established That There Was A "Meeting Of The Minds"

It is clear that Defendant wants the Court to *completely* ignore the trial record and disregard the observations and determinations of the triers of fact. This is not "spin." Despite seven days of trial, Defendant's brief does not cite to or quote *any* testimony from *any* witnesses – not even its own corporate officers. See Db. 4-22.

The truth, however, is the jury did receive substantial documentary and testimonial evidence, and the jury did unanimously conclude there was a "meeting of the minds" on the terms of the contract and what the parties had agreed to do. The jury heard testimony from Ms. Flor that evidenced the parties' "meeting of the minds," and it differed vastly from the interpretation that Defendant's somehow still cling to on appeal. For example, Ms. Flor testified:

> Q: Okay. Now, let me ask you a question. Is there anything in that document, the preliminary offer that they put before you that incorporated your requests, your requested changes, that you accepted and signed that says, as to those nine terms, they don't come into effect and are not enforceable against Greenberg Farrow unless some other document is signed?
> A: No.

4T. 84:7-15.

> Q: Okay. So who is going to be the initial employee of this company?
> A: Myself.
> Q: Okay. And so if you're not at that company, what does the company do?
> A: I suppose it doesn't do anything.
> Q: Okay. And so the time period that these folks committed to you, is that reflected anywhere on that document?
> A: Yeah. So the entire first portion, it mentions the two years and the company, everything we talked about was two years. And without me there running the company, there would be no other reason for me to be paid for two years if not to run the company for two years.

4T. 87:11-25.

The jury also received documentary and testimonial evidence that demonstrated that Defendant also understood what it had agreed to do pursuant to the contract. Defendant set up an email account system for Ms. Flor on a new domain for ENGenuity and a new bank account for ENGenuity at Sun Trust Bank. See 4T. 94:6-97:16, Da644 and 647. The parties looked for office space to lease together. See 4T. 103:2-25. Defendant's staff constructed ENGenuity's original website, reviewed potential hires for the start-up and then posted those positions on the ENGenuity website. See 4T. 106:6-108:10.[5] The jury would have construed the foregoing as evidence that the parties had agreed to do what the contract said. Indeed, Ms. Flor said it best:

> Q: Okay. And so at this juncture, by July 20th of 2016, did you have any concerns or suspicions that Greenberg Farrow was not acting as it stated it would under the contract?
> A: No. I was -- everything was -- they were complying with the contract. So I was excited that we were -- we had a website. We had a domain. We were looking at office space. We were advertising positions. I had obtained licenses. I was already applying for all the state licenses. So things were –
> Q: Okay.
> A: -- exactly as I expected.

4T. 111:20-112:7.

Although Defendant's brief makes no mention, as Plaintiffs also argued below, Mr. Johnston testified that Defendant understood it *was* funding both Ms. Flor and ENGenuity for an initial, two-year term.

> Q: Okay. And so was it from your perspective internally consistent that if the company was going to commit to fund her a salary amount equal to $350,000 over two years that it was going to fund the business for that period of time.
> A: Yes.

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[5] The jury also heard, and was free to deem credible, Mr. Ghadrdan's testimony that, aside from whatever private expectations he held for ENGenuity and Defendant, after the parties entered into the contract, Defendant paid third-party vendors to provide services and equipment to ENGenuity that were terms in the contract. See 6T. 50: 3-8. In other words, they heard him testify that, at least for a while, Defendant *was* doing what the contract required of it.

> Q: Okay. So would you agree with Ms. Flor that at least through mid-July of 2016, maybe approaching the third week of July of 2016, she and the folks at Greenberg Farrow as majority and minority members of this new entity were working together.
> A: Yes.
> Q: They were performing the very terms of that contract.
> A: Yes.

5T. 149:7-21.

Defendant's brief offers neither acknowledgment nor explanation of this causal relationship between Defendant's conduct in support of ENGenuity's early operations and the contract that spells out those obligations.

Even Mr. Ghadrdan, testified before the jury that Defendant understood that it *did* agree to fund ENGenuity, because Defendant understood this to be its obligation under the contract. He testified as follows:

> Q. So after the parties entered into that contract, as the top officer of Greenberg Farrow, was it your intention to fund the business from its outset?
> A. Yes.
> Q: Okay. Ms. Flor didn't have the money to do it, correct?
> A: Right.
> Q. Okay. And would you agree that the operating expenses of this new business that was to be formed would be the responsibility, financially, of Greenberg Farrow?
> A. Yes.
> Q. Okay. And I'm not sure if we got into it with you last week, but would you agree that through Ms. Flor Greenberg Farrow saw an opportunity to be introduced to New Jersey's public sector engineering (indiscernible)?
> A. Yes.
> Q. Okay. And would you agree that the operating expenses of this new business that was to be formed would be the responsibility, financially, of Greenberg Farrow?
> A. Yes.

> Q. Okay. Now, last week, I believe you started to give a little bit of testimony on monies being transferred in from Greenberg Farrow's account into an ENGenuity account. Do you remember that?
> A. Yes.
> Q. Okay. And you authorized that to be done, correct?
> A. Yes.
> Q. Okay. When you authorized your company to wire those monies into the ENGenuity account, did you believe that you were -- that Greenberg Farrow was doing what it said under the contract?
> A. Yes.

6T. 47:16-19, 48:4-21.

The trial testimony from these officers extensively and irrefutably contradicts Defendant's remarkable appellate argument that "there was no binding and enforceable contract that addressed the parties' interests, rights and obligations[.]" Db. 30. Defendant presents no evidence from the trial record to support its contention or, importantly, to rebut the foregoing record evidence that supported the January 29, 2021 Order on Defendant's motion for judgment notwithstanding the verdict. See Db. 30-42.

B. The Trial Court Correctly Rejected Defendant's "Partnership Agreement" Theory

Defendant's next argument, that the contract "provides on its face that it is only an agreement to agree on formal contractual terms in the future, and as the parties engaged in negotiations of a formal partnership agreement," also ignores the trial record. Db. 40. In fact, Defendant's appeal brief tries to run as far away from the trial record made, because Defendant's witnesses provided much of the critical testimony that underpins

Defendant's liability and forecloses this appeal. See Db. 40. As the trial court ultimately recognized and accepted, as it must, *any* contention that the contract was a mere "agreement to agree" simply ignores the evidence. "Although significant argument was offered throughout the trial that J2 was not a contract and amounted only to an 'agreement to agree' to be memorialized in later documents, the unanimous jury rejected Defendant's argument and found J2 was a valid and enforceable contract, which was breached by the Defendant resulting in damages to the Plaintiffs." Da23-24.

Mr. Johnston was the primary negotiator and the only signatory to the contract for Defendant. The jury heard the following testimony from Mr. Johnston:

> Q: Okay. So -- so there are no conditions that -- that you've identified so far as far as a partnership agreement, an operating agreement, an employment agreement or a management agreement in the contract, correct?
> A: That is correct.
> Q: Okay. Now, is there anything in this same contract, and again, I'm making reference to your joint exhibit number 2, I'm holding up joint exhibit 2A, that says we are going to sign some other document that's not in here that is going to serve the purpose of limiting or controlling those nine enumerated paragraphs?
> A: Specifically, no.

5T. 143:16-144:4.

Therefore, while creative, Defendant's novel appellate strategy, which is to argue there was a concurrent enforceable "employment agreement"[6] and an unenforceable "partnership agreement," rings hollow. See Db. 33.

Defendant's testifying officers both admitted under oath and before the jury that the contract was *not* conditioned upon the further execution of a "partnership agreement." Db. 33. Consequently, Defendant's strawman argument that "[t]his case does not present a close situation where there is a question as to whether the Letter evidences an intent by the parties to be bound in a partnership agreement" wildly misses its intended mark.

It also does not matter that Defendant's brief intersperses a patchwork of different labels – alternatively, a "contract," "offer letter," "Letter," "employment agreement," "partnership agreement", "formal partnership" or "binding documents," – in the apparent hope of confusing this Court as to what the parties intended in the operative writing. The trial put this to rest. Mr. Johnston provided this unequivocal testimony:

> Q: Okay. So is there anything in here that you can tell me about as a person that participated on the Greenberg Farrow side in that process and signed this offer letter that says that numbered paragraphs 1 through 4 as it relates to Ms. Flor were contingent upon her signing an operating agreement?
> A: No.
> Q: What about an employment agreement?
> A: I viewed this as the employment agreement.
> Q: I understand what your view may be. I simply asked is there anything that you actually put into this offer that says numbered paragraphs 1 through 4 are not enforceable unless you sign an employment agreement?

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[6] See Db. 7, fn. 2.

> A: No.
> Q: Okay. What about 1 through -- excuse me. I meant to say 1 through 5. I apologize. Paragraphs 1 through 5 are contingent and non-enforceable against Greenberg Farrow unless and employment agreement was signed.
> A: It is not.
> Q: Okay. No operating agreement, no employment agreement, correct?
> A: That's correct.
> Q: What about a management agreement? Are any of those first five paragraphs conditioned upon a management agreement?
> A: No.
> Q: Okay. What about a partnership agreement?
> A: No.
> Q: Okay. Now, the paragraphs 1 through 4 on the bottom of this first page of the contract which apply to the -- to support the WBE, the -- the limited liability company, same line of questions. Paragraphs 1 through 4, are there -- is there any indication in what you and the attorneys at Greenberg Farrow put together that says these four paragraphs will be contingent upon Ms. Flor signing an operating agreement, a management agreement or an employment agreement?
> A: I'd like to correct. This is not put together by attorneys. This is just a management agreement of Greenberg Farrow. And, no, there's nothing conditioned upon that.

5T. 140:3-141:21.

Indeed, the trial testimony established that the partnership agreement was considered and *removed* from the contract *before* the parties executed the final, operative contract:

> Q: Okay. This is page 2 of the final contract. Does it say anywhere in there that the obligations or the terms in enumerated paragraphs 1 through 9 on the first page will be contingent on Ms. Flor signing a partnership agreement or an operating agreement?
> A: It does not.
> Q: Those were actually removed, isn't that true?
> A: On the first draft, yes.
> Q: And they were removed in the final offer that you put your digital signature on, correct?
> A: That is correct.

Q: Okay. So that was not actually a term, correct?
A: That's correct.

5T. 144:22-145:12.[7]

C. The Trial Record Proved That Defendant Agreed To Fund ENGenuity's Operating Expenses

Defendant's third argument on appeal to reverse the judgment in favor of Plaintiffs notwithstanding the verdict fares no better. Defendant continues to insist that the contract cannot be interpreted or understood to mean that "Greenberg Farrow was obligated to pay 100% of the 'operating expenses' of ENGenuity for any specified period of time, much less two years." Db. 40.

In its April 4, 2018 Order denying summary judgment based on competing affidavits and proofs tendered by the parties, the trial court held that "a reasonable jury could find for either party concerning the existence of a valid contract and whether or not a 'meeting of the minds' to be bound has been proven[.]" (Da7.) The trial record, by contrast, is replete with references demonstrating that all parties were laboring under the understanding that their actions were contractual. The jury received and considered the following fact testimony from Mr. Johnston:

Q: Okay. And so was it from your perspective internally consistent that if the company was going to commit to

[7] Cf Da626-632 and Da633-634. These revisions are irrefutable proof that a "partnership agreement" was not a condition of enforcing the contract. Further, notwithstanding the brief's attempt to advance a colorable argument, the trial record clearly demonstrates that Defendant was well aware.

> fund her a salary amount equal to $350,000 over two years that it was going to fund the business for that period of time.
> A: Yes.
> Q: Okay. So would you agree with Ms. Flor that at least through mid-July of 2016, maybe approaching the third week of July of 2016, she and the folks at Greenberg Farrow as majority and minority members of this new entity were working together.
> A: Yes.
> Q: They were performing the very terms of that contract.
> A: Yes.

5T. 149:7-21.

Mr. Johnston was not alone in his position. Mr. Ghadrdan shared the same understanding that, under the contract, Defendant had the obligation to fund the operating expenses of ENGenuity for its initial two years:

> Q. So after the parties entered into that contract, as the top officer of Greenberg Farrow, was it your intention to fund the business from its outset?
> A. Yes.
> Q. Okay. And would you agree that the operating expenses of this new business that was to be formed would be the responsibility, financially, of GreenbergFarrow?
> A. Yes.
> Q. Okay. Now, last week, I believe you started to give a little bit of testimony on monies being transferred in from Greenberg Farrow's account into an ENGenuity account. Do you remember that?
> A. Yes.
> Q. Okay. And you authorized that to be done, correct?
> A. Yes.
> Q. Okay. When you authorized your company to wire those monies into the ENGenuity account, did you believe that you were -- that Greenberg Farrow was doing what it said under the contract?
> A. Yes.

6T. 47:16-19, 48:4-21.

The jury saw those documents and heard this testimony showing the parties doing exactly what was called for in the contract, which was a very clear indication of their "meeting of the minds." Mr. Johnston made it very clear to the jury:

> Q: Okay. And so at least for a while, either the first time there was a termination on September 9th from your e-mail or after you had the October 3rd phone call or engagement with her, which was the last termination, Greenberg Farrow was performing, correct?
> A: Yes.

5T. 129:19-25.

The triers of fact heard this testimony regarding Defendant funding ENGenuity's operations under the contract, and they were free to consider it and the credibility of the witnesses that gave it. They also received the testimony and significant documentary evidence detailing the $599,000.00 in damages that resulted from Defendant's breach. See 4T. 249:11-255:16 (discussing Dca237-Dca797); 5T. 10:22-21:24 (discussing Da1012-Da1020); 6T. 33:9-14, 34:11-24; Pa185-Pa202. Notwithstanding those evidentiary materials, Defendant's appeal does not demonstrate how the trial court erred in reviewing the record and rendering its decision on the Defendant's motion. Accordingly, on this evidentiary record, the trial court did not err in denying Defendant's motion for judgment notwithstanding the verdict.

## POINT III

**AS THE JURY VERDICT WAS SUPPORTED BY THE EVIDENCE AND DOES NOT SHOCK THE CONSCIENCE, THE TRIAL COURT'S DENIAL OF A MOTION FOR NEW TRIAL SHOULD BE AFFIRMED**

"The standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to its 'feel of the case,' including credibility." Caldwell v. Haynes, 136 N.J. 422, 432 (1994) (quoting Feldman v. Lederle Lab., 97 N.J. 429, 463 (1984) (quoting Dolson v. Anastasia, 55 N.J. 2, 6 (1969)).

> We will not reverse a trial court's decision to deny a motion for a new trial 'unless it clearly appears that there was a miscarriage of justice under the law.' R. 2:10-1. 'That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility.' Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)); see also Carrino v. Novotny, 78 N.J. 355, 360 (1979).
>
> A jury's 'verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.'" Hayes v. Delamotte, 231 N.J. 373, 385- 86 (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506 (2011)).

Morgan v. Willie Maxwell II, No. A-3157-19, 2021 N.J. Super. Unpub. WL 1605989, *7 (App. Div. April 26, 2021).

Viewing the evidence in the light most favorable to Plaintiffs, the jury's unanimous verdict for breach of contract, and the trial court's denial of Defendant's post-judgment motion for a new trial was not a miscarriage of justice, because they were supported by substantial trial evidence. Applying the aforementioned legal principles to the damages, the jury's award of $904,00.00[8] was reasonable, consistent with the weight of the evidence and not excessive.

Although Defendant's appellate brief plainly seeks a new trial, it takes Defendant forty-five (45) pages to clarify its "new trial" appellate argument, to wit: "The trial court erred in refusing to grant judgment to Greenberg Farrow on Plaintiffs' claim for the payment of . . . [the $599,000.00.00 of ] operating expenses, or, in the alternative, in failing to grant a new trial." Db.45." The only other argument in Defendant's brief for "new trial" relief states "the appellate court should order a new trial as the jury's verdict is both factually and legally incorrect because it does not reflect the nature of the specific performance relief sought by Plaintiffs in this action." Db. 49. One must

[8] Defendant abandons so much of its original trial and post-trial motion practice contentions relating to the breach of contract verdict and damages by conceding its liability on $305,000.00 of the $904,000.00 award. See Db. 7 (at fn.2). Thus, Defendant apparently contends the contract is two things: an enforceable "employment agreement" and an unenforceable "partnership agreement."

step back to the "Preliminary Statement" in Defendant's brief to grasp the gist of the argument:

> [T]he trial court found that despite the jury's finding that Greenberg Farrow was essentially required to specifically perform under the partnership agreement through the payment of 100% of the "operating expenses" of ENGenuity in the amount of $599,000, the trial court found that Greenberg Farrow was not entitled to anything in return.

Db. 2-3.

Of course, there was no "specific performance" claim, jury instruction or jury charge. There also was no jury instruction or charge to bifurcate the contract into a separate "employment agreement" and a separate "partnership agreement." Consequently, the Court should reject Defendant's contention that a new trial is warranted because the verdict means Defendant was ordered to specifically perform pursuant to a partnership agreement. Mr. Johnston's trial testimony should foreclose that option:

> Q: Okay. So -- so there are no conditions that -- that you've identified so far as far as a partnership agreement, an operating agreement, an employment agreement or a management agreement in the contract, correct?
> A: That is correct.
> Q: Okay. Now, is there anything in this same contract, and again, I'm making reference to your joint exhibit number 2, I'm holding up joint exhibit 2A, that says we are going to sign some other document that's not in here that is going to serve the purpose of limiting or controlling those nine enumerated paragraphs?
> A: Specifically, no.

5T. 143:16-144:4.

> Q: Okay. No operating agreement, no employment agreement, correct?
> A: That's correct.

> Q: What about a management agreement? Are any of those first five paragraphs conditioned upon a management agreement?
> A: No.
> Q: Okay. What about a partnership agreement?
> A: No.
> Q: Okay. Now, the paragraphs 1 through 4 on the bottom of this first page of the contract which apply to the -- to support the WBE, the -- the limited liability company, same line of questions. Paragraphs 1 through 4, are there -- is there any indication in what you and the attorneys at Greenberg Farrow put together that says these four paragraphs will be contingent upon Ms. Flor signing an operating agreement, a management agreement or an employment agreement?
> A: I'd like to correct. This is not put together by attorneys. This is just a management agreement of Greenberg Farrow. And, no, there's nothing conditioned upon that.

5T. 140:24-141:7.

> Q: Okay. This is page 2 of the final contract. Does it say anywhere in there that the obligations or the terms in enumerated paragraphs 1 through 9 on the first page will be contingent on Ms. Flor signing a partnership agreement or an operating agreement?
> A: It does not.
> Q: Those were actually removed, isn't that true?
> A: On the first draft, yes.
> Q: And they were removed in the final offer that you put your digital signature on, correct?
> A: That is correct.
> Q: Okay. So that was not actually a term, correct?
> A: That's correct.

5T. 144:22-145:12

That Defendant persists with this factually impossible claim screams of bad faith given its own witness' extensive and credible testimony on this subject. The Court should not countenance it.

As also discussed above, Messrs. Johnston and Ghadrdan both testified at trial that they understood and agreed that

Defendant was to fund ENGenuity's operating expenses for its initial two years. Mr. Johnston testified as follows:

> Q: Okay. And so was it from your perspective internally consistent that if the company was going to commit to fund her a salary amount equal to $350,000 over two years that it was going to fund the business for that period of time.
> A: Yes.
> Q: Okay. So would you agree with Ms. Flor that at least through mid-July of 2016, maybe approaching the third week of July of 2016, she and the folks at Greenberg Farrow as majority and minority members of this new entity were working together.
> A: Yes.
> Q: They were performing the very terms of that contract.
> A: Yes.

5T. 149:7-21.

Mr. Ghadrdan's testimony was completely consistent with that of Mr. Johnston:

> Q. So after the parties entered into that contract, as the top officer of Greenberg Farrow, was it your intention to fund the business from its outset?
> A. Yes.
> Q. Okay. And would you agree that the operating expenses of this new business that was to be formed would be the responsibility, financially, of Greenberg Farrow?
> A. Yes.
> Q. Okay. Now, last week, I believe you started to give a little bit of testimony on monies being transferred in from Greenberg Farrow's account into an ENGenuity account. Do you remember that?
> A. Yes.
> Q. Okay. And you authorized that to be done, correct?
> A. Yes.
> Q. Okay. When you authorized your company to wire those monies into the ENGenuity account, did you believe that you were -- that Greenberg Farrow was doing what it said under the contract?
> A. Yes.

6T. 47:16-19, 48:4-21.

Ms. Flor also testified that Defendant set up an email account system for her on a new domain for ENGenuity and opened a new Sun Trust Bank account for ENGenuity. See 4T. 94:6-97:16, Da644, Da647. Defendant initially funded the ENGenuity account with $150,000.00 in capital for its operating expenses. See 5T. 120:12-21; 7T. 7:23-11:17 (citing to Da1008). The parties looked for office space to lease together. See 4T. 103:2-25, 128:18-20. Defendant's staff constructed ENGenuity's original website, reviewed potential hires for the start-up and then posted those positions that were detailed in the agreed-to operations budget of ENGenuity on the ENGenuity website. See 4T. 106:6-108:10; Da1012-1013.) Defendant also paid third-party vendors for payroll and marketing services, as well as computer equipment provided to ENGenuity. See 5T. 96:20-97:7. Although Defendant ultimately breached the contract and withdrew as a member of ENGenuity by October 2016, the jury received ample evidentiary material demonstrating that until Defendant breached, it was in fact funding ENGenuity's operations under the contract.

Consequently, the trial court correctly recognized, and stated plainly, that the record evidence did *not* support Defendant's contentions on "specific performance" or a "partnership agreement." That Defendant rehashes the verbatim arguments on appeal as were presented to the trial court should not change the result. As the trial court noted, "[p]ursuant to the negotiated terms of the contract, GreenbergFarrow, the minority member, agreed to fund enumerated operating expenses for Plaintiffs, including salary, benefits, retaining legal counsel, human resources, accounting, and other day-to day expenses." Db.37. Moreover, drawing upon the record, the trial court commented:

> The jury rejected Defendant's strategy as demonstrated by the return of the precise dollar amount in compensatory damages requested by Plaintiffs. As noted nearly fifty years ago in Baxter, the findings of the jury should not be disturbed merely because the trial court might have found otherwise upon review of the same evidence. Rather, the inquiry is whether it clearly appears that there was a miscarriage of justice under the law. The jury's rejection of the Defendant's strategy does not satisfy this high threshold and the verdict for breach of contract, including the award of compensatory damages, will not be disturbed since it does not arise to a manifest denial of justice.

Da34.

Having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, the trial court concluded that its verdict and damages award was not a miscarriage of justice. See Da31. Broadly, the trial court reviewed the entire record and articulated its reasons for refusing to order a new trial:

> As previously noted, Flor made an exceptional witness throughout the trial. Her answers were clear, responsive and concise and consistent with the evidence that was presented to the jury. Her demeanor and body language were relaxed and comfortable throughout her testimony – including cross-examination.
>
> After extensive negotiations with the Defendant, she took the "leap of faith" to leave the comfort and security of her partnership with her former employer to

> form ENGenuity with Defendant. However, and after it became apparent that Defendant could not control ENGenuity, Defendant terminated the agreement and abandoned its obligations under the contract. Flor described her struggles as a single mother keeping ENGenuity afloat after being abandoned by Defendant less than four months after forming the company. She identified the financial hardships and her personal efforts to prevent ENGenuity from failing. When reviewing the entire evidentiary record and considering Flor’s credibility, this Court cannot conclude that the damages verdict was so wide of the mark that it rises to the level of shocking the judicial conscience.
>
> Defendant’s argument that the jury improperly awarded a larger amount of damages than the amount Plaintiffs’ sought is inconsistent with the proofs presented to the jury. The compensatory damages awarded for the breach of contract were $904,000.00, the exact amount Plaintiff’s claimed at trial. This award is supported by the evidence and demonstrates that the jury accepted all of Plaintiffs’ proofs on damages and rejected every defense offered by GreenbergFarrow.

Da31-32.

For all of the foregoing reasons, the court should affirm the lower court’s denial of Defendant’s post-trial motion for a new trial, because it is supported by substantial record evidence, did not constitute a “windfall” that shocks the conscience and did not rise to the level of a miscarriage of justice under the law.

## POINT IV

### THE TRIAL COURT REVIEWED THE ENTIRE RECORD OF EVIDENTIAL MATERIALS AND CORRECTLY DETERMINED THAT DEFENDANT TERMINATED AND WITHDREW FROM MEMBERSHIP IN ENGENUITY INFRASTRUCTURE, ENGAGED IN PRE-TERMINATION MISCONDUCT AND COMMITTED POST-TERMINATION MISCONDUCT AND HARM

A. All Statutory Bases For Defendant's Disassociation Were Properly Aired At Trial And In Post-Trial Briefs

Defendant's leading argument rehashes the same objection Defendant first raised in opposition to Plaintiffs' post-trial, cross-motion for relief arising under N.J.S.A. 42:2C-46(a), which is that the trial court erred in considering such relief, because Plaintiffs had not pled that statutory provision of the New Jersey Revised Uniform Limited Liability Company Act ("RULLCA") in their claim for declaratory relief with the other provisions relating to *pre*-termination and *post*-termination conduct warranting disassociation that were pled, *i.e.*, N.J.S.A. 42:2C-46(e)(1) and (3). See Db. 56-57. Neither the law nor the facts, however, support reversal.

First, it was abundantly clear from the trial testimony that Defendant's top officers admitted, under oath, that Defendant had terminated its membership and withdrawn completely from ENGenuity by October 2016.[9] See 6T. 69:4-23. Indeed, away from the jury,

[9] The cross-motion and its excerpts in this brief are included as allowed by the Court Rules, because the question of whether an issue was raised in the trial court is germane to the appeal. See R. 2:6(a)(2).

the trial court judge discussed this irrefutable evidence, and its impact on the statutory claim. See 6T. 134:24-136:4. The parties had notice of the facts and the relevance of this additional statutory claim that came to light on direct-examination of Defendant's witnesses, and had ample time to further explore and/or test those proofs in Plaintiffs' case-in-chief, Defendant's case-in-chief and in post-trial motions, all of which Defendant endeavored to do. See 6T. 139:1-140:9; 9T. 4-85; Da1184-Da1277; Pa1-Pa184. There was neither surprise nor prejudice to Defendant as the issues were plainly presented to the trial court. Consequently, Defendant's reliance on Beinhauer v. Manoukian, 215 N.J. Super. 9, 45 (App. Div. 1987), is misplaced, because the procedural facts of that case are inapposite. Similarly, Skripek v. Bergamo, 200 N.J. Super., 620, 629 (App. Div. 1985), is also inapposite. In Skripek, a plaintiff raised arguments, for the first time on appeal, that were never presented to the trial court. Consequently, the Appellate Division declined to consider them. Accordingly, the factual issues and procedural posture of that case have no application to this action. Defendant fares no better result under Natsis v. Township of Weehawken, 2010 N.J. Super. Unpub. WL 3075565, *3 (App. Div. Aug. 6, 2010). See Db. 57. In stark contrast to the procedural posture of this action, Nastis involved a claim of error with respect to a trial court allowing amendment "after the conclusion of proofs." Id. Nastis' facts are inapposite.[10]

Second, N.J. Court Rule 4:9-2 provides that, "[w]hen issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order. Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues." The power that underpins this Rule is also well-amplified in the decisional law of the State.

The "broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result," Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998) (citation

[10] Interestingly, the Nastis court also observed that its defendants had failed to show "how their proofs would have been different if [the additional claim] had been formally pled earlier." Id. Given the overwhelming documentary and testimonial record adduced at trial on the breach of contract claim in *this* action, Nastis' observation has some relevance: Defendant also did not show how its trial proofs in defense to the additional statutory claim under N.J.S.A. 42:2C-46(a) would have been different if Plaintiffs had amended their pleading to add that statutory term. Succinctly, Defendant's top corporate officers repeatedly admitted that Defendant had terminated its membership interest and permanently withdrawn from ENGenuity in October 2016.

omitted). Where an issue is not raised in the pleadings but is "**fully aired at the trial . . . and in post-trial briefs**, **[it] is therefore properly resorted to in determining the issues**." 68th Street Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561, fn.3 (Law Div. 1976) (emphasis added), aff'd o.b, 150 N.J. Super. 47 (App. Div. 1977); see also Teilhaber v. Green, 320 N.J. Super. 453, 456 (App. Div. 1999) ("a 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory"); Varelli v. White, No. A-4675-16T3, 2019 N.J. Super. Unpub. WL 3229679, * 10 (App. Div. July 18, 2019) (collecting earlier authorities and noting that,"[w]hen an issue has been injected into the case even in a deficient manner, the opposing party will be deemed to have been on notice that the issue is included in the matters to be resolved."); Joy Systems, Inc. v. FIN Associates LP, No. A-5373-15T4, 2018 N.J. Super. Unpub. WL 2922988, *4 (App. Div., Jun. 7, 2018), aff'd, 236 N.J. 33 (2018) (Court's amendment of pleading sustained because "FIN was not deprived of due process because it could contest the facts Joy adduced to prove its claim before, during, and after trial").

Here, the trial record conclusively showed that Defendant notified Plaintiff of its termination of membership in ENGenuity, first on September 9, 2016 (Da910), and then, on a final occasion, on October 3, 2016. See 4T. 225:7-13. Mr. Johnston testified as follows:

> Q: Okay. Did you participate in -- withdrawn. Do you remember sending an e-mail to Ms. Flor at or about 4:45 p.m. on Friday evening, the 9th of September terminating the relation -- the membership interest of Greenberg Farrow in Engenuity Infrastructure?
> A: Yes.
> Q: Okay. And when you sent that communication you were authorized to send it?
> A: Yes.
> Q: Who authorized that?
> A: Mr. Ghadrdan.
> Q: Okay. So is it safe for me to assume that as of at least September 9th Greenberg Farrow has terminated its membership interest in this entity?
> A:Yes.

5T. 156:8-22.

Flor testified as follows:

> Q: Did there come a time after that October 3rd termination date that Mr. Johnston reached out to talk to you?
> A: No. I -- after the 3rd? No. I never heard from him again.
> Q: What about Mr. Ghadrdan?
> A: No.
> Q: Anybody from Greenberg Farrow ever reach out to you again after they terminated on October 3rd?
> A: No.
> Q: That's it?
> A: That's it.

4T. 227:7-18.

Defendant presented neither documents nor testimony to rebut the foregoing testimony that detailed the first and last occasions on which Defendant provided notice, under N.J.S.A. 42:2C-46(a), of its withdrawal from ENGenuity.

Therefore, it strains all credulity for Defendant to seriously suggest on appeal that it somehow did not know of the evidence attributable to the admissions of its own officers. Mr. Ghadrdan was even more direct in his testimony:

> Q: Well, you heard the testimony over three days of Mr. Johnston and Ms. Flor regarding the contracts it was going after, the qualification statements it was submitting, the projects --
> A: Okay.
> Q: -- it was going after.
> A: Yes.
> Q: Okay. So it was an operating business; was it not?
> A: Yes.
> Q: Okay. So you eventually arrived at a point in time whereas the top officer of Greenberg Farrow you made a decision to terminate the relationship; is that correct?
> A: Yes.
> Q: Okay. And when you made that decision, would you agree that you also made the decision to cut off funding under Joint Exhibit Number 2 to Ms. Flor and to ENGenuity?
> A: At some point, I think I did.

6T. 69:4-23.

He directed Defendant to terminate and withdraw from ENGenuity.

The trial court also received a trial stipulation that, together with other testimony and evidence, further supported the totality of the evidence demonstrating that Defendant provided notice to Plaintiffs of its membership termination and withdrawal from all relations with and support for the business of ENGenuity. The following stipulated facts on behalf of Defendant's comptroller, Edmund Truty, see 4T. 231:21-22, were read into the trial record:

"Edmund Trudy (phonetic) requested the opening of the ENGenuity Infrastructure LLC account at SunTrust on July 11th, 2016. The account opening was officially completed by SunTrust on July 22, 2016. He was instructed to do so my Esmail Ghadrdan."

"Edmund Trudy was listed on the Trust -- SunTrust account signature card for the ENGenuity Infrastructure's account. Edmund Trudy caused $150,000 to be wired from Greenberg Farrow Architecture Incorporated's account to ENGenuity Infrastructure LLC's account on August 11th, 2016.

On August 3rd of 2016, Mr. Ghadrdan told Edmund Trudy the dollar amount to transfer from Greenberg Farrow Architecture Incorporated's account to the ENGenuity Infrastructure LLC account.

No one advised Edmund Trudy to describe the $150,000 deposit on August 11th, 2016, as a 'loan. That characterization of the transaction was made on the date of the deposit, not on thereafter.

Edmund Trudy did not verify if Greenberg Farrow Architecture Incorporated's $150,000 deposit on August 11th, 2016, was, in fact, a loan, and was waiting for the parties to enter into an operating agreement prior to classifying the transfer.

Edmund Trudy was not presented with any loan documents, maturity dates, interest rates, or terms of a loan.

Edmund Trudy prepared and maintained the cash journal in evidence as Plaintiff's Exhibit P-48. Edmund Trudy did record the $150,000 deposit by Greenberg Farrow Architecture Incorporated to ENGenuity Infrastructure LLC SunTrust account as a loan on Greenberg Farrow's books.

Edmund Trudy caused every transaction listed on the cash journal that is Plaintiff's Exhibit 48 to be made in ENGenuity Infrastructure LLC's account. He was directed to do so by either Keith Johnson (sic), Esmail Ghadrdan, or Jaclyn Flor.

Edmund Trudy was never a member of ENGenuity Infrastructure LLC. Edmund Trudy never sought

> authorization or permission from Jaclyn Flor to make any deposits, transfers, or payments from ENGenuity Infrastructure LLC's SunTrust account with the exception of requesting from Ms. Flor a $100 payment to a third party on August 10th, 2016.
>
> On November 14th, 2016, Edmund Trudy caused ENGenuity Infrastructure LLC to wire $12,830 from its account to Greenberg Farrow Architecture Incorporated account.
>
> On July 21st, 2016, Greenberg Farrow paid from its own account the check to M Studio (phonetic) LLC because the ENGenuity account was not fully established.
>
> The transfer of November 14th, 2016, was to pay Greenberg Farrow back for this payment.
>
> On November 14th, 2016, Edmund Trudy caused ENGenuity Infrastructure LLC to wire $83,318.82 to Greenberg Farrow Architecture Incorporated, and he was directed to do so by Esmail Ghadrdan.
>
> Edmund Trudy did not send any checks or credit cards from the ENGenuity Infrastructure LLC SunTrust bank account to Jaclyn Flor.
>
> Edmund Trudy did not cause ENGenuity Infrastructure LLC to make any payments for its accounts payable after November 14th, 2016.
>
> On November 14th of 2016, Edmund Trudy recorded the $83,318.82 wire to Greenberg Farrow Architecture Incorporated as a 'loan repayment', and he was directed to do so by no one.
>
> At no time has Edmund Trudy been presented with any 'loan' terms to confirm the accuracy of this transaction in the 'cash journal' in evidence as Plaintiff's Exhibit P-48."

7T. 7:23-11:17 (citing to 1008a).

The jury also heard Ms. Flor testify that Defendant's intentional acts had an immediate, harmful effect on ENGenuity:

> Q: Based on your review of the cash journal, after that last eighty-three-thousand-plus-dollar transfer out of funds, was there any money left in the ENGenuity account?

> A: No. It was entirely emptied it [sic]. The balance was zero.

4T. 235-7-12.

As evidenced by the extensive detail in the trial court's January 29, 2021 Order, the trial court carefully reviewed the full record evidence, and, based thereon, granted Plaintiffs' cross-motion for judgment disassociating Defendant from ENGenuity not later than October 3, 2016:

> Contrary to any argument offered by Defendant, this Court finds GreenbergFarrow withdrew from ENGenuity on October 3, 2016, which was confirmed in the testimony of Mr. Johnston. On that date, GreenbergFarrow ceased providing any contribution to ENGenuity. GreenbergFarrow submitted oral and written notification terminating its membership interest and any relationship with the new business. The evidentiary record established on that date, GreenbergFarrow abandoned its minority interest in ENGenuity and left the new business solely in Flor's hands to salvage without any aid or assistance. This Court rejects any suggestion that a minority member may abandon its interest, obligations, and responsibilities by voluntarily withdrawing from an LLC and subsequently claim an ownership interest in a business that has been ignored for four years. GreenbergFarrow has not contributed anything to ENGenuity since withdrawing from the business. The express words and conduct of GreenbergFarrow demonstrate the voluntarily disassociation from ENGenuity on October 3, 2016 and justify the declaratory relief sought by the Plaintiffs.

Da36-37.[11]

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[11] Defendant's attack on the colloquial references of The Honorable Owen C. McCarthy, J.S.C. to Defendant's withdrawal as an "abandonment" of membership in ENGenuity is little more than grasping at straws. See Db. 61; Da19. Over a week of testimony, dozens of trial exhibits and a detailed twenty-three page January 29, 2021 Order make clear that the trial court did not "confuse or conflate" any statutory concepts. Db.24-25, Db. 54-55.

Drawing upon other, substantial documentary and testimonial evidence adduced at trial, the court below also detailed Defendant's *pre*-termination wrongful conduct warranting disassociation, pursuant to N.J.S.A. 42:2C-46(e)(1):

> GreenbergFarrow . . . agreed to fund enumerated operating expenses for Plaintiffs, including salary, benefits, retaining legal counsel, human resources, accounting, and other day-to day expenses. Shortly after J2's execution, Defendant forwarded Flor a series of documents attempting to usurp control of ENGenuity from Flor and place control with GreenbergFarrow. The improper attempt to seize control of day-to-day operations is most clearly demonstrated in the Letter of Intent, setting forth twenty-two categories of decision making that were being transferred from Flor to GreenbergFarrow. The enumerated items were never discussed by the parties during the negotiations preceding the execution of J2. Moreover, Flor and Mr. Johnson [*sic*] testimony confirmed the execution of the Letter of Intent would have essentially shifted control from the majority member to the minority member.

Da37.

> GreenbergFarrow unilaterally terminated its membership interest in ENGenuity and any financial obligation under J2 on September 9, 2016. Despite the clear communication terminating GreenbergFarrow's interest, Flor continued to negotiate in good faith with the Defendant concerning the proposed language of the Letter of Intent in a last chance attempt to save the business relationship. However, and after failing to reach an agreement, GreenbergFarrow provided the final notice of termination of its membership interest in ENGenuity on October 3, 2016. Following this date, GreenbergFarrow provided no contributions and/or assistance to the operation of ENGenuity - despite the clear obligations identified in J2. GreenbergFarrow abandoned ENGenuity and left the business to Flor. The pre-termination conduct of improperly and unsuccessfully attempt a coup to seize control from the majority member amounts to pre-termination wrongful conduct warranting expulsion.

Da38.

Finally, the same record evidence amply demonstrated Defendant's *post*-termination conduct that materially and adversely affected ENGEnuity's business and warranted disassociation, pursuant to N.J.S.A. 42:2C-46(e)(3):

> Moreover, GreenbergFarrow's post-termination conduct materially and adversely affected ENGenuity's business operations. Since October 3, 2016, GreenbergFarrow has offered nothing to the LLC. Flor described at length ENGenuity's struggles caused by GreenbergFarrow's conduct. Despite the clear contractual obligations in *J2* concerning the unconditional and guaranteed financial contributions, GreenbergFarrow walked away from the left the company leaving it on the brink of financial ruin and Flor teetering on personal bankruptcy.
>
> Mr. Johnston's testimony confirmed GreenbergFarrow's obligation to pay Flor's salary and the operational expenses of ENGenuity, which was ignored by breaching of the contract and the withdrawal from the LLC.

Da38.

Ultimately, the trial court observed that Defendant's persistent argument at trial and in connection with its post-trial oral arguments on the cross-motion, i.e., that it did not engage in "wrongful conduct," was "contrary to the evidence adduced at trial[.]"Da39. Thus, the trial court made the following findings of fact and conclusions of law in support of its grant of Plaintiff's post-trial motion:

> Regardless of which statutory section is reviewed, the testimony of two senior officers of GreenbergFarrow confirmed that it walked away from ENGenuity in October 2016 and has ignored the new business in which it claims an economic interest. Their testimony is relevant and serves as a basis for expulsion under Section 42:2C:46(a) and Section 42:2C:46(e), which was pled in the Amended Complaint.

Da40.

> The conduct described throughout this opinion demonstrates that GreenbergFarrow engaged in wrongful conduct that adversely and materially affected the limited liability company's business; it will fully committed a material breach of the operating agreement (J2); and it engaged in conduct relating to the limited liability company business which makes it not reasonably practicable to carry on the business of the limited liability company. Moreover, the record confirms GreenbergFarrow voluntarily withdraw and disassociated itself from ENGenuity on October 3, 2016, thereby negating any equitable claim for reimbursement/payment of the fair market value of the LLC. Accordingly, Plaintiffs' request for declaratory relief is granted and it is ordered that GreenbergFarrow is expelled and disassociated from ENGenuity on October 3, 2016, without payment or consideration of the underlying membership interests.

Da41.

Against such a clear and corroborated trial record, the January 29, 2021 Order also acknowledges that the trial court considered the very same "forfeiture" argument in Defendant's February 18, 2020 opposition to Plaintiffs' cross-motion for declaratory relief as Defendant rehashes in the instant appeal. See Db. 61-62.[12] The trial court thoughtfully distinguished the facts and legal reach of IE Test, LLC v. Carroll, 226 N.J. 166, 179, 140 A.3d 1268 (2016), despite Defendant's tortured attempt to extend it to the wildly dissimilar facts of this action, see Db. 57-69, and this Court should do the same.

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[12] The Court is respectfully referred to Plaintiffs' Appendix where all such matters were previously presented to and considered by the trial court. See Pa1-Pa184.

Curiously, with no new law or facts available to it on appeal, Defendant clings to the same vague and misleading position that N.J.S.A. 42:2C-47 provides a statutory "sword" for Defendant to offset its breach and damages with a reward of a 49% membership interest in ENGenuity. Such a disjunctive remedy does not (and cannot) exist. Messrs. Ghadran and Johnston both testified that Defendant's membership interest was based on it funding ENGenuity's operations, which, if all budgeted employee hires were made, would cost approximately $2,000,000.00 in ENGenuity's initial two years. See Da1012-1020 (detailing each operational budget line item that the parties exchanged, reviewed and agreed to); Da39-40; Db. 62. That funding was never provided. See Da1186-1197. Five years later, the trial considered this argument and held that, as a matter of equity, Defendant's documented "conduct precludes any requested relief." Da40-41.

B. Defendant's "Waiver" Argument Is Not Properly Before This Court And The Doctrine Has No Application To This Dispute

Defendant's appeal advances nothing to demonstrate the trial court's error or to otherwise support reversal. In particular, Defendant's "waiver" argument is plucked from thin air and falls flat. First, waiver was not presented at the trial level, and, therefore, is not properly before this Court. See Daswani v. Outback Steakhouse, No. A-4620-18T2, 2020 N.J. Super. WL 7134882, *4 (App. Div. Dec. 7, 2020) (citing Housing Auth. Of Newark v.

Sagner, 142 N.J. Super. 332, 337 (App. Div. 1976) ("It is well settled that, absent a compelling reason, appellate courts will decline to consider questions or issues not properly presented at the trial level when an opportunity for such a presentation is available.")). Consequently, the Court should reject same. Second, the cases cited by Defendant are inapposite. Petrtillo v. Banchenberg, 263 N.J. Super. 472, 478-80 (App. Div. 1993), involved a question of whether certain acts by the plaintiff constituted a waiver of her right to cancel a land sale contract. Shebar v. Sanyo Business Corp., 111 N.J. 276, 291 (1988), presented a question of whether a plaintiff intended to waive his wrongful termination claims by accepting four checks as termination pay. County Chevrolet v. North Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983), presented a question of whether a plaintiff had waived notice of a planning board determination before commencing legal action relating to that determination. Each of those cases, however, involved a relinquishment of a right in exchange for something.

Waiver has no application to Defendant's unilateral election to terminate and withdraw from ENGenuity five years ago following its breach. Not surprisingly, Defendant's brief makes no effort to connect its irrelevant legal authorities to the RULLCA or to any facts presented at trial – the record evidence. Defendant instead demurs, "there was no proof that Greenberg Farrow knowingly and intentionally relinquished its rights to Engenuity." Db. 64. As this approach requires the Court to ignore the entire trial record, this is not even a close call. Whatever purported proofs Defendant relies upon to now argue waiver, they remain a mystery known only to it. As the trial court observed:

> This Court rejects any suggestion that a minority member may abandon its interest, obligations, and responsibilities by voluntarily withdrawing from an LLC and subsequently claim an ownership interest in a business that has been ignored for four years. GreenbergFarrow has not contributed anything to ENGenuity since withdrawing from the business. The express words and conduct of GreenbergFarrow demonstrate the voluntarily disassociation from ENGenuity on October 3, 2016 and justify the declaratory relief sought by the Plaintiffs.

Da36-37.

C. Defendant's "Windfall Forfeiture" Arguments Are A Myth

Defendant liberal use of the "windfall" term throughout its brief[13], as if it has some rhetorical power, is wrong in both definition and application. Indeed, it is a myth. Defendant's reliance on Correa v. Maggiore, 196 N.J. Super. 273, 283-384 (1984) makes the foregoing conclusion clear.

Correa involved the Appellate Court's consideration of a jury charge and the appropriate measure of damages in a fraud or concealment case. In sum, a plaintiff in Correa purchased a house from a defendant for $25,000.00 and later commenced an action for damages allegedly caused by "defendant's deliberate concealment of

[13] See Db. 1, 3, 18, 24, 43, 51-54.

material facts pertaining to latent defects in certain residential premises.” Id. at 275. The jury awarded the plaintiff $33,000.00. After examining the “out-of-pocket” and “benefit-of-the-bargain” rules and decisional law, the Appellate Court determined that it was an error for the trial court to “charge[] the jury that the reasonable costs of repairs were recoverable if they naturally flowed from defendant's misconduct[,]” given the age, condition and $25,000 purchase price of the home. Id. at 284.

The Correa court rejected restoration costs as a measure of damages on that construction contract based on the principle of avoiding economic waste. Consequently, the facts and legal proposition of Correa are plainly inapposite. Moreover, on the facts of *this* case, Correa does not support Defendant’s generic incantations that a “windfall is improper as a matter of law” or its proverb-twisting contention that “[t]he law does not permit Plaintiffs to have their cake and eat it too.” Db. 52.

Notwithstanding the foregoing, Defendant insists on appeal that because a jury had determined that Defendant was liable and awarded damages, and the trial court relied on that evidentiary record for disassociation purposes, it would be inequitable for Defendant to pay money damages for breach and “forfeit” its equity in the company it left five years ago. See Db. 52-53. Given the detailed trial record of *pre*- and *post*-termination misconduct by Defendant, its new equitable argument on appeal, while not properly before the Court,[14] also strains credulity given that Defendant did not itself "do equity." See Morsemere Fed. Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637, 645 (App. Div. 1986). The appeal raises nothing to demonstrate that the trial court erred in declining to ignore Defendant's proven unclean hands.

D. This Court Should Affirm That Equitable Relief Is Not Available To Defendant

Finally, Defendant's reliance, for the first time on appeal, on the equitable maxim that "equity abhors a forfeiture" is also wide of the mark. Defendant ignores that after seven days of trial, the jury learned that Defendant, at the direction of its top officers, willfully and intentionally breached the contract. The trial record supported the conclusion that Plaintiffs suffered damages that were "a reasonably certain consequence of the breach." See Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1, 14 (2007) (quoting Donovan v. Bachstadt, 91 N.J. 434, 445 (1982)). These evidentiary materials also made clear that Defendant voluntarily terminated its relations with Plaintiff and permanently withdrew as a member of ENGenuity in October 2016. See Da 36, 38.

[14] A cursory review of Defendant's opposition to Plaintiff's cross-motion for declaratory relief confirm its equitable relief argument was not raised below.

Accordingly, the appeal fails to establish that the trial court erred in awarding declaratory relief in favor of Plaintiffs, and the January 29, 2021 Order should be affirmed.

## CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully urge this Court to affirm the: (i) trial court's April 4, 2019 Order denying summary judgment to Defendant; (ii) trial court's January 29, 2021 Order denying Defendant's motions for judgment notwithstanding the verdict, for a new trial, or, in the alternative, for remittitur; and (iii) trial court's January 29, 2021 Order granting Plaintiffs' cross-motion for declaratory relief disassociating Defendant as a member of ENGenuity on October 3, 2016, without payment or consideration of the underlying membership interests.

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By: Owen A. Kloter
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Dated: October 29, 2021

# APPENDIX

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|---|---|
| JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>GREENBERG FARROW ARCHITECTURE INCORPORATED, ESMAIL GHADRDAN, and KEITH JOHNSTON,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY<br><br>DOCKET NO.: MON-L-1021-17<br><br>Civil Action |

**PLAINTIFFS' BRIEF IN SUPPORT OF CROSS-MOTION FOR DECLARATORY JUDGMENT EXPELLING OR DISASSOCIATING FORMER MEMBER GREENBERG FARROW ARCHITECTURE INC. FROM ENGENUITY INFRASTRUCTURE, LLC**

## PRELIMINARY STATEMENT

Plaintiffs Jaclyn Flor and ENGenuity Infrastructure LLC ("ENGenuity") (collectively, the "Plaintiffs"), by and through their counsel, Sichenzia Ross Ference LLP, make this *post*-trial cross-motion for an order declaring the expulsion and disassociation of Defendant GreenbergFarrow Architecture, Incorporated ("GreenbergFarrow") from ENGenuity effective October 3, 2016, pursuant to Section 42 of the New Jersey Revised Uniform Limited Liability Act (the "RULLCA"), following the conclusion of a jury trial on October 17, 2019. The jury issued unanimous (6-0) verdicts in favor of Plaintiffs on claims of breach of contract and breach of the implied covenant of good faith and fair dealing.[1] For the reasons set forth more fully below, the record evidence is replete with *undisputed* testimonial and documentary evidence warranting such order, including oral and written notice from GreenbergFarrow of its immediate membership termination and myriad acts and instances of *pre*-termination wrongful conduct that materially and adversely harmed ENGenuity and *post*-termination conduct that was so disruptive as to render ENGenuity's post-termination operations not reasonably practicable with GreenbergFarrow as a member.

## STATEMENT OF FACTS[2]

On or about June 10, 2016, Ms. Flor executed a contract ("Contract"), pursuant to which she was to be the majority and controlling member holding fifty-one percent (51%) of the membership interest in the entity that would become ENGenuity. GreenbergFarrow was to be the minority member, holding forty-nine percent (49%) of the member interest in ENGenuity. (See Oct. 9, 2019 A.M. Tr.,[3] at 86:2-5; see also Jt. Ex. 2.) ENGenuity was formed on June 30, 2016, and Ms. Flor started working as its sole employee, President and Chief Executive Officer.

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[1] Based on an oral decision of Your Honor rendered outside of the jury, the jury was not presented with jury instructions or a verdict sheet relating to the Amended Complaint's Sixth Cause of Action for declaratory judgment as to violations of the Act; rather, after the verdict (and again outside of the presence of the jury), Your Honor directed Plaintiffs to make the instant *post*-trial cross-motion for expulsion under the Act for the Court's determination. This cross-motion now comes before Your Honor pursuant to a revised briefing schedule with opposition due on February 14, 2020 and reply in support of this application due on February 28, 2020.

[2] A trial was conducted before The Honorable Owen McCarthy, Superior Court of New Jersey, Law Division, Civil Part, Monmouth County, on October 7, 8, 9, 10, 15, 16 and 17, 2019. Plaintiffs-cross-movants presume the Court's familiarity with the facts of same and limits its fact summary to those touching upon the issues in the instant brief. All trial transcripts have been filed electronically and served on the Court, in hard copy form, for filing under separate cover dated January 17, 2020.

[3] All references to the trial transcripts are hereafter cited as "Tr." All references to Plaintiffs' and Defendant's trial exhibits and joint trial exhibits admitted in evidence are hereafter cited as "P's Ex.", "D's Ex." And "Jt. Ex.", respectively.

(See Oct. 9, 2019 A.M. Tr., at 91:8-11.) ENGenuity was a start-up with no prior history of operations was formed to engage in public sector engineering project work in New Jersey, which was the professional province only of Ms. Flor *not* GreenbergFarrow.

Pursuant to the Contract, GreenbergFarrow agreed to fund enumerated operating costs and expenses of Ms. Flor and ENGenuity, including salary, benefits, hiring, insurance, legal counsel, human resources, payroll, marketing, accounting, IT and office lease space and equipment and other day-to-day operating expenses, during ENGenuity's initial two (2) years of operations. (See Jt. 2.) Ms. Flor was the sole employee and controlling and managing member of the limited liability company. For its financial and other support of ENGenuity during its initial two (2) years, GreenbergFarrow would obtain a minority member interest in the company.

Notwithstanding the express delineation of titles, duties and majority (and operational) control set forth in the Contract, on July 27, 2016, approximately a month into ENGenuity's operations, GreenbergFarrow sent Ms. Flor a proposed Letter of Intent ("LOI"). (See id., at Tr., 155-156; see also Jt. Ex. 3.) Through the LOI, GreenbergFarrow demanded that Plaintiffs agree to execute myriad other documents extraneous to the Contract, including an operating agreement, an employment agreement (in favor of GreenbergFarrow), a non-solicitation agreement (in favor of GreenbergFarrow), a management agreement (in favor of GreenbergFarrow) and a loan agreement (in favor of GreenbergFarrow). Despite that, GreenbergFarrow had agreed to, and subsequently did, remove any demand relating to an operating agreement from the Contract, and the other extraneous documents set forth in the LOI had *never* been discussed or demanded during the earlier contract negotiations. At trial, GreenbergFarrow admitted that such documents would greatly alter the terms and effects of the Contract. (See Oct. 15, 2019 Tr., at 52:22-54:25.)

Moreover, GreenbergFarrow *never* presented Plaintiffs with any such documents – they simply insisted that Plaintiffs agree to the concept of executing specific types of extraneous documents.

Ms. Flor testified that, through the LOI, the minority member also sought to wrench majority control away from Ms. Flor on behalf of ENGenuity in favor of unanimous consent authority for twenty-two (22) categories of decision-making that would affect essentially every aspect of ENGenuity's business operations. These included: incurring indebtedness; assigning property; handling capital contributions of members; approving employee hiring; approving management agreements; authorizing and making distributions; engaging in business transactions, including, but not limited to, leasing or selling, transferring, assigning or disposing assets; issuing checks above $10,000.00; making payments for accounts payable above $2,500.00; purchasing or terminating insurance; leasing or purchasing office space or real estate; revising accounting or company policies or procedures; or entering into any form of agreement that, in the course of operating ENGenuity, would touch upon any of the foregoing subjects. (See Jt. 3.) Furthermore, GreenbergFarrow demanded the right to utilize a "call option" pursuant to which it would have the right to purchase the majority membership interest but extended the payment period over ten (10) years and – after ENGenuity's second anniversary – demand that Ms. Flor purchase the minority membership interest (a "put option") with payment due within ninety (90) days to three (3) years. (See id.) GreenbergFarrow sought the right, after the second anniversary, to demand to be purchased by the majority holder at a price determined by GreenbergFarrow, which – if not accepted by the majority – would liberate GreenbergFarrow to sells its minority interest to any third-party with no further recourse to the majority. (See id.) [4]

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[4] On direct examination, Mr. Ghadrdan agreed that, with respect to the LOI's 22 categories of decision-making as to which GreenbergFarrow sought equal voting rights with the majority member, "put" and "call" options in favor of GreenbergFarrow and that majority member alone

Testimony and documents adduced at trial also demonstrated that, although Ms. Flor started working for the new startup entity in mid-June 2016, GreenbergFarrow withheld payments of her guaranteed and unconditional salary, benefits, bonus and reimbursements month-after-month despite her pressing for such monies to be released. The record evidence demonstrated that GreenbergFarrow failed and refused to pay for most day-to-business operating expenses and costs incurred and insurance that was critical for ENGenuity to start contract work it had already secured as early as July 2016. Importantly, the documentary and testimonial evidence in the record also demonstrated that the minority member's wrongful conduct in these regards coincided with Plaintiffs objecting to the scope and scale of the LOI that GreenbergFarrow foisted upon Plaintiffs in late July 2016 and persisted through August and into mid-September. Indeed, the evidence showed that GreenbergFarrow conditioned any of its funding obligations upon Ms. Flor's agreeing to "move forward with our LOI negotiation." (See P's Ex. 37.) The minority member was holding ENGenuity's operating funds, and the viability and survival of ENGenuity, hostage.

Ms. Flor testified that the effect of the LOI would be to eviscerate her majority control and management over the entity in which she was the only employee and proficient, subject matter professional. She testified that, under the LOI, GreenbergFarrow could compel ENGenuity to purchase a wide range of day-to-day operating services from its minority member despite GreenbergFarrow's contractual obligation to fund those operating services as determined by ENGenuity. (See Oct. 9, 2019 A.M. Tr., at 179:19-180:1.) This was not just a "power grab"; Ms. Flor testified that the minority member's management fee demand of ENGenuity would

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execute a non-solicitation agreement, employment agreement and management agreement, these terms would in fact change nature and terms of the parties' membership in the contract ENGenuity and how it operates. (See Oct. 15, 2019 Tr., at 52:22-54:25.)

create an annual account payable for ENGenuity in favor of GreenbergFarrow of approximately $150,000.00 or $300,000.00 for the initial two-year Contract term. (See Oct. 9, 2019 A.M. Tr., at 179:16-183:10.)

Ms. Flor also testified that the LOI would require the majority member to invest her own capital into ENGenuity, and to finance this mandatory investment by her taking a loan from, and becoming a debtor to, the minority member. She testified that the LOI contradicted the terms of the Contract and how the business would operate under the Contract, and, if agreed to, would violate New Jersey's Women Business Enterprise ("WBE") certification requirements rendering that credential unobtainable for ENGenuity. (See Oct. 9, 2019 A.M. Tr., at 157:9-14-161:8, 164:17-165:16; see also Oct. 9, 2019 P.M. Tr., at 202:2-203:2.) Nonetheless, Plaintiffs continued to perform their contractual duties and circulated drafts of proposed LOI revisions to GreenbergFarrow. GreenbergFarrow never responded to Plaintiffs' proposed revisions. (See Oct. 9, 2019 P.M. Tr., at 201.)

On direct examination, Mr. Johnston *admitted* that, GreenbergFarrow had, under the Contract, agreed to fund both Plaintiffs for a two-year period of time.

> Q: And so was it from your perspective internally consistent that if the company was going to commit to fund her a salary amount equal to $350,000 over two years that it was going to fund the business for that period of time. [*sic*]
> A: Yes.
>
> Q: Would you agree or disagree that Greenberg Farrow [*sic*] had committed to fund the operations of Engenuity [*sic*] Infrastructure for that initial two-year period?
> A: I would agree.

(See Oct. 10, 2019 A.M. Tr., at 149:7-12; 181:21-25.)[5]

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[5] Mr. Ghadrdan also testified on direct examination that GreenbergFarrow had agreed to fund ENGenuity. (See Oct. 10, 2019 P.M. Tr., at 218:6-11; see also Oct. 15, 2019 Tr., at 48:4-8.)

He also admitted that the minority member had agreed to fund ENGenuity's insurance but failed to do so. (See id., at 155:14-156:7.)

As to the LOI, Mr. Johnston further *admitted* that, as to those 22 categories of decision-making, GreenbergFarrow demanded the right to approve all such business decisions in order for ENGenuity to operate. (See Oct. 10, 2019 A.M. Tr., 169: 18-25.) He conceded that GreenbergFarrow demanded "put" and "call" rights, and demanded that the majority member sign an employment agreement, that ENGenuity sign a management agreement in favor of GreenbergFarrow and that ENGenuity agree to pay GreenbergFarrow the management fee for the services – just as Ms. Flor had testified. (See id., at 170:15-172:12.)

On September 9, 2016, with no further explanation, GreenbergFarrow notified Plaintiffs, in writing, of its immediate termination of its membership interest in ENGenuity and would not continue their contractual relationship. (See id., 188:20-191:7; see also P's Ex. 36.) GreenbergFarrow had conditioned its performance of its contractual obligations that underpinned its membership interest on Plaintiffs resolving business issues and concerns raised by GreenbergFarrow in the LOI – *not* concerns arising from the Contract. (See Oct. 9, 2019 P.M. Tr., at 209:11-210:17, 211:8-11; see also P's Ex. 37.)[6]

Evidence at trial, however, also demonstrated that, after Plaintiffs agreed to continue discussions *post*-September 9, 2016 as to the non-binding LOI, GreenbergFarrow persisted in its course of wrongful conduct. The minority member demanded control over ENGenuity's

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[6] Mr. Ghadrdan testified that he had made the decision to terminate GreenbergFarrow's membership in ENGenuity and all funding of Plaintiffs, despite that, when he did so, ENGenuity was operational. (See Oct. 10, 2019 P.M. Tr., at 229:21-23; see also Oct. 15, 2019 Tr., at 68: 14-69:23.) He also confirmed that, at his direction, GreenbergFarrow withdrew the funds it had originally deposited into ENGenuity's bank after GreenbergFarrow had terminated its membership in ENGenuity.

financial books and records and accounting, and objected to ENGenuity's engaging an independent accountant for the company – despite the fact that such independence would be examined during ENGenuity's anticipated WBE certification application process to ensure that ENGenuity was a bona fide women-owned and -controlled business. (See id., at 213:20-215:5; P's Exs. 39 and 40.)

On October 3, 2016, for a last time, GreenbergFarrow terminated its membership interest in ENGenuity.[7] Mr. Johnston testified that GreenbergFarrow terminated its membership in and relationship to ENGenuity because GreenbergFarrow could not resolve the "issues" presented in its non-binding LOI, including the WBE certification process. (See Oct. 16, 2019 A.M. Tr., at 115:22-117:7.) Yet, he ultimately conceded that the WBE credential was *not* necessary for ENGenuity to operate. (See id., at 151: 8-10, 152:17-153:6.) Simply, GreenbergFarrow terminated its membership in ENGenuity because it did not want to be in business with

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[7] During Plaintiffs' case-in-chief, Mr. Johnston admitted that GreenbergFarrow had terminated its membership in ENGenuity on September 9, 2016. He testified that he had done so, in writing, and with the approval of GreenbergFarrow's chief executive officer and chairman, Esmail Ghadrdan:

> Q: Do you remember sending an e-mail to Ms. Flor at or about 4:45 p.m. on Friday evening, the 9th of September terminating the relation - - the membership interest of Greenberg Farrow [*sic*] in Engenuity [*sic*] Infrastructure?
> A: Yes.
> Q: Okay. And when you sent that communication you were authorized to send it?
> A: Yes.
> Q: Who authorized that?
> A: Mr. Ghadrdan.
> Q: Okay. So is it safe for me to assume that as of at least September 9th Greenberg Farrow [*sic*] has terminated its membership interest in this entity?
> A: Yes.

(Oct. 10, 2019 A.M. Tr., at 156:19-22.)

He further acknowledged that on October 3, 2016, for a second and final time, GreenbergFarrow again terminated its membership in ENGenuity. (See id., at 117:19-23.)

ENGenuity as a minority member in the public sector market – notwithstanding the terms of the Contract.[8]

> Q: Now, I believe you testified that Greenberg Farrow [*sic*] made the decision not to continue with the relationship because of its evaluation of the negotiations on the letter of intent. Did you testify to that effect at your deposition?
> A: Yes.
> Q: Okay. So it did not terminate the relationship because the nine enumerated terms in the contract were a problem; it terminated because this non-binding letter of intent, which goes to a WBE credential, couldn't be resolved?
> A: Yes.

(Oct. 16, 2019 A.M. Tr., at 153: 22-0154:8.)

*After* terminating its membership interest in ENGenuity a second and final time, *i.e.*, on October 3, 2016, without notice to or authorization or approval from ENGenuity's managing and majority member, GreenbergFarrow *reimbursed itself* for payments it had made on behalf of ENGenuity to vendors for marketing services, which services GreenbergFarrow had agreed to fund in the Contract. (See Oct. 9, 2019 P.M. Tr., at 232:17-234:10; see also Oct. 16, 2019 Tr., at 10:12-15, 10:22-11:1.)

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[8] As Ms. Flor's unchallenged testimony made clear, in the end, GreenbergFarrow simply did not want to be engaged in business with ENGenuity or Ms. Flor. GreenbergFarrow never presented Plaintiffs with any writing reflecting what operating expenses or types of expenses GreenbergFarrow, as a minority member, was prepared to fund on behalf of ENGenuity. (See Oct. 10, 2019 A.M. Tr., at 19: 13-19.) In fact, GreenbergFarrow ultimately failed to present Plaintiffs with any writing extraneous to the contract as a condition of GreenbergFarrow continuing its membership in ENGenuity and funding its operations. (See id., at 19:20-24.)

In addition, when pressed by Plaintiffs' Counsel to identify for the jury any writing from Plaintiffs to GreenbergFarrow that demanded that GreenbergFarrow set aside $2,000,000.00 "in June or July or August or September or any point up until the October 3 termination from Greenberg Farrow [*sic*]," Mr. Johnston conceded that none of the documents in evidence, including the original and the draft, revised LOIs, contained any such demand for a $2,000,000.00 set aside, despite GreenbergFarrow's contention that this mystery "set aside" was an obstacle to their continued funding obligations in favor of and membership in ENGenuity. (See Oct. 16, 2019 A.M. Tr., at 154:13-157:2, 163:12-16; see also Jt. Ex. 3; P's Exs. 30, 66 and 67; D's Ex. 7.)

The parties also stipulated to certain facts that were admitted into the record and read to the jury, including, in part, the following:

> Edmund Truty caused $150,000 to be wired from Greenberg Farrow [*sic*] Architecture Incorporated's account to ENGenuity Infrastructure LLC's account on August 11th, 2016.
>
> On November 14th, 2016, Edmund Truty caused ENGenuity Infrastructure LLC to wire $12,830 from its account to Greenberg Farrow [*sic*] Architecture Incorporated account.
>
> On November 14th, 2016, Edmund Truty caused ENGenuity Infrastructure LLC to wire $83,318.82 to Greenberg Farrow [*sic*] Architecture Incorporated, and he was directed to do so by Esmail Ghadrdan.
>
> Edmund Truty did not cause ENGenuity Infrastructure LLC to make any payments for its accounts payable after November 14th, 2016.
>
> On November 14th, 2016, Edmund Truty recorded the $83,318.82 wire to Greenberg Farrow [*sic*] Architecture Incorporated as a 'loan repayment', and he was directed to do so by no one.

(Oct. 16, 2019 A.M. Tr., at 8:18-21, 10:12-15, 10:22-11:1, 11:6-13.)

In the approximately three (3) years that have elapsed since GreenbergFarrow's disassociation, ENGenuity has subsisted solely on the basis of personal investments and loans to the company by Ms. Flor, net proceeds from contracts performed by ENGenuity's employees, a company credit card and a small business line of credit secured by all of Ms. Flor's real and personal property and assets. (See Oct. 9, 2019 P.M. Tr., at 235:15-238:25, 252:12-19; see also P's Exs. 44, 48, 49, 50, 51, 52, 53, 60, 61 and 62.) As a result of GreenbergFarrow's refusal to pay the contractually-guaranteed salary of the majority member, and to fund both the advertised employee positions in year 1, as well as the additional, projected employee hires for year 2, Ms. Flor's income fell from approximately $170,000.00 to a low of $13,700.00, and ENGenuity was forced to allocate all revenue toward funding its skeletal workforce and operations. Those figures are reflected on ENGenuity's tax returns, which Ms. Flor testified she had personally reviewed and affirmed to be true and correct (and also had submitted on behalf of ENGenuity with its WBE certification application to the State of New Jersey). (See Oct. 9, 2019 P.M. Tr., at 240:6-249:7; P's 54, 55 and 56.) At all relevant times, ENGenuity has been a single-member limited liability company. (See Oct. 9, 2019 P.M. Tr., at 247:3-13; see also Oct. 10, 2019 A.M. Tr., at 84:17-19; Oct. 16, 2019 Tr., at 36:14-19.) Without the full, multi-year funding support from GreenbergFarrow to fund, among other critical needs, employee hires that had been advertised and projected for years 1 and 2, ENGenuity was unable to participate in certain Requests for Qualifications ("RFQs") and Requests for Proposals ("RFPs") because it could not hire employees to service the scope and breadth of the projects. (See Oct. 9, 2019 A.M. Tr., at 104:10-111:19; see also Oct. 10, 2019 A.M. Tr., 13:10-14: 5, 37:18-39:6.)

The minority member has failed and refused to make any payments against ENGenuity's accounts payable after withdrawing all funds from ENGenuity's bank account, and it terminated its work and support of ENGenuity with respect to pending and completed RFQs and RFPs. (See Oct. 9, 2019 P.M. Tr., at 253: 20-23.) GreenbergFarrow also failed and refused to work with the majority member on subcontract work that, in or around July 2016, ENGenuity had secured from Ms. Flor's former employer, T & M Associates. (See Oct. 9, 2019 A.M. Tr., at 127:11-129:12; see also P's Ex. 6.) GreenbergFarrow failed and refused to pay for ENGenuity's insurance, which coverage was required for ENGenuity to do *any* public sector work in New Jersey and, in the broadest terms, cut-off all funding of business operations and all communications with Plaintiffs after October 3, 2016. (See Oct. 10, 2019 A.M. Tr., at 24:19-24.) GreenbergFarrow has not serviced or supported any RFQs or RFPs that ENGenuity had participated in before GreenbergFarrow's disassociation. (See Oct. 9, 2019 P.M., Tr., at 228:2-5.) Since October 3, 2016, GreenbergFarrow has been a complete stranger to the company. (See id., at 227:7-228:1.)

In the broadest terms, GreenbergFarrow has *never* again contacted ENGenuity or, in any manner, participated in its business, operations, governance, control, policies or operations. (See affidavit of Jaclyn Flor, dated January 16, 2020, at ¶¶ 10-21 ("Flor Affidavit").

## LEGAL ARGUMENT

### POINT I

### A DECLARATORY JUDGMENT THAT GREENBERGFARROW IS EXPELLED AND DISASSOCIATED FROM ENGENUITY INFRASTRUCTURE, LLC EFFECTIVE OCTOBER 3, 2016 SHOULD BE ENTERED.

The Declaratory Judgments Act, N.J.S.A. § 2A:16-50 *et seq.*, provides, in relevant part, that "[a]ll courts if record in this state shall, within their respective jurisdictions, have power to declare rights, status and other legal relations, whether or not further relief is could be claimed." N.J.S.A. § 2A:16-52.

Sections 42:2C-46(a) and (e)(1) and (3) of the Revised Uniform Limited Liability Company Act, N.J.S.A. § 42:2C-1 *et seq.* ("RULLCA"), provide that a member of a limited liability company, upon judicial finding, shall be expelled or disassociated from the company under a number of alternative methods, including, in relevant part, the following:

> Events Causing Dissociation. A person is dissociated as a member from a limited liability company when:
>
> **(a)** The company has **notice of the person's express will to withdraw as a member**, but, if the person specified a withdrawal date later than the date the company had notice, on that later date;
>
> **(e)** On application by the company, the person is expelled as a member by judicial order because the person:
>
> **(1)** has engaged, or is engaging, in **wrongful conduct** that has adversely and materially affected, or will adversely and materially affect, the company's activities;

> **(3)** has engaged, or is engaging, in conduct relating to the company's activities which makes it **not reasonably practicable** to carry on the activities with the person as a member;

Id. (emphasis added.)

While there is still scant case law on expulsion or disassociation of a limited liability member under the RULLCA, in IE Test, LLC v., Carroll, 226 N.J. 166 (2016), the Court of Appeals reviewed a trial and appellate courts' determinations concerning a defendant-member's expulsion from a limited liability company, pursuant to subsections (e)(1) and (3). "To disassociate an LLC member from the LLC under subsection 3(a), a court must find that the member's wrongful conduct has 'adversely and materially affected' the company's business." IE Test, 226 N.J. at 181. This requires evidence of harm caused to the business in the past. As to Subsection (e)(3), the IE Test court observed that "the LLC member's conduct must be so disruptive that it is "not reasonably practicable" to continue the business unless that member is expelled." Id. at 182. This means "unfeasible, despite reasonable efforts, to keep the LLC operating while the disputed member remains affiliated with it." Id. at 183.

The IE Test court laid out the following seven-factor test to be considered, "with no requirement that all factors support expulsion, and no single factor determining the outcome", for expulsion:

1. the nature of the LLC member's conduct relating to the LLC's business;
2. whether, with the LLC member remaining a member, the entity may be managed so as to promote the purposes for which it was formed;
3. whether the dispute among the LLC members precludes them from working with one another to pursue the LLC's goals;
4. whether there is deadlock among the members;
5. whether, despite deadlock, members can make decisions on the management of the company pursuant to the operating agreement or in accordance with applicable statutory provisions;
6. whether, due to the LLC's financial position, there is still a business to operate; and

7. whether continuing the LLC, with the LLC member remaining a member, is financially feasible.

Id. at 183.

1. GreenbergFarrow Admits That It Provided Oral And Written Notice Of Its Membership Termination To ENGenuity

Under Subsection 3(a) of the RULLCA, termination of a member's interest in a limited liability company is effective if it "has notice of the person's express will to withdraw as a member[.]" Id. At trial, Ms. Flor testified that Mr. Johnston initially provided notice of its termination of its membership in ENGenuity on September 9, 2016 and a second, final time on October 3, 2016. (See Oct. 16, 2019 A.M. Tr., at 15:13-20, 45:6-20.) Similarly, on direct examination, GreenbergFarrow *admitted* that it had provided written notice of its termination to ENGenuity:

> Q: Okay. Did you participate in -- withdrawn. Do you remember sending an e-mail to Ms. Flor at or about 4:45 p.m. on Friday evening, the 9th of September terminating the relation -- the membership interest of Greenberg Farrow in Engenuity [*sic*] Infrastructure?
> A: Yes.
> Q: Okay. And when you sent that communication you were authorized to send it?
> A: Yes.
> Q: Who authorized that?
> A: Mr. Ghadrdan.

(Oct. 10, 2019 A.M. Tr., at 156:8-18; see also id., at 163:25-164:4.)[9]

Accordingly, the record evidence is *irrefutable* that on the earlier of September 3, 2016, or the later of October 3, 2016, GreenbergFarrow provided oral and written notice to ENGenuity that it was immediately terminating its membership interest and relationship with ENGenuity. Also, as Mr. Johnston admitted, effective October 3, 2016, GreenbergFarrow had completely

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[9] Indeed, in ruling that the Sixth Cause of Action for an order declaring the expulsion or disassociation of GreenbergFarrow would be withheld from the jury and decided by this Court, Your Honor pointedly summarized the undisputed testimony of the parties, to wit: GreenbergFarrow had terminated its membership, and Ms. Flor has operated ENGenuity exclusively since the later of September 9 or October 3, 2016. (See Oct. 15, 2019 Tr., at 144:2-12.)

disassociated from ENGenuity and its business and has *never* contacted ENGenuity since. (See Oct. 16, 2019 A.M. Tr., at 12-23.) Accordingly, based on the record evidence adduced at trial, the Court should declare GreenbergFarrow expelled and disassociated as of the earlier of September 9, 2016, but not later than October 3, 2016.

2. The Trial Record Contains Substantial Evidence of *Pre*-Termination Wrongful Conduct to Merit Expulsion and Disassociation

Unlike IE Test, in which expulsion was considered on summary judgment, the record evidence of GreenbergFarrow's "wrongful conduct" that materially and adversely affected ENGenuity's business is neither uncertain, disputed or unresolved; rather, the documentary and testimonial evidence was tested on direct- and cross-examination at trial and supported unanimous verdicts in favor of Plaintiffs on breach of contract and breach of the implied covenant of good faith and fair dealing causes of action.

The corpus of the operative facts for the instant cross-motion includes many, if not most, of the facts presented to the jury demonstrating that GreenbergFarrow's conduct was wrong, material and adverse, in relevant part, to ENGenuity and deprived it of the purpose of the formation of the business. Indeed, the minority members' officers testified that GreenbergFarrow's *post*-Contract actions, including its demands in the LOI, if accepted, would have fundamentally changed the business, the members' relationship and the Contract. (See Oct. 10, 2019 A.M. Tr., 169: 18-25, 170:15-172:12; see also Oct. 15, 2019 Tr., at 52:22-54:25.) As detailed above, within months of ENGenuity's formation, GreenbergFarrow had pushed ENGenuity to the brink of business, reputational and financial ruin. (See Oct. 16, 2019 A.M. Tr., at 8:18-21, 10:12-15, 10:22-11:1, 11:6-13; Oct. 9, 2019 P.M. Tr., at 235:15-238:25, 252:12-19; see also P's Exs. 44, 48, 49, 50, 51, 52, 53, 60, 61 and 62.)

Notwithstanding the express delineation of titles, duties and majority and operational control set forth in the Contract, on July 27, 2016, approximately a month into ENGenuity's operations, GreenbergFarrow sent Ms. Flor a proposed Letter of Intent ("LOI"). (See id., at Tr., 155-156; see also Jt. Ex. 3.) Through the LOI, GreenbergFarrow demanded that Plaintiffs agree to execute myriad other documents extraneous to the Contract, including an operating agreement, an employment agreement (in favor of GreenbergFarrow), a non-solicitation agreement (in favor of GreenbergFarrow), a management agreement (in favor of GreenbergFarrow) and a loan agreement (in favor of GreenbergFarrow) – despite GreenbergFarrow's removal of the requirement of an operating agreement during earlier contract negotiations. GreenbergFarrow resurrected the demand and then added the other four (4) agreements to its list of demands. (See Oct. 9, 2019 A.M. Tr., at 157:9-161:8.) At trial, GreenbergFarrow admitted that such documents would greatly alter the terms and effects of the Contract. (See Oct. 15, 2019 Tr., at 52:22-54:25.) Moreover, GreenbergFarrow *never* presented Plaintiffs with any such documents – they simply demanded in the LOI that Plaintiffs agree to same in blank. (See Oct. 9, 2019 A.M. Tr., at 181:16-20.)

Ms. Flor testified that, through the LOI, the minority member also sought to wrest majority control from Ms. Flor on behalf of ENGenuity in favor of unanimous consent authority for twenty-two (22) categories of decision-making that would affect essentially every aspect of ENGenuity's business operations. Those included: incurring indebtedness; assigning property; handling capital contributions of members; approving employee hiring; approving management agreements; authorizing and making distributions; engaging in business transactions, including, but not limited to, leasing or selling, transferring, assigning or disposing assets; issuing checks above $10,000.00; making payments for accounts payable above $2,500.00; purchasing or terminating insurance; leasing or purchasing office space or real estate; revising accounting or company policies or procedures; or entering into any form of agreement that, in the course of operating ENGenuity, would touch upon any of the foregoing subjects. (See Oct. 9, 2019 A.M. Tr., at 157:9-161:8; see also Jt. Ex. 3.) Furthermore, GreenbergFarrow demanded the right to utilize a "call" option, pursuant to which it would have the right to purchase the majority's equity over a ten-year period. It demanded the right, after ENGenuity's second anniversary, to compel the majority member to purchase the minority's equity in ninety (90) days, but no more than three (3) years. (See id.) GreenbergFarrow sought the right, after the second anniversary, to demand to be purchased by the majority holder at a price determined by GreenbergFarrow, which, if not accepted by the majority, would liberate GreenbergFarrow to sell its minority interest to any third-party – with no further recourse to the majority. (See id.) [10]

The evidence adduced at trial also demonstrated that, although Ms. Flor started working for the new startup entity in mid-June 2016, GreenbergFarrow withheld payment of her guaranteed and unconditional salary, benefits, bonus and reimbursements month-after-month despite her pressing for such monies to be released. (See Oct. 9, 2019 A.M. Tr., at 185:20-186:22.) The record evidence demonstrated that GreenbergFarrow failed and refused to pay for most day-to-business operating expenses and costs incurred as well as insurance that was critical for ENGenuity to start contract work it had already secured as early as July 2016. Importantly, the documentary and testimonial evidence in the record also demonstrated that the minority

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[10] On direct examination, Mr. Ghadrdan agreed that, with respect to the LOI's 22 categories of decision-making as to which GreenbergFarrow sought equal voting rights with the majority member, "put" and "call" options in favor of GreenbergFarrow and that majority member alone execute a non-solicitation agreement, employment agreement and management agreement, these terms would in fact change nature and terms of the parties' membership in the contract ENGenuity and how it operates. (See Oct. 15, 2019 Tr., at 52:22-54:25.)

member's wrongful conduct in those regards coincided with Plaintiffs objecting to the scope and scale of the LOI that GreenbergFarrow foisted upon Plaintiffs in late July 2016 and persisted through August and into mid-September. Indeed, the evidence showed that GreenbergFarrow conditioned any of its funding obligations upon Ms. Flor agreeing to "move forward with our LOI negotiation." (See Oct. 9, 2019 P.M. Tr., at 208:24-209:7; see also P's Ex. 37.) The minority member was holding the finances of Plaintiffs – and the viability and survival of ENGenuity – hostage.

Ms. Flor testified that the effect of the LOI would be to eviscerate her majority control and management over the entity in which she was the only employee and proficient, subject matter professional. She testified that, under the LOI, GreenbergFarrow could compel ENGenuity to purchase a wide range of day-to-day operating services from its minority member despite GreenbergFarrow's having been contractually obligated to fund those operating services as determined by ENGenuity. (See Oct. 9, 2019 A.M. Tr., at 179:19-180:1.) This was not just a "power grab"; Ms. Flor testified that the minority member's management fee demanded of ENGenuity would create an annual account payable for ENGenuity in favor of GreenbergFarrow of approximately $150,000.00 or $300,000.00 for the initial two-year Contract term. (See Oct. 9, 2019 A.M. Tr., at 179:16-183:10.)

Ms. Flor also testified that the LOI would also require the majority member to invest her own capital into ENGenuity, and to finance this mandatory investment by her taking a loan from, and becoming a debtor to, the minority member. She also testified that the LOI would violate New Jersey's Women Business Enterprise ("WBE") certification requirements rendering that credential unobtainable for ENGenuity. (See Oct. 9, 2019 A.M. Tr., at 157:9-14-161:8, 164:17-165:16; see also Oct. 9, 2019 P.M. Tr., at 202:2-203:2.) Nonetheless, Plaintiffs continued to work and operate the business and circulated drafts of proposed LOI revisions to GreenbergFarrow. GreenbergFarrow never responded to Plaintiffs' proposed revisions. (See Oct. 9, 2019 P.M. Tr., at 201.)

On direct examination, Mr. Johnston *admitted* that, GreenbergFarrow had, under the Contract, agreed to fund both Plaintiffs for a two-year period of time.

> Q: And so was it from your perspective internally consistent that if the company was going to commit to fund her a salary amount equal to $350,000 over two years that it was going to fund the business for that period of time. [*sic*]
> A: Yes.
>
> Q: Would you agree or disagree that Greenberg Farrow [*sic*] had committed to fund the operations of Engenuity [*sic*] Infrastructure for that initial two-year period?
> A: I would agree.

(See Oct. 10, 2019 A.M. Tr., at 149:7-12; 181:21-25.)[11]

He also admitted that the minority member had agreed to fund ENGenuity's insurance but failed to do so. (See id., at 155:14-156:7.)

As to the LOI, Mr. Johnston *admitted* that, as to those 22 categories of decision-making, GreenbergFarrow demanded the right to approve all such business decisions in order for ENGenuity to operate. (See Oct. 10, 2019 A.M. Tr., 169: 18-25.) He conceded that GreenbergFarrow demanded for itself "put" and a "call" options and demanded that the majority member sign an employment agreement, that ENGenuity sign a management agreement in favor of GreenbergFarrow and that ENGenuity agree to pay GreenbergFarrow the management fee for the services – just as Ms. Flor had testified. (See id., at 170:15-172:12.)

On September 9, 2016, without further explanation, GreenbergFarrow notified Plaintiffs, in writing, of its immediate termination of its membership interest in ENGenuity and that it

[11] Mr. Ghadrdan also testified on direct examination that GreenbergFarrow had agreed to fund ENGenuity. (See Oct. 10, 2019 P.M. Tr., at 218:6-11; see also Oct. 15, 2019 Tr., at 48:4-8.)

would not continue its contractual relationship with same. (See id., 188:20-191:7; see also P's Ex. 36.) GreenbergFarrow had conditioned its performance of its contractual obligations that underpinned its membership interest on Plaintiffs resolving business issues and concerns raised by GreenbergFarrow in the LOI *not* concerns arising from the Contract. (See Oct. 9, 2019 P.M. Tr., at 209:11-210:17, 211:8-11; see also P's Ex. 37.)[12]

In summary, when this Court denied summary judgment on this claim for declaratory relief under the RULLCA, it held, in relevant part, that "the wrongfulness of Defendants' [*sic*] alleged conduct hinges upon whether Defendants were contractually obligated to perform in a certain manner. Because there is a dispute over whether the Letter was a valid contract, there is in turn a dispute over whether Defendants' alleged breaches of the Letter constituted the wrongful conducted required under subsection (e)(1)." (Decision, dated April 4, 2019, Transaction No. LCV2019602599.) On this fact record, the jury unanimously held that GreenbergFarrow had both breached the operative Contract and breached the implied covenant of good faith and fair dealing. This same fact record is replete with evidence of GreenbergFarrow's past, wrongful conduct that harmed ENGenuity's business and expulsion and disassociation effective not later than October 3, 2016 is necessary.

3. The Trial Record Contains Substantial Evidence of *Post*-Termination Disruptive Conduct By GreenbergFarrow To Merit Expulsion and Disassociation

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[12] Mr. Ghadrdan testified that he had made the decision to terminate GreenbergFarrow's membership in ENGenuity and all funding of Plaintiffs, despite that, when he did so, ENGenuity was operational. (See Oct. 10, 2019 P.M. Tr., at 229:21-23; see also Oct. 15, 2019 Tr., at 68: 14-69:23.) He also confirmed that, at his direction, GreenbergFarrow withdrew the funds it had originally deposited into ENGenuity's bank account after GreenbergFarrow had terminated its membership in ENGenuity. (See Oct. 10, 2019 P.M. Tr., at 218:6-11.)

That same fact record established the impact that GreenbergFarrow's conduct had upon ENGenuity's business in the years *after* its termination while ENGenuity struggled to survive and stabilize without *any* assistance, cooperation, participation, support by, or contact with or from GreenbergFarrow after October 3, 2016. No clearer record could have been developed for expulsion purposes.

As the IE Test Court clarified, expulsion pursuant to subsection (e)(3) of the RULLCA concerns an analysis of the impact of a member's conduct on the limited liability company's future. See 226 N.J. at 181.

As to the first factor concerning the nature of the conduct concerning the business, at trial, Ms. Flor testified that multiple weeks after ENGenuity's formation and Ms. Flor's start as its only employee, GreenbergFarrow stopped working cooperatively with ENGenuity. Specifically, on or about July 27, 2016, GreenbergFarrow presented Plaintiffs with an LOI that, as both she *and GreenbergFarrow* testified at trial, would fundamentally alter and materially change most aspects of how ENGenuity operates in contravention of the Contract. (See Oct. 10, 2019 A.M. Tr., 169: 18-25, 170:15-172:12; see also Oct. 15, 2019 Tr., at 52:22-54:25.)

The documents and testimony evidenced a succession of sweeping and outrageous demands thereafter that would require of ENGenuity's agreement to myriad, extraneous contractual documents to alter governance, control and operations, stripping the controlling and managing member of day-to-day operational control, mandating that ENGenuity create a $15,000.00 per-person account payable obligation in favor of its minority member, mandating that ENGenuity utilize its minority member for human resources, marketing, IT, payroll, hiring and accounting – *not* vendors independent of ENGenuity and its minority member. (See Oct. 9, 2019 A.M. Tr., at 179:16-183:10.) The sum of those demands, which never lessened in their number or potency, evolved to a point of such contention and impasse for GreenbergFarrow, that it also ceased paying for *any* of ENGenuity's operating services enumerated in the Contract and stopped paying and reimbursing ENGenuity's employee who was incurring operating expenses in connection ENGenuity's efforts to participate in RFQs, RFPs and subcontracts.

GreenbergFarrow refused to pay for ENGenuity's insurance as RFQ and subcontract and "teaming" arrangement deadlines loomed. (See Oct. 9, 2019 P.M. Tr., at 209:11-210:17.) GreenbergFarrow refused to pay for computer equipment or office space, and terminated the WBE certification application process. The foregoing acts and events were not simply a "distracting dispute." Indeed, GreenbergFarrow was so committed to its strategy that Mr. Johnston brazenly wrote to Ms. Flor that GreenbergFarrow would not fund any of the company's operating expenses until Plaintiffs agreed to "move forward with our LOI negotiation." (See id., at 209:24-210:4; see also P's Ex. 37.)

After GreenbergFarrow terminated its membership it withdrew all funds from ENGenuity's bank account, refused to make full payment on ENGenuity's marketing contract, refused to pay any of ENGenuity's accounts payable and refused to support or assist ENGenuity with both pending RFQs and RFPs and existing subcontracts with longstanding client relationships of Ms. Flor that ENGenuity had secured with T & M Associates. (See Oct. 9, 2019 P.M. Tr., at 253:20-23; see also Oct. 16, 2019 A.M. Tr., at 8:18-21, 10:12-15, 10:22-11:1, 11:6-13.)

The foregoing demonstrates that GreenbergFarrow continuously and actively undermined the business of ENGenuity by failing to cooperate with the company and honor ENGenuity's obligations to its vendors and clients. Such evidence weighs heavily in favor of finding that continuing ENGenuity's business with GreenbergFarrow a member is "not reasonably practicable" under the RULLCA

Those same facts also support the analysis of the second, third, fourth and fifth factors concerning management of ENGenuity if the Court retroactively awards (or recognizes) a membership interest for GreenbergFarrow three years after it intentionally abandoned ENGenuity. Like Ms. Flor, Messrs. Ghadrdan and Johnston both testified that after October 3, 2016, GreenbergFarrow had relinquished its equity, terminated its relationship and concluded that it had no further obligations or duties in respect of GreenbergFarrow. Indeed, as Mr. Ghadrdan testified, on that basis he directed Edmund Truty to access ENGenuity's bank account *post*-termination and transfer all of ENGenuity's operating balance – approximately $95,000.00 – back to GreenbergFarrow. (See Oct. 10, 2019 P.M. Tr., at 227:13-25, 229:21-230:8.) And, as stipulated, Mr. Truty did so on or about November 14, 2016, and GreenbergFarrow never paid another account payable. (Oct. 16, 2019 A.M. Tr., at 8:18-21, 10:12-15, 10:22-11:1, 11:6-13.) Suffice to say, by any objective measure, GreenbergFarrow's proven breach and termination and every other aspect of the "dispute" relating thereto, precludes Ms. Flor from working with GreenbergFarrow to pursue ENGenuity's goals; business goals for *post*-October 2016, 2017, 2018, 2019 and now 2020 as to which GreenbergFarrow has no familiarity, experience or interest.

The record evidence also established that GreenbergFarrow terminated its membership and abandoned ENGenuity, because it could not coax Plaintiffs to relent to the minority member's many demands set forth in the LOI. (Oct. 16, 2019 A.M. Tr., at 153: 22-0154:8.) Yet, despite Mr. Johnston's testimony that the LOI – not the Contract – was the obstacle, GreenbergFarrow ultimately terminated negotiations and failed to respond to the draft, proposed revisions to the non-binding LOI that ENGenuity had provided. (See Oct. 10, 2019 A.M. Tr., at 19:20-24.) In effect, GreenbergFarrow treated the parties as "deadlocked" in their positions concerning management and operations notwithstanding the Contract or, as the trial testimony revealed, the default provisions of the RULLCA, and "walked away" from the business and operation of ENGenuity. Thus, on the fact record made at trial, the second, third, fourth and fifth factors heavily support this Court declaring the expulsion and disassociation of GreenbergFarrow from ENGenuity effective no later than October 3, 2016.

With respect to the sixth and seventh factors, the record evidence is clear that GreenbergFarrow refused to fund the enumerated operating expenses and costs of ENGenuity for two (2) years. The minority member cutoff all financial and other support for ENGenuity. Indeed, as amplified in the accompanying Flor Affidavit, GreenbergFarrow has not received a Schedule K-1 reflecting a membership (or equity) interest in ENGenuity, and has not been allocated any profits, losses, distributions, charges or the like as an equity member of ENGenuity. GreenbergFarrow also has not incurred any indebtedness, obligations or other liabilities on behalf of or made any loans, capital contributions or investments or capital payments to ENGenuity to keep ENGenuity operational and solvent since October 3, 2016 (unlike its sole member, Ms. Flor). (See Flor Affidavit at ¶¶ 10-14.) GreenbergFarrow has been totally inactive in, disassociated from and played no role whatsoever in ENGenuity's survival. It has not exercised any joint control over any aspect of ENGenuity's business since its 2016 termination and disassociation. GreenbergFarrow is not a signatory to an ENGenuity operating agreement. (See id.)

Despite the foregoing, the documentary and testimonial evidence also demonstrated that ENGenuity has persisted and stabilized under the management and leadership of Ms. Flor, which results came, in large part, from (1) her great personal financial sacrifice and (2) ENGenuity foregoing business opportunities and growth given its limited cash flow without GreenbergFarrow's funding, *i.e.*, participating in larger, more lucrative, RFQs, RFPs and subcontracts that it otherwise would have pursued. Notwithstanding the harm and disruption that GreenbergFarrow caused ENGenuity's business while it was a member, the record evidence is irrefutable that, *post*-October 2016, 2017, 2018 and 2019, ENGenuity prevailed as a viable, operating business *without* GreenbergFarrow.

Still, the Flor Affidavit also makes clear that ENGenuity *cannot* operate financially with GreenbergFarrow as a member without jeopardizing all of the critical credentials, certifications, and additional competitive pre-qualifications that ENGenuity has obtained since October 3, 2016. (See Flor Affidavit at ¶¶ 15-23.) Likewise, given the specter of the raft of conflicts that would result for ENGenuity throughout the State if the Court would award (or recognize) a membership interest for GreenbergFarrow, whose private clients may, at any time, be before the same public jurisdictions and entities where ENGenuity participates or seeks to participate in RFQs and/or RFPs, membership for GreenbergFarrow in ENGenuity would be financially detrimental to ENGenuity. (See id. at ¶¶ 24-27.) For all of these reasons, the record weighs heavily in favor of this Court declaring the expulsion and disassociation of GreenbergFarrow from ENGenuity effective no later than October 3, 2016.

## CONCLUSION

For all of the foregoing reasons, this Court should grant the cross-motion in its entirety and declare GreenbergFarrow Architecture, Incorporated expelled and disassociated from ENGenuity Infrastructure, LLC not later than effective October 3, 2016 and without payment or other consideration for the underlying membership interests and for such other and further relief as the Court in its discretion shall deem appropriate.

Dated: January 17, 2020
New York, New York

Respectfully submitted,

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| JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>GREENBERG FARROW ARCHITECTURE INCORPORATED<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MONMOUTH COUNTY<br><br>DOCKET NO. MON-L-1021-17<br><br>Civil Action |

**GREENBERGFARROW'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR DECLARATORY JUDGMENT EXPELLING OR DISASSOCIATING FORMER MEMBER GREENBERGFARROW ARCHITECTURE INC. FROM ENGENUITY INFRASTRUCTURE, LLC**

Plaintiffs continue to seek to have it both ways in their Cross-Motion for Declaratory Judgment Expelling or Dissociating Former Member GreenbergFarrow Architecture Inc. from ENGenuity Infrastructure, LLC (the "Cross-Motion"). In particular, Plaintiffs sought throughout this litigation to have GreenbergFarrow Architecture Incorporated ("GreenbergFarrow") pay all of the operating costs of ENGenuity Infrastructure, LLC ("ENGenuity") during its first two years in existence, as well as substantial payments directly to Ms. Flor. At the same time, through their Cross-Motion, Plaintiffs ask this Court to expel GreenbergFarrow as a member of ENGenuity. In other words, Plaintiffs ask the Court to give Ms. Flor everything—full ownership of ENGenuity, all operating costs, and all direct payments—and at the same time ensure that GreenbergFarrow gets nothing. The Court should deny the Cross-Motion, in its entirety, and avoid this absurd result.

## I. THE AFFIDAVIT OF MS. FLOR IS NOT PROPERLY BEFORE THE COURT

As a preliminary evidentiary matter, Plaintiffs rely in their briefing regarding the Cross-Motion on a newly filed affidavit by Ms. Flor (the "New Flor Affidavit"). (See Pls.' Br. in Supp. of Cross-Motion at 24–25.) The New Flor Affidavit is not properly before the Court at the present, post-trial posture of the Cross-Motion, and the Court should decline to consider this affidavit for numerous reasons.

First, the New Flor Affidavit is not proper evidence at the current posture of the case. During trial, the Court faced the issue of whether to send the issues raised in the Cross-Motion to the jury, or reserve that decision for the Court. While the Court ultimately reserved this issue, it nonetheless acts in the same position as the jury would have if it were to decide the Cross-Motion. Specifically, the Court is limited solely to the evidence that was actually adduced *at trial*. Plaintiffs ignore this limitation and submit an additional affidavit from Ms. Flor with purported statements that were *not* adduced at trial. In other words, Plaintiffs seek to treat their Cross-Motion as a second motion for summary judgment and expand the record at trial with new evidence that has not undergone the adversarial factfinding process provided by trial. The Court should find that it is limited to the evidence that was presented at trial and decline to consider the New Flor Affidavit when considering the Cross-Motion.

Second, the New Flor Affidavit is not proper evidence on which to base declaratory judgment. Of course, "[i]t is well settled that [courts] will not render advisory opinions or function in the abstract." Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005) (citations omitted). "This strong policy is solidly embedded in [the] Declaratory Judgment Act . . . ." Id. As such, "declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." Id. at 302 (citation omitted). In other words, "when a declaratory judgment is sought, [courts] are admonished not to 'decide a case based on facts which are undeveloped or uncertain.'" Binkowski v. New Jersey, 322 N.J. Super. 359, 374 (1999) (quoting N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't of Human Servs., 89 N.J. 234, 241 (1982)).

In submitting the New Flor Affidavit, Plaintiffs request that the Court do precisely what it is not permitted to under the Declaratory Judgment Act—issue declaratory judgment based on an undeveloped or uncertain factual record. Plaintiffs had the opportunity to raise the statements in the Flor affidavit at any point during trial. Plaintiffs nonetheless declined to do so. These new factual assertions therefore have not undergone any portion of the adversarial factfinding process, such as cross-examination or the opportunity for objections, and remain undeveloped to this day. The Court should decline Plaintiffs' request to consider the undeveloped and uncertain assertions in the New Flor Affidavit.

Third and relatedly, the Court considering the New Flor Affidavit will severely prejudice GreenbergFarrow. Plaintiffs chose not to introduce into evidence at trial the assertions in the New Flor Affidavit. GreenbergFarrow thus was not able to exercise its right to challenge the veracity of those statements through cross-examination or its right to raise objections. The Court should protect a defendant's rights to challenge a plaintiff's evidence at trial, ensure that post-trial motions relate only to evidence that is actually adduced at trial, and decline to consider the New Flor Affidavit when ruling on the Cross-Motion.

## II. ARGUMENT AND CITATION OF AUTHORITIES

### A. Plaintiffs' Request for Declaratory Relief Fails as a Matter of Law

Plaintiffs' request for declaratory relief is fatally flawed in its conception. Plaintiffs do not seek declaratory judgment on the basis of some potential future harm. Instead, Plaintiffs impermissibly seek declaratory judgment based solely on purported past harms.

New Jersey's Declaratory Judgments Act, N.J.S.A. § 2A:16-50 *et seq.*, provides, in relevant part, that "[a]ll courts of record in this state shall, within their respective jurisdictions, have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed." N.J.S.A. § 2A:16-52. Courts "will render declaratory relief" pursuant to the Declaratory Judgments Act "when there is an actual dispute between parties who have a sufficient stake in the outcome." N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't of Human Servs., 89 N.J. 234, 241 (1982) (collecting cases).

Plaintiffs' request for declaratory relief is improper and should be rejected by the Court because Plaintiffs improperly seek declaratory relief *after* the purported harm has occurred. As stated by the Supreme Court, "[s]ince the adoption of the Uniform Declaratory Judgments Act in this State our courts have held that the declared purpose of the act limited its application ordinarily to cases where rights had . . . not yet been invaded or wrongs yet committed to the extent of actionable damage." Adams v. Atlantic City, 26 N.J. Misc. 259, 261 (1948). In other words, "[t]he purpose of the declaratory judgment proceeding is to provide a means by which rights, obligations and status may be adjudicated in cases involving a controversy that has not yet reached the stage at which either party may seek a coercive remedy." Rego Indus., Inc. v. Am. Modern Metals Corp., 91 N.J. Super. 447, 452 (App. Div. 1966); see, e.g., N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't of Human Servs., 89 N.J. 234, 242 (1982) (noting that the Declaratory Judgment Act's "purpose is to end uncertainty about the legal rights and duties of the parties to litigation in controversies which have not yet reached the stage at which the parties seek a coercive remedy"); In re Quinlan, 137 N.J. Super. 227, 263 (Ch. Div. 1975) (noting that "[t]he application" of the Declaratory Judgment Act "is prospective and in advance of the controversy"). "Such proceeding is intended to serve as an instrument of preventive justice, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or status without the necessity of a prior breach." Rego Indus., Inc., 91 N.J. Super. at 453.

Plaintiffs' claim for declaratory relief fails because they improperly brought this cause of action *after* the judiciable controversy at issue arose between the parties. Plaintiffs do not seek prospective declaratory judgment about potential future harm or controversies. Instead, Plaintiffs waited until after the purported harm and/or breaches occurred to seek declaratory relief. Indeed, the evidence that Plaintiffs rely on in support of their declaratory judgment claim is virtually identical to the evidence pertaining to their breach of contract claim. (See Pls.' Br. at 14–24.) Further, Plaintiffs cannot assert that they brought the declaratory judgment claim prior to seeking a coercive remedy, as they also brought claims for damages for breach of contract in the same complaint. Simply put, the Declaratory Judgments Act pertains to situations that have not yet risen to a potential breach and the basis for Plaintiffs' claim is past purported breaches. Plaintiffs' claim therefore addresses an improper subject matter of past conduct and fails as a matter of law. See, e.g., Rego Indus., Inc., 91 N.J. Super. at 453 (finding that "[r]elief under the Declaratory Judgments Act is . . . unavailable to plaintiff" because "the parties have reached a stage where rights have been breached" and, as such, the parties are "beyond the point of a justiciable controversy" for purposes of the Act).

**B. Plaintiffs' Request for Declaratory Relief is Moot**

In its Motion for Judgment Notwithstanding the Verdict Under Rule 4:40-2 or, in the Alternative, Motion for New Trial Under Rule 4:49-1 or, in the Alternative, Motion for Remittitur ("GreenbergFarrow's Motion"), GreenbergFarrow demonstrates why the Court must award GreenbergFarrow a 49% ownership interest in ENGenuity if the Court upholds any portion of the jury's verdict in this matter. This is a threshold question for the Court to determine prior to addressing Plaintiffs' Cross-Motion, as the Court awarding GreenbergFarrow this interest in ENGenuity renders the Cross-Motion moot.

New Jersey courts "refrain[] from rendering advisory opinions or exercising [their] jurisdiction in the abstract." De Vesa v. Dorsey, 134 N.J. 420, 428 (1993). "Consistent with that principle, [New Jersey] courts normally will not entertain cases when a controversy no longer exists and the disputed issues have become moot." Id. "A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation." Id. (citation omitted). Stated similarly, "[a]n issue is moot when the decision sought in the matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrs., 382 N.J. Super. 254, 257–58 (App. Div. 2006) (citation omitted).

In its Cross-Motion, Plaintiffs request a declaration "expell[ing] and "disassociate[ing]" GreenbergFarrow "from ENGenuity . . . not later than effective October 3, 2016." (Pls.' Br. at 25; see, e.g., Pls.' Notice of Cross-Motion at 2 (providing Plaintiffs' request for an order expelling or disassociating GreenbergFarrow from ENGenuity "effective October 3, 2016").) However, as addressed at length in GreenbergFarrow's Motion, if the Court determines that GreenbergFarrow is entitled to a 49% ownership interest in ENGenuity due to the verdict, the Court must order that GreenbergFarrow owns that interest at present. Given this ruling, it is irrelevant whether the Court expels GreenbergFarrow from ENGenuity effective October 3, 2016. Indeed, even if the Court provides this order, GreenbergFarrow's membership and ownership interest in ENGenuity will simply be reinstated by the Court's corresponding order relating to the verdict. In other words, once the Court finds that GreenbergFarrow is entitled to a 49% ownership interest in ENGenuity due to the verdict, the Court's order on Plaintiffs' Cross-Motion will have no effect whatsoever because this issue had become moot. The Court should first address whether GreenbergFarrow is entitled to a 49% ownership interest in ENGenuity and, if the Court upholds any portion of the verdict relating to Plaintiffs' claim for breach of contract, find that this issue renders Plaintiffs' Cross-Motion moot. See, e.g., New Jersey v. Davila, 443 N.J. Super. 577, 584 (App. Div. 2016) ("Courts of this state do not resolve issues that have become moot due to the passage of time or intervening events." (citation omitted)); JUA Funding Corp. v. CNA Ins./Continental Cas. Co., 322 N.J. Super. 282, 288 (App. Div. 1999) ("When a party's rights lack concreteness from the outset or lose it by reason of developments subsequent to the filing of suit, the perceived need to test the validity of the underlying claim of right in anticipation of future situations is, by itself, no reason to continue the process." (citation omitted)).

### C. Plaintiffs' Request for Declaratory Relief Under Subsection (a) of Section 42:2C-46 of the RULLCA Is Not Properly Before the Court

In the complaint and throughout this litigation, Plaintiffs raised only two purported bases under Section 42:2C-46 of the Revised Uniform Limited Liability Company Act (the "RULLCA") for their request for a declaration expelling GreenbergFarrow from ENGenuity—subsections (e)(1) and (e)(3). (See Am. Compl. ¶¶ 134–139; Plaintiffs' Pretrial Information Exchange, Ex. E (providing Plaintiffs' requested jury charge relating to the declaratory judgment claim).) Nonetheless, Plaintiffs introduce a third new purported basis for the first time in their Cross-Motion—subsection (a) of Section 42:2C-46. Plaintiffs thus defacto attempt to amend their pleadings *after trial* and without explicitly seeking an amendment. Plaintiffs' new legal theory under subsection (a) is not properly before the Court and the Court should deny Plaintiffs' request for declaratory judgment based on Section 42:2C-46(a).

Rule 4:9-2 "authorizes amendments of pleadings at trial in order to conform to the evidence," Aly v. Garcia, 333 N.J. Super. 195, 202 (App. Div. 2000), and states as follows:

> When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order. Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 4:9-2 permits amendments "to be made to conform to the evidence (but only after fair notice)." Gruccio v. Baxter, 135 N.J. Super. 290, 294 (1975). "The court rules afford flexibility in amending pretrial orders where necessary to subserve the presentation of the merits of the action, provided the adverse party will not be prejudiced thereby." L & L Oil Serv., Inc. v. Director, Div. of Taxation, 340 N.J. Super. 173, 181 (App. Div. 2001) (citation omitted). "A motion for leave to amend to conform to the evidence is generally to be liberally construed under Rule 4:9-2." 47 N.J. Prac., Civil Trial Handbook § 45:4 (2019). "It is nonetheless a matter left to the trial judge's sound discretion in the interests of justice." Id.; see, e.g., Aly, 333 N.J. Super. at 202 ("The decision as to whether to grant an amendment rests in the court's sound discretion.").

Plaintiffs' request in its Cross-Motion for declaratory judgment relating to subsection (a) of Section 42:2C-46 fails for numerous reasons. First, Plaintiffs have not even sought an amendment to their pleadings. While "the claims of a party may be deemed amended to conform to the proofs at a trial" under Rule 4:9-2, "such amendment should be at the behest of a party." R. Wilson Plumping & Heating, Inc. v. Wademan, 246 N.J. Super. 615, 618 (1991) (quoting Essex Cty. Adjustor v. Brookes, 198 N.J. Super. 109, 114 (App. Div. 1984)). "The request to amend the pleading 'must be definite and categorical, not vague or unexpressed.'" Ryan v. Biederman Indus., 223 N.J. Super. 492, 498 (App. Div. 1988) (quoting Grobart v. Society for Establishing Useful Mfrs., 2 N.J. 136, 146 (1949)). In this case, Plaintiffs have never sought to amend their pleadings to add a new basis for their declaratory judgment claim. Absent such amendment, Plaintiffs' novel theory under subsection (a) is not properly before the Court and the Court should not consider it when ruling on the Cross-Motion.

Second, Plaintiffs failed to satisfy the prerequisites of an amendment under Rule 4:9-2. As stated by Rule 4:9-2, issues that are "not raised by the pleadings and pretrial order . . . shall be treated in all respects as if they had been raised in the pleadings and pretrial order," but only if they "are tried by consent or without the objection of the parties." The legal theory relating to subsection (a) of Section 42:2C-46 was neither consented to by the parties at trial nor raised without objection at trial. Indeed, Plaintiffs never raised this legal theory at all during trial and instead relied exclusively on subsections (e)(1) and (e)(3) of Section 42:2C-46 as the bases for their declaratory judgment claim throughout this litigation, including in their pretrial materials and at trial. (See Am. Compl. ¶¶ 134–139; Plaintiffs' Pretrial Information Exchange, Ex. E (providing Plaintiffs' requested jury charge relating to the declaratory judgment claim).) Plaintiffs therefore failed to satisfy the prerequisites of an amendment under Rule 4:9-2 and the Court should deny the Cross-Motion to the extent it seeks relief relating to Section 42:2C-46(a). See, e.g., Yilmaz, Inc. v. Director, Div. of Taxation, 22 N.J. Tax 204, 240 (Tax Ct. 2005) (addressing Rule 4:9-2 and excluding evidence pertaining to a legal issue where "the issue was not contained in the pleadings or pretrial order, and was not discussed at trial"); Bainhauer v. Manoukian, 215 N.J. Super. 9, 45 (App. Div. 1987) (concluding "that the trial judge erred in permitting the complaint to be amended at the close of the proofs to add" a new basis for a claim where the defendant "did not have an adequate opportunity to meet the charge since he could not have known until after the proofs were closed that the alleged [new basis] was to be a part of the cause of action"); New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 492 (App. Div. 1985) (finding that a party's "motion to amend was properly denied by the trial judge as a matter of discretion" where the party "had numerous opportunities to amend the . . . counts . . . , either when granted leave to file the amended [claim] or during the twelve days of actual trial"); see also Skripek v. Bergamo, 200 N.J. Super. 620, 629 (App. Div. 1985) (declining to consider the plaintiff's new claim where that legal theory "was not pleaded by plaintiff in her complaint, was not included as an issue in the pretrial order," "was not tried before the jury," and was not raised as an amendment to the pleadings by the plaintiff "during trial").

Third, GreenbergFarrow has not been accorded its right to a full hearing on Plaintiffs' new legal theory relating to subsection (a) of Section 42:2C-46. "In order to insure a litigant's due process right to be apprised of the nature of the claim against him and to be accorded the opportunity to address it fully, R. 4:9-2 authorizes the amendment of pleadings during trial only if the 'objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.'" Wademan, 246 N.J. Super. at 618. A necessary component of this due-process requirement is a full hearing—*i.e.*, "such amendment . . . should be granted only if there is a full hearing where the evidence and arguments for and against the issue may be considered." Id. (quoting Brookes, 198 N.J. Super. at 114). Here, GreenbergFarrow was not accorded an opportunity at trial to argue and present evidence relating to Plaintiffs' new legal theory under Section 42:2C-46(a) because Plaintiffs never raised this issue. As such, GreenbergFarrow has not been accorded the requisite "full hearing" relating to this new legal theory and the Court should deny Plaintiffs' Cross-Motion to the extent it relates to subsection (a) of Section 42:2C-46. See, e.g., Brookes, 198 N.J. Super. at 115 (addressing Rule 4:9-2 and vacating a portion of the trial court's award based on an issue that was not "addressed in an adversary proceeding").

Fourth, GreenbergFarrow will face substantial and undue prejudice if the Court considers Plaintiffs' new legal theory relating to subsection (a) of Section 42:2C-46. Under Rule 4:9-2, "[t]he court must balance undue delay or prejudice from the amendment against the overriding need to seek justice." Yardley Travel Ltd. v. Betar, 2012 WL 2737802, at *8 (App. Div. July 10, 2012); see, e.g., Brower v. Gonnella, 222 N.J. Super. 75, 80 (1987) (noting that the denial of a motion to amend on the basis of "the 'interests of justice' is usually only required when there would be prejudice to another party"). In other words, amendment is improper if "undue prejudice would result." Aly, 333 N.J. Super. at 202 (citations omitted). Further, "amendment is not appropriate when accomplished without accounting for prejudice to the other party." Adkins v. Krikor, Inc., 2010 WL 4116879, at *3 (App. Div. Oct. 21, 2010).

In this case, GreenbergFarrow will suffer extensive prejudice if the Court considers Plaintiffs' new legal theory relating to subsection (a) of Section 42:2C-46. Plaintiffs did not plead this legal theory and did not raise it at any point throughout this litigation up to and including trial. As such, GreenbergFarrow was never put on notice that this legal theory may be at issue and accorded the basic right to address this legal theory through motion briefing—such as at summary judgment where GreenbergFarrow moved on each and every one of Plaintiffs' claims—or during trial. Bainhauer, 215 N.J. Super. at 45 (finding that the trial court erred in permitting an amendment that was sought "at the close of the proofs" and noting that, "[o]bviously, one reacts different to what appears to be" a separate issue "than to what he understands or should understand to be a component of the cause of action itself"). The failure of Plaintiffs to timely raise this new legal theory thus substantially prejudiced GreenbergFarrow by ensuring that GreenbergFarrow could not litigate and defend against this new legal theory, even at trial. This severe prejudice to GreenbergFarrow, by itself, requires that the Court deny Plaintiffs' Cross-Motion to the extent it relates to subsection (a) of Section 42:2C-46. Alternatively, if the Court determines that consideration of Plaintiffs' new legal theory is proper, it should also find that a mistrial is required to avoid the corresponding substantial prejudice to GreenbergFarrow. See, e.g., Natsis v. Township of Weehawken, 2010 WL 3075565, at *3 (App. Div. Aug. 6, 2010).

Finally, if the Court considers Plaintiffs' new legal theory, it would be rewarding Plaintiffs for waiting until *after trial* to raise this issue. Plaintiffs had every opportunity from their initial complaint to the pretrial materials to raise the legal theory relating to Section 42:2C-46(a). Additionally, to the extent Plaintiffs believed this legal theory was implicated by the evidence at trial—which they argue in their briefing relating to the Cross-Motion, (see Pls.' Br. at 14–15)—Plaintiffs could have sought during trial to amend their pleadings to include this new theory. Despite these pervasive opportunities, Plaintiffs declined throughout this litigation to raise their new legal theory. The Court should decline to reward Plaintiffs for waiting until after trial to raise for the first time their legal theory relating to subsection (a) of Section 42:2C-46 and, instead, the Court should deny the Cross-Motion to the extent it relies Section 42:2C-46(a). See, e.g., Brower v. Gonnella, 222 N.J. Super. 75, 80 (App. Div. 1987) ("Of course, 'progressive judicial policy in permitting amendments, generally, is not intended to afford a refuge to languid or dilatory litigants." (quoting Branch v. Emery Transp. Co., 53 N.J. Super. 367, 375 (App. Div. 1958))).

**D. Plaintiffs' Request for Declaratory Relief Under Section 42:2C-46(e)(1) of the RULLCA Fails**

Plaintiffs argue that GreenbergFarrow engaged in past wrongful conduct that warrants expulsion under subsection (e)(1) of Section 42:2C-46. (See Pls.' Br. at 15–24.) This argument fails because Plaintiffs have not shown that GreenbergFarrow engaged in the requisite "wrongful conduct," or the necessary certain and concrete harm to ENGenuity (rather than Ms. Flor).

Section 42:2C-46(e) states the following, in relevant part:

> A person is dissociated as a member from a limited liability company when:
>
> . . .
>
> e. On application by the company, the person is expelled as a member by judicial order because the person:
>
> (1) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;

"Subsection 3(a) has a normative component, requiring that the member's behavior be 'wrongful.'" All Saints Univ. of Med. Aruba v. Chilana, 2012 WL 6652510, at *14 & n.10 (App. Div. Dec. 24, 2012). "Subsection [(e)(1)] also requires actual harm to the enterprise, demanding proof that the member has committed wrongs that already have 'adversely and materially affected' the . . . business." Id. at *10. In short, "to justify expulsion under subsection [(e)(1)], the member's 'wrongful conduct' must have damaged the LLC's business in the past." IE Test, LLC v. Carroll, 226 N.J. 166, 181 (2016).

Plaintiffs' request for expulsion under subsection (e)(1) fails for three separate reasons. First, GreenbergFarrow did not engage in "wrongful conduct," as that phrase is used in subsection (e)(1). The RULLCA does not define the phrase "wrongful conduct." E.g., Chilana, 2012 WL 6652510, at *14 n.10. Nonetheless, the common usage of this phrase is instructive. See, e.g., N.J.S.A. § 1:1-1. In particular, Black's Law Dictionary defines this phrase as "[a]n act taken in violation of a legal duty; an act that unjustly infringes on another's rights." Conduct, Black's Law Dictionary (11th ed. 2019).

Here, Plaintiffs fail to address in any form a hypothetical legal duty to ENGenuity that GreenbergFarrow violated or how GreenbergFarrow infringed on ENGenuity's rights, so GreenbergFarrow is left to guess on this legal issue. Further, Plaintiffs cannot rely on the letter dated June 3, 2016 and signed by Ms. Flor on June 10, 2016 (the "Letter") as the purported basis for any legal duty or basis of infringement, as, even if it is a contract, that document—including any statements regarding funding for the entity—only potentially creates legal duties and obligations from GreenbergFarrow to Ms. Flor and *not* the entity (which did not even exist at that time). GreenbergFarrow did not enter into a contract with ENGenuity creating legal duties or a basis for infringement, and any purported failure of GreenbergFarrow to fulfill alleged obligations under the Letter harm Ms. Flor—and *not* the entity—who would then be in the position to herself fulfill those obligations. Simply put, Plaintiffs have failed to demonstrate (or even address) the legal analysis of whether GreenbergFarrow engaged in "wrongful conduct," as that phrase is used in subsection (e)(1). Plaintiffs' argument relating to that subsection therefore fails.

Second, Plaintiffs fail to cite to any evidence in the trial record demonstrating that GreenbergFarrow engaged in wrongful conduct that actually harmed the business. It is important to distinguish at this juncture the type of harm that is required. Plaintiffs cite extensively to evidence relating to purported harm to Ms. Flor and discussions regarding an LOI potentially limiting Ms. Flor's options and control mechanisms over the entity. (See Pls.' Br. at 15–20.)

However, this evidence is irrelevant in this analysis, as the sole issue is whether the entity itself was harmed. See, e.g., N.J.S.A. 42:2C-46(e)(1). It is on this dispositive issue that Plaintiffs' argument falls flat. Plaintiffs do not cite to any concrete evidence in the record of actual and specific harm to ENGenuity due to conduct of GreenbergFarrow, such as a specific and identifiable lost business opportunity with particular other entities or the theft of funds by GreenbergFarrow. Further, to the extent Plaintiffs cite to evidence of purported harm akin to lost profits or lost business opportunities, the evidence of such is merely that Ms. Flor believed the entity could have done more business absent GreenbergFarrow's conduct. This type of evidence does not address a specific business opportunity that ENGenuity lost and is therefore speculative and uncertain evidence that cannot form the basis for declaratory judgment as a matter of law. See, e.g., N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't of Human Servs., 89 N.J. 234, 241 (1982) (discussing declaratory judgment and noting that courts "will not render advisory opinions or function in the abstract . . . . [n]or will [courts] decide a case based on facts which are undeveloped or uncertain" (citations omitted)); Krebs v. City of Long Branch, 2011 WL 6378837, at *6 (App. Div. Dec. 16, 2011) ("[A]ny right plaintiff claims has been violated . . . is purely speculative and not ripe for adjudication through a declaratory judgment action."). In short, Plaintiffs cite to no evidence whatsoever on the sole relevant issue of a specific and identifiable harm to ENGenuity and their request relating to subsection (e)(1) fails.

Third, this case is a far cry from the types of "wrongful conduct" that courts have historically found is a basis for expulsion under subsection (e)(1) or analogous statutes. In particular, courts typically find that expulsion is warranted where the member caused an identifiable and quantifiable harm to the entity, such as when the member steals funds from the entity. See, e.g., Sherwood Park Business Ctr., LLC v. Taggart, 323 P.3d 551, 561 (Or. Ct. App.

2014) (addressing an analogous statutory provision in Oregon); CCD, L.C. v. Millsap, 116 P.3d 366, 373 (Utah 2005) (addressing an analogous statutory provision in Utah). Plaintiffs have offered no evidence of a similar identifiable and quantifiable harm that GreenbergFarrow caused to the entity and any failure of GreenbergFarrow to fund the entity harmed the other signatory to the Letter (Ms. Flor), who would then be in the position to herself pay those funds. Further, Plaintiffs cite to no case law demonstrating that expulsion under subsection (e)(1) is appropriate where, as here, any potential harm to the entity is merely speculative. The Court should reject Plaintiffs' request to extend the stringent standards under subsection (e)(1) to expel GreenbergFarrow based on mere speculation.

**E. Plaintiffs' Request for Declaratory Relief Under Section Section 42:2C-46(e)(3) of the RULLCA Fails**

Plaintiffs next request that the Court expel GreenbergFarrow from ENGenuity pursuant to subsection (e)(3) of Section 42:2C-46. (See Pls.' Br. at 21–25.) Plaintiffs' argument lacks merit because Plaintiffs failed to show that ENGenuity cannot be managed notwithstanding GreenbergFarrow's purported conduct and the relevant factors weigh against the expulsion of GreenbergFarrow.

Section 42:2C-46(e) states, in relevant part:

> A person is dissociated as a member from a limited liability company when:
>
> . . .
>
> e. On application by the company, the person is expelled as a member by judicial order because the person:
>
> . . .
>
> (3) has engaged, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member.

"[T]he Legislature did not authorize a court to premise expulsion under subsection [(e)(3)] on a finding that it would be more challenging or complicated for other members to run the business with the . . . member than without him." IE Test, LLC v. Carroll, 226 N.J. 166, 182 (2016). "Nor does the statute permit the . . . members to expel a member to avoid sharing the [entity's] profits with that member." Id. "Instead, the Legislature prescribed a stringent standard of prospective harm: the . . . member's conduct must be so disruptive that it is 'not reasonably practicable' to continue the business unless that member is expelled." Id. (citation omitted). The phrase "not reasonably practicable," as used in subsection (e)(3), means "that it must be unfeasible, despite reasonable efforts, to keep the [entity] operating while the disputed member remains affiliated with it." Id.

"In short, . . . members seeking to expel a fellow member under subsection [(e)(3)] . . . are required to clear a high bar." Id. at 183. This provision does not "authorize[] a court to disassociate a[] . . . member merely because there is a conflict." Id. (citations omitted). Rather, "[this] provision[] require[s] the court to evaluate the . . . member's conduct relating to the [entity], and assess whether the [entity] can be managed notwithstanding that conduct." Id.

In addition to this overarching question, the Supreme Court also provided the following non-exclusive factors for courts to consider "that may be relevant to a particular case":

> (1) the nature of the LLC member's conduct relating to the LLC's business; (2) whether, with the LLC member remaining a member, the entity may be managed so as to promote the purposes for which it was formed; (3) whether the dispute among the LLC members precludes them from working with one another to pursue the LLC's goals; (4) whether there is a deadlock among the members; (5) whether, despite that deadlock, members can make decisions on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions; (6) whether, due to the LLC's financial position, there is still a business to operate; and (7) whether continuing the LLC, with the LLC member remaining a member, is financially feasible.

Id. "A trial court considering an application to expel a member under . . . [subsection (e)(3)] should conduct a case-specific analysis of the record using those factors, and other considerations raised by the record, with no requirement that all factors support expulsion, and no single factor determining the outcome." Id. at 184.

As a preliminary matter, Plaintiffs' request to expel GreenbergFarrow pursuant to subsection (e)(3) of Section 42:2C-46 fails for a simple and overarching reason—Plaintiffs have not cited to any evidence whatsoever demonstrating that ENGenuity cannot be managed notwithstanding any purported conduct by GreenbergFarrow. In fact, all the evidence in the record is to the contrary, as Ms. Flor herself testified that ENGenuity has grown each year and become a successful entity that has received accolades. (See, e.g., Oct. 16, 2019 Tr. vol. 1, at 34:2–36:13; see also Ex. D-4 (constituting the blog entry from ENGenuity's website).) Absent evidence on the central and dispositive issue of whether GreenbergFarrow's purported conduct prevents the ongoing management of ENGenuity, Plaintiffs' request for expulsion under subsection (e)(3) fails. IE Test, LLC, 226 N.J. at 183.

Turning to the factor analysis, Plaintiffs' request for expulsion also fails under the balance of the relevant factors. As to the first factor—the nature of member's conduct relating to the entity's business—Plaintiffs again cite to purported obligations of GreenbergFarrow under the Letter and the discussions regarding a letter of intent. (Pls.' Br. at 21–23.) However, as previously noted, those documents were solely between GreenbergFarrow and Ms. Flor and, to the extent GreenbergFarrow failed to perform any such obligations, the harm would be to Ms. Flor who would then herself have to pay those obligations (as, in fact, she did). Simply put, Ms. Flor suffering harm does not equate to the entity suffering harm. Consequently, this factor weighs against expulsion.

The second factor—whether, with the member remaining a member, the entity may be managed so as to promote the purposes for which it was formed—also weighs against expulsion for the simple reason that Plaintiffs have cited to no evidence whatsoever demonstrating that ENGenuity cannot continue as a business with GreenbergFarrow as a member.

Regarding the third and fourth factors—whether the dispute among the members precludes them from working with one another to pursue the entity's goals (the third factor) and whether there is deadlock among the members (the fourth factor)—Plaintiffs appear to mistake the relevant inquiry. The issue is not whether the parties were deadlocked and unable to work together in the past. Indeed, past conflicts by themselves are insufficient as a matter of law to expel a member. IE Test, LLC, 226 N.J. at 183. Instead, the sole inquiry is whether the parties can work together prospectively—*i.e.*, in the *future*. Id. at 182. Plaintiffs have cited to no evidence stating that the parties cannot work together in the future without deadlock, so the third and fourth factors weigh against expulsion.

As to the fifth factor—whether, despite deadlock, members can make decisions on the management of the company in accordance with applicable statutory provisions—Plaintiffs fail to cite to any evidence demonstrating that the parties cannot make decisions going forward in accordance with applicable statutes. This factor therefore similarly weighs against expulsion.

Regarding the sixth and seventh factors, Plaintiffs again appear to mistake the relevant inquiry and discuss the financial contributions of Ms. Flor and ENGenuity's status as a WBE.[1]

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[1] In their discussion of the sixth and seventh factors, Plaintiffs cite to the New Flor Affidavit in favor of their irrelevant discussions regarding financial detriments to Ms. Flor and ENGenuity if GreenbergFarrow remains a member. (See Pls.' Br. at 24–25.) As discussed at length above, the Court should not consider the New Flor Affidavit or any of the statements included therein when deciding the *post-trial* Cross-Motion. Nonetheless, the assertions in the New Flor Affidavit that are cited by Plaintiffs are irrelevant in the context of the sixth and seventh factors.

This evidence is irrelevant here. The sixth and seventh factors have nothing to do with the financial contributions of the parties or whether ENGenuity continues as a WBE. See IE Test, LLC, 226 N.J. at 183; see also id. at 182 ("Significantly, the Legislature did not authorize a court to premise expulsion under subsection [(e)(3)] on a finding that it would be more challenging or complicated for other members to run the business with the . . . member than without them."). Instead, the sixth factor provides a simple question: is ENGenuity still an operational business? The answer is yes, so the sixth factor weighs against expulsion. The seventh factor similarly asks simply whether continuing ENGenuity as an ongoing business is financially feasible with GreenbergFarrow as a member. Plaintiffs have not cited to any evidence showing that ENGenuity cannot continue as an operational business with GreenbergFarrow as a member—even if ENGenuity is no longer a WBE—so the answer to this question is also yes and the seventh factor weighs against expulsion.

In summary, all of the relevant factors weigh against expulsion. The Court should therefore deny Plaintiffs' request for an order expelling GreenbergFarrow from ENGenuity pursuant to Section 42:2C-46(e)(3).

### F. GreenbergFarrow Retains Its Economic Ownership Interest in ENGenuity Even If the Court Orders GreenbergFarrow's Expulsion from ENGenuity

If the Court ultimately orders the expulsion of GreenbergFarrow from ENGenuity, this does not terminate all interest GreenbergFarrow has in this entity. In particular, while such an order would remove the managerial ownership interest held by GreenbergFarrow—*i.e.*, the ability to make managerial decisions—it would have no impact whatsoever on GreenbergFarrow's separate economic ownership interest in ENGenuity.

The ramifications of an event of expulsion are addressed by Section 42:2C-47, which provides that the expelled party's managerial rights in the entity and fiduciary duties to the company cease at the time of expulsion, but "any transferable interest owned by the person immediately before dissociation in the person's capacity as a member is owned by the person solely as a transferee." N.J.S.A. § 42:2C-47(a); see also IE Test, LLC v. Carroll, 226 N.J. 166, 179 (2016) ("In the wake of a judicial determination disassociating the . . . member form the [entity], that member's interest is immediately limited to the rights of an assignee of a member's limited liability interest . . . ." (citation omitted)). In other words, "[a] member's dissociation from an [entity] pursuant to the statute does not cause the member to 'sell' or 'give up' economic rights involuntarily in the [entity]." All Saints Univ. of Med. Aruba v. Chilana, 2012 WL 6652510, at *12 (App. Div. Dec. 24, 2012). Instead, "the member suffers through dissociation the loss of his or her management rights, but is entitled to retain an interest in the LLC as an assignee." Id. (citation omitted). Indeed, even if a member resigns or withdraws from the entity—such as under Section 42:2C-46(a)—they still retain "the rights of an economic interest holder" in the entity. N.J.S.A. § 42:2C-1, cmt.

In short, even if the Court expels GreenbergFarrow from ENGenuity, GreenbergFarrow retains its 49% economic interest in ENGenuity. This includes all of the benefits of that interest, such as "allocation of income, gain, loss, deduction, or credit." Chilana, 2012 WL 6652510, at *12 (addressing the predecessor statutory scheme to the RULLCA); see, e.g., IE Test, LLC v. Carroll, 226 N.J. 166, 182 (2016) (noting that the statute does not "permit the . . . members to expel a member to avoid sharing the [entity's] profits with that member").

Despite this clear statutory scheme, Plaintiffs curiously request both that the Court issue an order expelling GreenbergFarrow and that GreenbergFarrow be accorded no "payment or other consideration for the underlying membership interests." (Pls.' Br. at 25–26.) Plaintiffs cite to no law in support of this novel request, which is not surprising given that this request is not permitted by the statutory scheme. Nonetheless, this request continues the theme of Plaintiffs' requests throughout this litigation—demand full payment from GreenbergFarrow of all operating expenses for ENGenuity, and yet simultaneously demand that Ms. Flor have full ownership over this entity and that GreenbergFarrow receive nothing. The Court should follow the provisions of the RULLCA, reject Plaintiffs' request that GreenbergFarrow receive no consideration for its interest in ENGenuity, and, if the Court orders that GreenbergFarrow is expelled from ENGenuity, also find that GreenbergFarrow retains its 49% economic interest in this entity and all the benefits associated with that interest.[2]

## III. CONCLUSION

Plaintiffs continue to try to have their cake and eat it too. On the one hand, Plaintiffs asked the jury to find that the Letter is a binding contract and force GreenbergFarrow to pay all of the operational expenses of ENGenuity. At the same time, Plaintiffs ask that the Court prevent GreenbergFarrow from retaining the beneficial ownership interest in ENGenuity that was purportedly contemplated as the exchange for those operational expenses. In other words, Plaintiffs ask that Ms. Flor get everything—all expenses paid, full ownership of ENGenuity, all direct payments to Ms. Flor—and GreenbergFarrow get nothing. This absurd outcome is not permitted by the law in New Jersey. The Court should deny the Cross-Motion in its entirety.

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[2] Section 42:2C-47(c) provides that, if a court expels a member pursuant to subsection (e) of Section 42:2C-46, then the court "may order the sale of the interests held by such person immediately before dissociation to either the company or to any other persons who are parties to the action if the court determines, in its discretion, that such an order is required by any other law, rule or regulation, or that such an order would be fair and equitable to all parties under all of the circumstances of the case." Plaintiffs do not seek this relief in their Cross-Motion or otherwise address this analysis in any way, so GreenbergFarrow will similarly not address it here.

Respectfully submitted this the 18th day of February, 2020.

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| | |
|---|---|
| JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>GREENBERG FARROW ARCHITECTURAL INCORPORATED,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MONMOUTH COUNTY<br><br>DOCKET NO. MON-L-1021-17<br><br><u>Civil Action</u><br><br>**CERTIFICATION OF MATTHEW N. FIORAVANTI IN SUPPORT OF GREENBERGFARROW'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR DECLARATORY JUDGMENT EXPELLING OR DISASSOCIATING FORMER MEMBER GREENBERGFARROW ARCHITECTURE INC. FROM ENGENUITY INFRASTRUCTURE, LLC** |

I, Matthew N. Fioravanti, do hereby certify and state:

1.

I am an attorney with Giordano, Halleran & Ciesla, P.C. I am a counsel for Defendant GreenbergFarrow Architecture Incorporated ("GreenbergFarrow") in the above-referenced action. I make this Certification in support of GreenbergFarrow's Opposition to Plaintiffs' Cross-Motion for Declaratory Judgment Expelling or Disassociating Former Member GreenbergFarrow Architecture Inc. from ENGenuity Infrastructure, LLC.

2.

The facts set forth in this Certification are true, accurate, and based upon my personal knowledge.

3.

Attached hereto as Attachment A is a true and correct copy of the Appellate Division's unpublished opinion in Adkins v. Krikor, Inc., 2010 WL 4116879 (App. Div. Oct. 21, 2010). I further state that counsel for GreenbergFarrow are not aware of any unpublished opinions that are contrary to this opinion.

4.

Attached hereto as Attachment B is a true and correct copy of the Appellate Division's unpublished opinion in All Saints Univ. of Med. Aruba v. Chilana, 2012 WL 6652510 (App. Div. Dec. 24, 2012). I further state that counsel for GreenbergFarrow are not aware of any unpublished opinions that are contrary to this opinion.

5.

Attached hereto as Attachment C is a true and correct copy of the Appellate Division's unpublished opinion in Krebs v. City of Long Branch, 2011 WL 6378837 (App. Div. Dec. 16, 2011). I further state that counsel for GreenbergFarrow are not aware of any unpublished opinions that are contrary to this opinion.

6.

Attached hereto as Attachment D is a true and correct copy of the Appellate Division's unpublished opinion in Natsis v. Township of Weehawken, 2010 WL 3075565 (App. Div. Aug. 6, 2010). I further state that counsel for GreenbergFarrow are not aware of any unpublished opinions that are contrary to this opinion.

7.

Attached hereto as Attachment E is a true and correct copy of the Appellate Division's unpublished opinion in Yardley Travel Ltd. v. Betar, 2012 WL 2737802 (App. Div. July 10, 2012).

I further state that counsel for GreenbergFarrow are not aware of any unpublished opinions that are contrary to this opinion.

I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment

By: ______________________

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# ATTACHMENT A

2010 WL 4116879
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Jennipher ADKINS, Plaintiff-Respondent,
v.
KRIKOR, INC., and Krikor
Kalfayan, [1] Defendants-Appellants.

Argued Sept. 13, 2010.
|
Decided Oct. 21, 2010.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2181-08.

**Attorneys and Law Firms**

Matthew M. Keshishian argued the cause for appellants.

Respondent has not filed a brief.

Before Judges RODRÍGUEZ and GRALL.

**Opinion**

PER CURIAM.

*1 Defendants Krikor Kalfayan (Kalfayan) and Krikor, Inc., (Krikor) appeal from a $26,550 judgment entered against them jointly, severally and individually, after a bench trial. Plaintiff Jennipher Adkins has not participated in this appeal. We conclude the judgment must be reduced to $15,000, the limit on damages that may be recovered in an action in the Special Civil Part.

The litigation arose from a dispute between plaintiff, who is a designer of bonnets, headbands, head-wraps and scarves, and defendants, the manufacturer that agreed to produce the accessories according to her design. Plaintiff commenced the litigation in the Special Civil Part of the Law Division. Defendants filed an answer and a counterclaim. In their answer, defendants contended that Kalfayan was not a proper defendant. The counterclaim, which was filed in the name of Krikor, sought damages in excess of the $15,000 available in the Special Civil Part.

The initial pleadings were dismissed for reasons not clear on this record, but plaintiff filed a second complaint reasserting her intention to be bound by the $15,000 limitation on damages in the Special Civil part. Defendants responded, reitcrating the objection to an action against Kalfayan and a counterclaim for damages by Krikor in excess of $15,000. The case was transferred to the Civil Part of the Law Division and scheduled for trial.

Plaintiff and defendants' attorney appeared for trial, but Kalfayan did not attend and no other witness for the defense was called. Defense counsel requested an adjournment because he could not reach Kalfayan and there was no one else in business with him. Although his request was denied, defense counsel, noting he was not likely to receive an adjournment from the presiding judge, declined to pursue that option. Thereafter, over defense counsel's objection based on lack of prior notice, the judge amended plaintiff's complaint to allow her to establish damages in the amount of $69,000.

Plaintiff's unrebutted testimony established the following. Plaintiff, owner of Jenny Capp Company (JCC), and Krikor, through Kalfayan, had cooperated in business ventures prior to the transaction at issue. In the earlier transactions, plaintiff dealt only with Kalfayan, purchased material from Krikor and manufactured the products she marketed herself in JCC's California facility.

This transaction was different in that plaintiff had a contract with another company, TWT Distributing. TWT agreed to pay her $95,616 for a product line she designed and that TWT planned to market under its own label. Because plaintiff did not have the wherewithal to fill the order, she and Kalfayan discussed the possibility of Krikor overseeing production and shipping of the completed products.

Plaintiff produced three draft agreements, which were dated May 15, May 23, and November 1, 2006, respectively. The first was prepared by plaintiff, and the second two were prepared by Kalfayan. The agreement plaintiff prepared was for Kalfayan's signature as owner of Krikor. The agreements Kalfayan drafted identified him as the president of Krikor. Although all three agreements set forth the respective obligations of JCC and Krikor, all three identify plaintiff, JCC, Kalfayan and Krikor as the contracting parties.

*2 The agreements have common elements pertinent to plaintiff's claim. Under each version, Krikor was obligated to either produce and ship or supervise the manufacture and shipment of the finished products. Krikor was to pay the suppliers and contractors, and JCC was to provide printed inserts for the packaging. Plaintiff was to produce evidence that she had granted TWT authority to pay Krikor for the merchandise and for Krikor to deduct its costs and retain three percent of the net amount of the invoice.

The differences in the agreements related to the cost of shipping; plaintiff proposed that she pay the costs, but Kalfayan proposed that he deduct that expense along with his other costs and his three percent of the net value of the invoice before remitting the remainder of TWT's payment to JCC. Although Kalfayan did not sign his May 23 or November 1, 2006 proposals, in June 2006 he had notified plaintiff that he would have the order completed by the second week in July. The November 1, 2006 agreement varied from Kalfayan's May 23 proposal only in that it provided for the parties to agree on a per-item cost, inclusive of shipping costs. Krikor was to deduct that per-item cost, along with three percent of the net amount of the invoice, before remitting the balance to JCC. Plaintiff signed that agreement when Kalfayan sent it to her on November 1, 2006. She did not have a copy signed by him.

At trial, plaintiff testified that Kalfayan's total per-item cost was $75,181. She subsequently corrected that assertion and said that the $75,181 also included Krikor's three-percent share of the net invoice value.

The merchandise was not shipped to TWT in November. According to plaintiff, in December 2006 Kalfayan told her he could not complete the packaging of the individual items. At the same time, TWT was threatening plaintiff with cancellation of its order because of the delay. Consequently, plaintiff traveled from California to Krikor in New Jersey to complete the work. She hired laborers at a cost of $3200 and spent $2887 on packaging materials and was ready to ship on December 22. Kalfayan, however, demanded payment of $35,000 in advance and directed plaintiff to leave when she could not comply with his demand. Kalfayan contacted plaintiff on December 29, but by that time the owner of TWT had called plaintiff and cancelled the contract.

At the time of trial, plaintiff had no idea what Kalfayan had done with the products he produced and she packaged. She said she lost a $20,435 profit on the transaction, which represented the portion of the $95,616 invoice amount due her after deduction of the $75,181 owed to Krikor, which included its three-percent share of the net invoice value. In addition, she sought payment of her costs in completing the packaging as well as the expense of her travel and stay in New Jersey.

On the foregoing evidence, the trial judge found that the parties had reached an agreement that was evidenced by the written agreements, Kalfayan's acceptance by partial performance and the oral agreement on the amount due Krikor. He further determined that defendants breached the agreement by failing to complete the work and demanding advance payment. The trial judge awarded plaintiff $26,550 to account for her lost profit and her expenditures on labor and packaging.

*3 Relevant to Kalfayan's individual liability, the trial judge found that he was named as a party to the contracts and that by dealing directly with plaintiff he had further indicated his intention to be bound. The trial judge concluded that Kalfayan's conduct indicated that he was "entering into an agreement ... on an individual basis." He was "satisfied" that this conduct was a sufficient reason to hold Kalfayan personally liable for the damages.

On appeal defendants argue:

I. The transaction was between plaintiff and corporate defendant Krikor, Inc.

II. Plaintiff's damages should be capped at the jurisdictional limit of the Special Civil Part.

III. The court allowed hearsay evidence to be presented in the case and [it] was considered by the court in rendering its decision.

IV. The court err[ed] in making a contract out of the oral positions of the parties where there was clear diversity of position.

We reject defendants' claim that the trial judge erred by concluding that this transaction was between plaintiff, Krikor and Kalfayan and not between plaintiff and Krikor. The question was whether the parties intended to bind themselves as well as their business entities. The trial judge determined that this intention was manifest in the language identifying both plaintiff and Kalfayan as parties to the agreement, which appears in all three agreements including the two presented to plaintiff by Kalfayan, and by Kalfayan's direct dealings with plaintiff as if he were "running the show."

This evidence is adequate to support the factual findings that underlie the judge's conclusion that plaintiff and Kalfayan intended to bind themselves. *Rova Farms Resort v. Investors Ins. Co.*, 65 *N.J.* 474, 484 (1974). Moreover, there is no question that it was proper for the judge to consider the several written agreements drafted by the parties in the course of this transaction and to take account of the circumstances, including their relationship at the time and their conduct. *See Graziano v. Grant,* 326 *N.J. Super* . 328, 342 (App.Div.1999); *Nester v. O'Donnell,* 301 *N.J.Super.* 198, 210 (App.Div.1997); *The Anthony L. Petters Diner, Inc. v. Stellakis,* 202 *N.J.Super.* 11, 21 (App.Div.1985); *see also N.J.S.A.* 12A:2-204 (providing that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract"). Given the parties' agreement as the trial judge found it to be, Kalfayan's status as president of Krikor is irrelevant.

In contrast to defendants' claim about Kalfayan's liability, their objection to entry of a judgment in excess of $15,000 has merit. Despite notice of defendants' request for transfer from the Special Civil Part because the damages exceeded $15,000, plaintiff never moved to amend her complaint to seek damages in excess of the limit applicable to a claim filed in the Special Civil Part. *See R* . 6:1-2(c) (precluding recovery that exceeds the limit). There is no question that a plaintiff may seek to amend a complaint to recover damages in amount of the limit when the matter is transferred to the Law Division. *See R.L. Mulliken, Inc. v. City of Englewood,* 59 *N.J.* 1, 4 (1971); Pressler & Verniero, *Current N.J. Court Rules,* comment 2.1.1 on *R.* 6:4-1 (2011) (noting that the body of law regarding the county district court's monetary jurisdiction, such as *R.L. Mullen,* remains fully applicable to the Special Civil Part). Nonetheless, amendment is not appropriate when accomplished without accounting for prejudice to the other party. *See R.* 4:9-2 (providing that on objection to trial of an issue not within the pleadings a court may permit the amendment when the objecting party fails to show prejudice). Here, there was no witness available to testify on behalf of defendants. The prejudice to the defense was apparent, and in this circumstance, the trial judge erred by not exercising his discretion to grant a continuance in accordance with *Rule* 4:9-2. Accordingly, the judgment must be reduced to $15,000.

*4 Our decision to reduce the judgment makes it unnecessary to consider defendants' objection to the adequacy of competent evidence supporting an award of damages for plaintiff's expenditures on packaging and labor. The amounts in issue do not exceed the reduction we direct.

Similarly, defendants' objection to the trial judge's reliance on plaintiff's hearsay testimony about TWT's cancellation of the contract is immaterial. While plaintiff's loss was the benefit of her bargain with TWT, whether or not TWT cancelled its purchase order, plaintiff could not collect that benefit because of defendants' failure to deliver the finished products.

Defendants' claim that the evidence was inadequate to establish an enforceable agreement is without sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(E). The trial judge's findings are adequately supported by the record. *R.* 2:11-3(e)(1)(A).

Affirmed as modified and remanded for amendment of the judgment in conformity with this opinion.

**All Citations**

Not Reported in A.3d, 2010 WL 4116879

Footnotes

1 Improperly pleaded as Kohar Krikor, Inc., and Greg Kalfayan.

# ATTACHMENT B

2012 WL 6652510
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

ALL SAINTS UNIVERSITY OF MEDICINE ARUBA; Asuma LLC; and Richmond Paulpillai, Plaintiffs,
and
Joshua Yusuf, Plaintiff–Appellant,
v.
Gurmit Singh CHILANA, Defendant–Respondent,
and
Peter Silberie, Defendant.

A-2628-09T1
|
Submitted Dec. 5, 2011.
|
Decided Dec. 24, 2012.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C–147–08.

**Attorneys and Law Firms**

Samuel D. Bornstein, attorney for appellant.

Ferro Labella & Zucker, L.L.C., attorneys for respondent (Arthur P. Zucker, of counsel and on the brief; Michael A. McDonough, on the brief).

Before Judges A.A. RODRÍGUEZ, SABATINO and ASHRAFI.

**Opinion**

PER CURIAM.

***1** This case involves what is termed the "judicial dissociation" of two shareholders in a New Jersey limited liability company, ASUMA, LLC ("ASUMA" or "the LLC"), through a final order expelling them from further involvement in the LLC's business. The LLC was formed in connection with the operations of a fledgling medical school in Aruba. After the medical school developed a host of financial and other problems, litigation over the entity's operations ensued in the Chancery Division involving the LLC's four shareholders, plaintiffs Joshua Yusuf and Richmond Paulpillai, and defendants Gurmit Singh Chilana and Peter Silberie.[1] The trial court appointed a fiscal agent to oversee the LLC's affairs. Meanwhile, Chilana, a minority shareholder, infused a substantial amount of his personal funds to pay the medical school's expenses and to prevent its closing.

Following a six-day bench trial, the Chancery judge ordered that Yusuf and Paulpillai be expelled from the LLC, upon finding that they had engaged in conduct authorizing such judicial dissociation, pursuant to both subsections 3(a) and 3(c) of *N.J.S.A.* 42:2B–24(b). The judge also concluded, based upon the unrebutted testimony of defendants' financial expert, that plaintiffs' shares in the LLC had no value.

Yusuf now singularly[2] appeals the trial court's findings, arguing that his conduct and that of Paulpillai violated neither of the two statutory provisions alternatively relied upon by the trial judge. Yusuf further contends that the judge erred in attributing zero value to his shares in the company.

For the reasons that follow, we affirm the trial court's final judgment ordering plaintiffs' dissociation from the LLC. We do so based solely upon subsection 3(c) of the statute, without the need to reach the separate grounds cited under subsection 3(a).

We further clarify that, despite what the parties and the trial judge may have otherwise assumed, *N.J.S.A.* 42:2B–24(b) does not compel the sale of the shares of a dissociated member. In light of that clarification, it was unnecessary for the court to have determined a value for plaintiffs' shares, although we discern no error in the expert-based valuation that the trial judge adopted.

## I.

The extensive trial record contains the following pertinent facts and circumstances. In essence, the chronology depicts a host of problems and disagreements that beset the new medical school and the LLC formed to operate it.

*The Formation of the Medical School in Aruba*

Yusuf holds a doctorate degree in science. He was a student and faculty member teaching biochemistry at St. James

School of Medicine in the Dutch Antilles, where he met Paulpillai, an admissions administrator there. The two men resolved, with their collective experience, to establish another medical school in the Caribbean. To pursue that objective, Yusuf suspended his medical education. At the time, he was twenty months away from obtaining his medical degree.

***2** In 2004, plaintiffs formed a Canadian corporation, named the Medical Education Examination Resource Center, Inc. ("MEERC"), for the purpose of starting a medical school in the Caribbean. They used MEERC to obtain a charter for such a school from the government of Aruba. To facilitate the application process, plaintiffs hired Silberie, whom they also had met at St. James, to establish a link with the Aruba government. In exchange for contributing his services, Silberie received an ownership stake in MEERC, although the record does not indicate what percentage.

On November 10, 2004, the Aruba government granted MEERC's application for a charter to establish All Saints University of Medicine ("All Saints"). On the same date, the principals of All Saints entered into an agreement with the government. In that agreement, the government agreed to issue residency permits to the students and faculty at All Saints. The government also agreed to issue no more than two charters for a medical school in the country. The second charter was issued to Xavier University School of Medicine ("Xavier").

After obtaining the charter, the three founders of All Saints (Yusuf, Paulpillai, and Silberie) began preparing the school for classroom instruction. Yusuf initially served as the school's Chief Academic Officer. In that capacity, he hired the faculty and designed a four-year curriculum for the M.D. degree program. Meanwhile, Paulpillai, as Chief Administrative Officer, created the admissions criteria and recruited students. Lastly, Silberie assisted students with the immigration process, as the school's Director of Internal Affairs. Yusuf and Paulpillai bought equipment, supplies, and furnishings. They also opened an account at the Caribbean Mercantile Bank in Aruba (the "CMB account") on behalf of All Saints.

In January 2005, All Saints became operational, with an initial class of seventeen students. At the outset, MEERC received the tuition from these students, which was deposited into an account in Canada (the "MEERC account"), and then wired to the CMB account in Aruba. Yusuf and Paulpillai were authorized to sign checks on both accounts. Silberie was an authorized signatory only on the CMB account. Paulpillai did not ordinarily sign checks on the CMB account, from which All Saints initially paid its operating expenses.

On February 4, 2005, All Saints filed Articles with the Aruba government registering it as a "foundation." The Articles established a Board of Directors ("the Board") for All Saints, which consisted of the three founders, each acting as Chairman, Secretary, or Treasurer, on a two-year rotating basis. Initially, Yusuf was the school's Secretary, Paulpillai the Treasurer, and Silberie the Chairman. The Articles required the Treasurer to "conduct[ ]" the "financial management" of All Saints.

Pursuant to the Articles, the decisions of the Board of All Saints required unanimous action by all three founders. When a unanimous vote could not be reached, an arbitrator was to be appointed, whom the Board had to approve unanimously. The Board also had the express authority to "grant others one or more of its powers, provided this is clearly described."

***3** In September or October 2005, the enforcement branch of the Aruba immigration department entered All Saints with armed officials and detained several of its students. In response, All Saints collaborated with a member of the Aruba parliament, at the direction of the Prime Minister, to establish protocols that would allow its students to remain in Aruba while the government processed their permit applications. The immigration problems evidently persisted, but some protocols were apparently in place as of the time of the trial in the fall of 2009.

*The Recruitment of Chilana and the Formation of the LLC*

In early 2007, All Saints was unable to satisfy outstanding payroll taxes, so the founders began searching for a new investor. The Dean of All Saints, Lakhinder Kanwar, referred Yusuf to Chilana, an obstetrician and gynecologist licensed in New Jersey and practicing in Paterson. Chilana agreed to purchase 250 shares of All Saints, representing a twenty-five percent stake, for $500,000. The four parties (Yusuf, Paulpillai, Silberie, and Chilana) also agreed to form a New Jersey LLC, ASUMA, to assume many of the functions of MEERC.

On May 3, 2007, the four parties executed an Operating Agreement for ASUMA.[3] As contemplated, Chilana received 250 shares in All Saints, which represented a twenty-five percent minority interest, in exchange for his $500,000 contribution. Meanwhile, Yusuf and Paulpillai each owned 265 shares, together controlling fifty-three percent of All Saints. Finally, Silberie owned 220 shares, a twenty-two percent interest. Among other things, the parties stated in the Operating Agreement that they "shall not at anytime [sic] be compelled to give up or sell their shares for any reason," and that their "decision to sell shares must be voluntary."

The Operating Agreement further provided that half of Chilana's $500,000 purchase price would be applied to cover the school's $60,000 outstanding payroll taxes, and other operating expenses. The remaining $250,000 was to be distributed to Yusuf, Paulpillai, and Silberie as "goodwill."

In addition, the Operating Agreement appointed Chilana to the Board of All Saints, and he was given the title of Chief Clinical Officer. Yusuf testified that Chilana's position on the Board did not give him the same authority as the three founding members. For example, the Treasurer had the authority to manage All Saints's finances. Chilana could not become Treasurer because, pursuant to the Articles, that title rotated only among the founding members every two years.

The Operating Agreement gave Chilana authority to co-sign checks on the CMB account. Two signatories were needed to authorize checks on the CMB account, which could be Silberie and "at least one other director or Dean," including Chilana. The Operating Agreement further provided that a second bank account would be established in the United States.

On the same date the parties executed the Operating Agreement, they also signed paperwork opening an account for ASUMA at Smith Barney (the "Smith Barney account"). The Operating Agreement provided that the authorized signatories on the Smith Barney account could include Chilana, plus either Yusuf or Paulpillai, but not Silberie.

*4 Under the Operating Agreement, signatures from three persons were required to write a check over $10,000 on each account, but each party had rights to view the accounts. These terms were contained in Paragraph 7F of the Operating Agreement.

The Operating Agreement did not expressly designate a managing member who was responsible for making day-to-day operational decisions for the LLC. The Operating Agreement did, however, make clear that Board decisions required a unanimous vote of the directors. The Operating Agreement also contained a provision that the expenses of the administrative offices "must be approved by the directors and taken care of by the University." The Operating Agreement similarly had a "[b]udgeting" provision, in which the parties had agreed that:

> [a] budget for the operation of the University must be prepared every semester by the USA administrative office and *must be approved in writing by all the directors/shareholders* before it can be implemented. Budget must be prepared at least six weeks prior to commencement of a new semester. All operational expenses must be approved *by at least three of the shareholders/directors.*
>
> [Emphasis added.]

Meanwhile, in the paperwork submitted to Smith Barney, Chilana and Yusuf were designated as ASUMA's "managing members."

On May 5, 2007, Chilana filed a Certificate of Formation in New Jersey, organizing ASUMA LLC. Paragraph 3 of the Operating Agreement provided that the "shareholders of [All Saints] are also ... shareholders of ASUMA LLC[.]" As a result, the parties had the same percentage interests in ASUMA as they did in All Saints. Specifically, Yusuf and Paulpillai each had 265 shares, and thus, had a combined controlling stake in the LLC; Chilana had 250 shares, and Silberie, 220 shares.

Chilana established ASUMA's office in the basement of the building of his New Jersey medical practice. To begin paying ASUMA's expenses, Chilana sent fifty blank checks on the Smith Barney account to Yusuf and Paulpillai, which they respectively signed and returned to him. Chilana also gave Paulpillai, Silberie, and Yusuf a password to view the Smith Barney account online.

*Problems Emerging With the Business and the Parties' Relationships*

At a directors' meeting held at ASUMA's office in New Jersey on June 27, 2007, which lasted ten hours, the parties' relationship began to deteriorate. Among other things, Paulpillai and Yusuf objected to ASUMA's offices being located in a building owned by Chilana. Silberie, meanwhile, complained that some students from All Saints had transferred to a Dominican medical school, known as "All Saints University of Medicine, Dominica," in which Paulpillai and Yusuf owned a combined eighty-percent interest. Silberie perceived that the students were being improperly siphoned to Dominica. He also complained that he was unable to get All Saints's financial statements for 2005 and 2006 from Yusuf and Paulpillai.

*5 The June 2007 directors' meeting ended with persisting conflict between Silberie, on the one hand, and Yusuf and Paulpillai, on the other. Chilana, meanwhile, straddled a middle position at that time, siding with neither camp.

The next day, after Yusuf and Paulpillai had left the office, Chilana asked Silberie to co-sign checks on the Smith Barney account and Silberie agreed. Having gained Silberie's willingness to provide his signature, Chilana thereafter ceased sending checks to Yusuf and Paulpillai to co-sign. According to Chilana's trial testimony, he had "forgotten" about Paragraph 7F in the Operating Agreement, requiring that either Yusuf or Paulpillai co-sign checks with him. Chilana also thought that the Operating Agreement's provision, which appeared to prohibit him from co-signing the Smith Barney checks with Silberie, "did not make sense[.]"

At some point in July or August 2007, Chilana opened a deposit account (the "Citibank account") for the LLC, which Chilana believed was with Yusuf's consent. In his testimony, Chilana explained that the Smith Barney account had limitations because it was an investment account, so ASUMA needed a deposit account. According to Chilana, deposits into the Citibank account transferred automatically to the Smith Barney account, and vice versa.

Chilana began to pay All Saints's expenses from the Citibank account. He also changed the online method for students to pay their semester tuition to All Saints from PayPal to Google, because the Google system was substantially cheaper. The tuition payments transferred electronically into the Citibank account through Google's payment service. Chilana was the only authorized signatory on the Citibank account. Yusuf testified that he was not given the password to access the new Google account, and thus he could not monitor it.

In July 2007, Yusuf learned that Chilana and Silberie were co-signing the Smith Barney checks. The following month, Yusuf complained to Chilana by phone that he was violating Paragraph 7F of the Operating Agreement in co-signing checks with Silberie. Yusuf memorialized that conversation in an e-mail to Chilana. Chilana responded by e-mail, accusing plaintiffs of also signing checks in breach of Paragraph 7F. Paulpillai and Yusuf threatened to advise Smith Barney that checks signed by Silberie "were NOT authorized by the board of ASUMA," which they understood would have "serious implications."

Despite their ongoing conflict over check-signing authority on the Smith Barney account, on August 14, 2007, the parties agreed to a new arrangement for the authorized signatures as to the CMB account, which could be any two principals, including the combination of Chilana and Silberie. In effect, this modified agreement resulted in Silberie being no longer needed to co-sign withdrawals from the CMB account, as the Operating Agreement had required.

The parties continued to dispute, however, the authorized signatories for the Smith Barney account. In February 2008, plaintiffs sent a letter to Smith Barney on All Saints letterhead and, relying on their combined majority interest in ASUMA, directed Smith Barney not to honor checks signed only by Chilana and Silberie. Alternatively, they instructed the bank to honor only the checks signed by these four combinations of ASUMA members: (1) Chilana and Yusuf; (2) Chilana and Paulpillai; (3) Silberie and Paulpillai; and (4) Silberie and Yusuf.

*6 Yusuf testified that he was attempting to compromise by permitting Silberie to sign checks, but prevent him from signing with Chilana. Yusuf explained that he did not want Chilana and Silberie co-signing checks together because he feared they would not tell Paulpillai and him the reasons for withdrawing funds.

The Operating Agreement required that "[a]ll expenses of [ASUMA]" be "approved by the directors," and that All Saints's "operational expenses must be approved by at least three ... shareholders / directors." However, at trial Yusuf specifically contested only the issuance of two identified checks: one to Chilana's lawyer, Lazerowitz (which was evidently payment for Lazerowitz's services rendered in forming ASUMA); and another check to "Volpo" (which Yusuf discovered was a designation for the payment for student clinical rotations).

On February 6, 2008, Smith Barney responded to plaintiffs' letter by suspending activity on the account. It advised that "going forward we will require the signatures of *all four partners* to effect transactions [.]" (Emphasis added).

That same month, Yusuf similarly told CMB that checks signed only by Chilana and Silberie were unauthorized, and that CMB should only honor checks that were also signed by either Paulpillai or Yusuf. In response, CMB froze its account on February 7, 2008.

As a result of these accounts being frozen, the parties had difficulty paying teacher salaries, rent, and taxes. Some checks that had already been issued on the accounts bounced.

On February 14, 2008, by e-mail to the parties, Chilana proposed that they use their personal funds to pay the school's urgent expenses of $50,000. Chilana again urged the others to adopt this solution by an e-mail sent the following day. Plaintiffs did not agree. In fact, in a reply e-mail, Paulpillai told Chilana that he "will NOT be allowed to take any money out of the University accounts in the [United States] or Canada unless it is authorized by ALL the four of us." In another e-mail, this one directed to Silberie but also received by Chilana, Paulpillai told Silberie that if he "refuse[d] to agree" with him and Yusuf regarding the authorized signatories, and "checks and withdrawals are not honored by our bank in the U.S.A. and Aruba before [the] end of February 2008, you and you alone will be totally responsible for whatever devastating consequences this might bring[.]" That e-mail apparently was copied to some of the teachers at All Saints.

*Chilana's Infusion of Funds and The Enterprises' Continued Problems*

Faced with these operational difficulties and plaintiffs' resistance, Chilana used his own personal funds to pay expenses and teacher and staff salaries to keep the school afloat. [4] Because February 2008 salaries had been paid late to the teachers and staff, they sent an e-mail on March 25, 2008, threatening to "walk out" and to report All Saints to the Aruba labor department if the March 2008 salaries were also paid late. In addition, the school's immigration problems were persisting, apparently because All Saints either did not pay or had been late in paying its taxes. [5]

*7 On March 11, 2008, the Smith Barney account was modified to provide that the only authorized signatories for it were Paulpillai and Chilana. An authorization to that effect was signed by all the parties except Silberie. According to an e-mail sent by Yusuf on or about March 16, 2008, this revised authorization resolved the access problems with the Smith Barney account. However, that perception was apparently inaccurate. To the contrary, Chilana testified that Smith Barney never agreed to accept less than all four parties' unanimous approval of transactions. Chilana further testified that both the CMB and Smith Barney accounts had not "opened up" prior to this litigation.

Sometime in March 2008, Chilana and Silberie applied to the Aruba government for a charter to operate another medical school. In spite of the government's earlier commitment that no more than two such charters would be issued, it granted defendants' request and issued them the third charter in October 2008.

Chilana and Silberie established the Aruba University of Medicine Foundation. They listed the foundation with the Aruba Chamber of Commerce, as a precondition for the charter to be issued. According to Chilana, he acquired the charter with no intention to start a medical school unless All Saints failed, in which case the students and faculty would need a new medical school. He did not recruit faculty, staff, or students for the third school. He also did not buy or rent property or medical equipment. [6]

*The Order to Show Cause and the Chancery Litigation*

On April 22, 2008, Yusuf and Paulpillai, as plaintiffs, filed a verified complaint in the Chancery Division, alleging breach of fiduciary duty, breach of contract, and misappropriation against defendants, Chilana and Silberie, stemming from their alleged violations of the Operating Agreement. At time of the verified complaint's filing, the LLC's bank accounts were still frozen.

Chilana counterclaimed for fraud, misappropriation of funds and corporate opportunity, breach of fiduciary duty, misconduct, and negligent misrepresentation. He requested injunctive relief, seeking to have the court authorize him "to act solely on behalf of [All Saints]."

On April 30, 2008, the trial court entered an order to show cause with temporary restraints. The court appointed Richard H. Weiner, an attorney, as Special Fiscal Agent for the LLC. Weiner, in turn, appointed Theodore Glueck, an executive, as the interim chief operating officer of All Saints and the LLC.

By consent order on June 10, 2008, the trial court vacated the temporary restraints and imposed new preliminary restraints delineating the rights and obligations of the parties to manage ASUMA and All Saints, pending trial. On September 11, 2008, the court entered another consent order expanding Glueck's authority as interim chief operating officer, which specifically outlined his responsibilities. This expansion was suggested by Weiner, who was "extremely concerned [about the] financial viability" of All Saints. Default judgment was subsequently entered against Silberie, who did not file any responsive pleadings to the lawsuit.

*8 On November 20, 2008, Chilana filed an emergent application requesting the trial court to declare plaintiffs judicially dissociated from ASUMA, pursuant to *N.J.S.A.* 42:2B–24(b)(3) of the New Jersey Limited Liability Company Act ("LLCA"), *N.J.S.A.* 42:2B–1 to –70. Chilana sought such emergent relief because All Saints required immediate capital to continue operating into the next semester. By certification dated November 24, 2008, Glueck confirmed that All Saints was in poor financial condition. Chilana intended to inject the capital necessary to sustain the school only if plaintiffs were dissociated.

On December 3, 2008, oral argument was held on Chilana's emergent application. The parties attempted that day to reach agreement on a method to save All Saints, pending trial. Plaintiffs insisted, however, that they were "not in a position" to make any capital contributions. Chilana, on the other hand, argued that All Saints was essentially a "pyramid scheme," because students' prepaid tuition payments had been used to pay All Saints's expenses. Hence, if the students' tuition payments were not so applied, additional equity from the members would be needed to cover the expenses. Chilana offered to contribute that needed equity if the court ousted Yusuf and Paulpillai from operating All Saints and ASUMA.

On December 15, 2008, the trial court entered an order amending its prior order of June 10, 2008 imposing preliminary restraints. This order provided that Chilana "shall loan ... $350,000 to ASUMA to be used by the COO to pay the obligations" of ASUMA and All Saints. The order also enjoined plaintiffs, pending trial, from participating in the day-to-day affairs of ASUMA and All Saints. On the same date, Weiner verified that Chilana had transferred $250,000 into a trust account to pay All Saints's obligations, of which $100,000 had already been used to pay past-due bills. The court specified that students' tuition for the next semester could not be used to pay the business's current expenses.

On March 13, 2009, the trial court entered an order sanctioning plaintiffs for failure to comply with a prior order as to certain discovery issues. In particular, plaintiffs had not provided ASUMA's accountant, Dean Symeonides,[7] with adequate bank records establishing that students had paid tuition to plaintiffs prior to the formation of ASUMA, and showing in which bank plaintiffs had deposited the tuition payments.

Because plaintiffs persisted in their non-compliance with the court's discovery order, Chilana moved for an adverse inference on May 12, 2009. On June 12, 2009, the court granted that request. In its oral opinion, the court described plaintiffs' failure to provide the tuition-related records as "outrageous," "a farce," "contemptuous," and "evasive." Specifically, the court ruled that:

> [T]here will be an inference that [Yusuf and Paulpillai] have converted the money for the entity for their own purposes. That's the finding. So I'm not going to sanction. I'm not going to order moneys to be paid. But the determination is that based on this record they've converted these moneys to their own purposes, and they have done so in [derogation] of the entity that should have received the moneys. They've had plenty of opportunities to show otherwise. They haven't.

*9 Shortly before trial, on September 4, 2009, Silberie agreed to sell his interest in ASUMA to Chilana for the nominal consideration of one dollar. That agreement was contingent on Chilana successfully dissociating plaintiffs from ASUMA.[8]

*The Trial and the Court's Findings*

The trial took place over six intermittent days in September 2009. At trial, Weiner (the fiscal agent) and Glueck (the chief operating officer) each testified about the host of management and financial problems persisting at All Saints. Weiner testified that All Saints could not continue as a viable entity, or it would be "extremely difficult" to do so, if plaintiffs and defendants continued to operate ASUMA and All Saints collectively, given the parties' divisive conduct. Glueck, meanwhile, testified that the financial condition of All Saints was "tenuous," and that its operations were "extremely difficult."

As further illustration of the venture's problems, Weiner testified about two students who had claimed that All Saints had wrongfully failed to issue their medical degrees, despite their completion of the required medical courses and accumulation of sufficient credits. Plaintiffs supplied the academic records of one of those students to Weiner, but those records were incomplete. Glueck hired an expert to determine whether the student was entitled to a degree, and the expert confirmed that he was. Weiner believed that the problem with this student predated Chilana's involvement in All Saints. As for the second student, she obtained a default judgment in Canada against All Saints, after serving her complaint on plaintiffs. Weiner was able to resolve this student's lawsuit. He did not know whether her problem had predated Chilana's involvement in All Saints. Weiner contended that the problems with these two particular students was reflective of a more general failure by All Saints to keep accurate student records.

Following the trial, the court issued a written decision on December 23, 2009. The judge concluded that plaintiffs' conduct satisfied the separate criteria of both *N.J.S.A.* 42:2B–24(b)(3)(a) and *N.J.S.A.* 42:2B–24(b)(3)(c) for dissociation. In particular, the court concluded, as to subsection 3(a), that plaintiffs had engaged in wrongful conduct that adversely and materially affected the LLC's business. As to subsection 3(c), the court was persuaded that plaintiffs had engaged in conduct which "makes it not reasonably practicable to carry on the business of the LLC with them as members."

Having dissociated plaintiffs from the LLC pursuant to the statute, the trial court then attempted to fix an amount representing the fair value of their interests in the LLC. However, plaintiffs did not offer competing expert testimony to refute the opinion of defendant's valuation expert that the LLC had no positive value. Hence, the court valued plaintiffs' interest in the LLC at zero, consistent with the only expert testimony that it heard on the subject. The value was determined as of June 31, 2008, because the parties had stipulated to that date.

***10** On January 6, 2010, the court entered a corresponding final judgment dissociating plaintiffs from ASUMA and dismissing plaintiffs' complaint.

*Post–Trial Developments*

On January 14, 2010, Chilana petitioned the Court of First Instance in Aruba to remove Yusuf and Paulpillai from the Board, relying on the Chancery judge's decision in this case. Meanwhile, in February 2010, Paulpillai entered into an agreement conveying his interest in ASUMA to Yusuf for the sum of $10.

Yusuf subsequently appealed the final judgment to this court. Paulpillai did not appeal the judgment, and defendants have not cross-appealed on any issues.

On May 27, 2010, the Aruba Court of First Instance issued a decision on Chilana'a petition. That tribunal credited the Chancery judge's findings, and held that those findings established under Aruba law that plaintiffs had engaged in the "(financial) mismanagement" of All Saints, which justified their removal from the Board. The Aruba court noted, however, that Yusuf's appeal of the January 6, 2010 final judgment was pending with this court, and therefore it merely suspended him from the Board until this court's merits decision. Since Paulpillai did not appeal the Chancery judge's findings, the Aruba court deemed the findings to be final against him, and thus removed him individually from the Board.

As of the time the parties' filed their appellate briefs, Chilana was still operating ASUMA and All Saints. The School has been renamed the Aureus University of Medicine. Evidently, Silberie remains on the school's Board, but he is not a member of ASUMA.

II.

On appeal, Yusuf fundamentally contests the trial court's denial of relief to him and Paulpillai and its grant of relief instead to defendants. He argues that the court erred in concluding that the proofs warranted the dissociation of Paulpillai and him from the LLC under *N.J.S.A.* 42:2B–24(b)(3)(a) and (c). Yusuf further argues that the harsh statutory remedy of dissociation is not automatic, nor is it appropriate here because, in his view, the judge essentially and improperly "rewrote" the terms of the LLC's Operating Agreement.

Yusuf maintains that several of the court's factual findings lack support in the record, specifically including findings that plaintiffs (1) improperly withheld financial documents relating to the operations of the LLC and MEERC; (2) failed to provide documentation of student grades, courses, and credits; (3) caused a deadlock over the handling of the Smith Barney and CMB bank accounts, resulting in those accounts being frozen; (4) permitted immigration problems to fester; (5) failed to make adequate funding available to the school and misused current student funds to meet past defaulted obligations; and (6) engaged in conduct that brought the school to the brink of collapse and threatened its future viability.

In addition, Yusuf argues that the trial court should not have excused defendants for signing checks in violation of the Operating Agreement and for obtaining a charter for a third medical school in Aruba. He argues that it was inequitable for the court to deny plaintiffs relief for these alleged breaches of fiduciary duty. He also challenges the court's conclusion that defendant's actions caused no harm to the LLC or to All Saints. He contends that he has a right to affirmative relief, even in the absence of a showing of any monetary harm to the LLC or All Saints flowing from defendants' alleged misdeeds.

***11** Lastly, Yusuf argues that the court erred in accepting the defense expert's opinion that plaintiffs' shares in the LLC had no value. He asserts that the valuation comprised an improper net opinion. He further argues that the expert improperly relied upon hearsay projections of enrollment and other information that Symeonides had received from Glueck and Chilana.

A.

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review[.]" *Seidman v. Clifton Sav. Bank,* 205 *N.J.* 150, 169 (2011). " '[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice [.]' " *In re Trust Created By Agreement Dated December 20, 1961,* 194 *N.J.* 276, 284, 944 A.2d 588 (2008) (quoting *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.,* 65 *N.J.* 474, 484, 323 A.2d 495 (1974)). The court's findings of fact are "binding on appeal when supported by adequate, substantial, credible evidence." *Cesare v. Cesare,* 154 *N.J.* 394, 411–12, 713 A.2d 390 (1998); *see also Brunson v. Affinity Fed. Credit Union,* 199 *N.J.* 381, 397, 972 A.2d 1112 (2009).

To the extent that the Chancery judge's rulings in this case implicate equitable principles, we also bear in mind that appellate courts are generally reluctant to interfere with the exercise of judgment by a court of equity. We accord considerable deference to the discretion of the judges who make such equitable rulings. *See, e.g., Sears Mortg. Corp. v. Rose,* 134 *N.J.* 326, 354, 634 A.2d 74 (1993); *see also Marioni v. 94 Broadway, Inc.,* 374 *N.J.Super.* 588, 600–01, 866 A.2d 208 (App.Div.2005) (noting the Chancery court's discretion in deciding whether to grant the equitable remedy of specific performance). "[A] judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice and the law." *Graziano v. Grant,* 326 *N.J.Super.* 328, 342, 741 A.2d 156 (App.Div.1999).

By comparison, we review the trial court's determinations on legal issues de novo. A trial judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty v. Twp. Comm.,* 140 *N.J.* 366, 378, 658 A.2d 1230 (1995).

Applying these well-established standards of review here, we discern no basis to set aside the trial court's final judgment, for the many reasons that we now delineate.

B.

The issues litigated in this case require our application of the LLCA, the operative statute that was in force at the time of the parties' actions and the trial court's rulings, and which remains in force as of the time of this appeal. [9] Section 2B–24 of the LLCA provides that "[a] member *shall be dissociated* from a limited liability company upon the occurrence of *any* of the following events," as enumerated in subsections (a) and (b) of the provision and the various subparts of those subsections. *N.J.S.A.* 42:2B–24 (emphasis added).

***12** Our focus here is upon *N.J.S.A.* 42:2B–24(b)(3), which provides that a member of an LLC is to be dissociated from the company, upon judicial expulsion, for one of three reasons:

> (a) the member engaged in *wrongful conduct that adversely and materially affected* the limited liability company's *business;*
>
> (b) the member willfully or persistently committed a material breach of the operating agreement; or
>
> (c) the member engaged in *conduct relating to the* limited liability company *business which makes it not reasonably*

> *practicable to carry on the business with the member as a member of the limited liability company* [.]
>
> [*N.J.S.A.* 42:2B–24(b)(3) (emphasis added).]

Yusuf first contends that the trial judge misapplied this statute, as a matter of law, by failing to enforce the Operating Agreement's restrictions upon the forced sale of a member's stock in the LLC. We disagree.

We recognize that the LLCA does afford members of an LLC wide discretion to define their relationship, by allowing members to establish the LLC's structure, and to contract for their rights and obligations through the express terms of an operating agreement. *See Kuhn v. Tumminelli,* 366 *N.J.Super.* 431, 440, 841 A.2d 496 (App.Div.) (noting that the LLCA applies to an LLC "unless the members agree otherwise in an operating agreement"), *certif. denied,* 180 *N.J.* 354, 851 A.2d 648 (2004). As *N.J.S.A.* 42:2B–66(a) instructs, the LLCA "is to be liberally construed to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements."

Even so, in the absence of an operating agreement that speaks to the issues, the rights and obligations of members in an LLC must be controlled by the provisions of the LLCA. *Kuhn, supra,* 366 *N.J* . at 440. By extension of the principle of freedom of contract articulated in the LLCA and in *Kuhn,* involuntary dissociation is a concept that LLC members may define for themselves, but only if they make their intentions to depart from the LLCA sufficiently clear.

Here, the parties failed to include an alternative procedure in the Operating Agreement to govern the involuntary dissociation of the LLC's members. The portion of the Operating Agreement that Yusuf argues that the trial court should have enforced in lieu of *N.J.S.A.* 42:2B–24(b) does not use the term "dissociation." That provision simply states in relevant part: "Shareholder(s) cannot or shall not at anytime [sic] be compelled to give up or sell their shares for any reason. The decision to sell shares must be voluntary. No shareholder(s) can buy out other shareholder(s)."

A member's dissociation from an LLC pursuant to the statute does not cause that member to "sell" or "give up" economic rights involuntarily in the LLC. Rather, the member suffers through dissociation the loss of his or her management rights, but is entitled to retain an interest in the LLC as an "assignee," preserving the right under *N.J.S.A.* 42:2B–39 to resign as a member of the LLC and to receive within a reasonable time "the fair value of his [LLC] interests as of the date of resignation[.]" *See N.J.S.A.* 42:2B–24.1 (noting that the dissociated member has, subject to *N.J.S.A.* 42:2B–39, "rights of an assignee of a member's limited liability interest"). Such assignees are entitled to receive distributions and "allocation of income, gain, loss, deduction, or credit[.]" *N.J.S.A.* 42:2B–44.

***13** Hence, the Operating Agreement's provision stating that the LLC members cannot be "compelled to give up or sell their shares for any reason" does not suffice to function as an election against the application of the involuntary dissociation provisions under the LLCA. Because a dissociated member retains economic rights, judicial dissociation ordered under *N.J.S.A.* 42:2B–24 does not cause Yusuf to "give up or sell" his economic interest in ASUMA. Yusuf does, however, retain the right to do so if he resigns pursuant to *N.J.S.A.* 42:2B–39.

Although the record is murky on the point, it does not appear that the parties stipulated to a voluntary sale of shares in the event of judicial dissociation. Rather, the parties and trial judge seem to have proceeded under the assumption that dissociation automatically constitutes a loss of economic rights in addition to a loss of managerial rights. However, as we have already noted, the LLCA does not mandate a forced sale of shares in the event of dissociation. Moreover, pursuant to the Operating Agreement's terms, no shareholder can be "compelled to give up or sell [his] shares for any reason."

For these reasons, to the extent that the trial court's final order might be construed to imply that a sale of Yusuf's shares is compelled, we do not adopt such a construction. To the contrary, Yusuf may continue to hold his shares (and those assigned to him by Paulpillai) but as a dissociated member he is enjoined from participating in the management of the LLC. We recognize that Yusuf is not likely to want to sell his shares, since the court adopted the opinion of defendant's expert that the shares had zero value on the stipulated date of valuation. Even so, a decision to tender his shares remains up to Yusuf. Indeed, there is no provision in the final judgment ordering such a tender.

The trial court correctly observed that the Operating Agreement was silent about whether a member could petition for dissociation of another member under *N.J.S.A.* 42:2B–24(b)(3). Because of that silence, the LLCA applied to the parties by default. *See Kuhn, supra,* 366 *N.J.Super.* at 440, 841 A.2d 496; *Union Cnty. Improvement Auth. v. Artaki, LLC,* 392 *N.J.Super.* 141, 152, 920 A.2d 125 (App.Div.2007) (absent an LLC operating agreement, the LLCA controls). *Cf. Man Choi Chiu v. Chiu,* 71 A.D.3d 646, 896 *N.Y.S.2d* 131, 132 (App.Div.2010) (in a situation where the operating agreement did not include a provision for expelling members from the LLC formed under New York law, the court dismissed the dissociation petition since the New York LLC statute, unlike New Jersey's LLCA, does not provide for judicial dissociation).

Nor do principles of waiver support Yusuf's legal position. The waiver of a legal right must be effective. "An effective waiver requires a party to have full knowledge of his [or her] legal rights and intent to surrender those rights." *Knorr v. Smeal,* 178 *N.J.* 169, 177, 836 A.2d 794 (2003). Furthermore, a waiver of a known right must be clear, unequivocal, and decisive. *Ibid.*

***14** Here, the Operating Agreement contains no language that clearly indicates that the members of the LLC, by agreeing to its terms, knowingly waived the applicability of judicial dissociation under *N.J.S.A.* 42:2B-24(b)(3). The provision in the Operating Agreement cited by Yusuf in support of his waiver theory was included in a paragraph allocating the parties' shares in *All Saints,* whereas the paragraph allocating the parties' shares in *ASUMA* (the LLC) does not contain a similar restriction. Yusuf has not established that any alleged waiver of the LLCA's dissociation provisions was clear and unequivocal.

We therefore agree with the trial judge's legal ruling that the Operating Agreement did not provide for an effective waiver of Chilana's right to petition the court under *N.J.S.A.* 42:2B–24(b)(3) for judicial dissociation of plaintiffs from the LLC. The judge rightly concluded that judicial dissociation under *N.J.S.A.* 42:2B–24(b)(3) remained a remedy available to Chilana.

C.

Having confirmed that the LLCA's dissociation provisions do indeed apply to the parties' LLC, we now turn to the substance of the trial court's decision. As we have already noted, the court found two alternative grounds for dissociating plaintiffs from ASUMA: first, *N.J.S.A.* 42:2B–24(b)(3)(a), which pertains where a member engaged in "*wrongful conduct* that *adversely and materially affected* the [LLC's] business;" and second, *N.J.S.A.* 42:2B–24(b)(3)(c), which pertains where a member engaged in "*conduct* relating to the [LLC's] business which makes it *not reasonably practicable to carry on* the business ... as a member of the [LLC]." (Emphasis added).

The wording of the statute clearly reflects that the triggering conduct that authorizes dissociation under subsection 3(c) is less stringent than that required under subsection 3(a). Subsection 3(a) has a normative component, requiring that the member's behavior be "wrongful." [10] *Ibid.* Subsection 3(c) lacks such a wrongfulness element, merely requiring "conduct" by the member that makes it "not reasonably practicable to *carry on* the business" with the member's participation. *Ibid.* (emphasis added).

Subsection 3(a) also requires actual harm to the enterprise, demanding proof that the member has committed wrongs that already have "adversely and materially affected" the LLC's business. *Ibid.* By comparison, subsection 3(c) has a prospective orientation, examining whether, looking forward, the member's conduct "makes it not reasonably practicable to carry on the business" with that member. *Ibid.* These textual differences, on the whole, make it easier to justify dissociation under subsection 3(c) than 3(a). However, proof of either standard suffices because the statute uses the disjunctive term "or" in listing the alternative grounds for dissociation. *Ibid.*

Given these significant differences in the applicable statutory tests, we elect to confine our analysis to the trial court's determination under subsection 3(c)—the less stringent provision—rather than subsection (a). We recognize that Yusuf strenuously maintains that his conduct, and that of his co-plaintiff, Paulpillai, was not "wrongful," and that the duo acted in the best interests of the LLC and attempted to prevent defendants from taking unauthorized control of the business and its finances. *See generally Muellenberg v. Bikon Corp.,* 143 *N.J.* 168, 181, 669 A.2d 1382 (1996) (noting, in the context of a closely-held corporation, that controlling shareholders have a legitimate interest "to rein in [the] management and control the affairs of the corporation"). Although the trial judge was unpersuaded by that contention, we need not decide ourselves whether plaintiffs' actions and inactions met the wrongfulness test of subsection 3(a). Instead, we shall confine our attention to the separate—but equally dispositive—question of whether plaintiffs' conduct was of a nature that makes it "not reasonably practicable to carry on the business" of ASUMA with them remaining in the LLC as members. *N.J.S.A.* 42:2B–24(b)(3)(c). [11]

***15** By restricting our inquiry to the sufficiency of the proofs under subsection 3(c), [12] several of Yusuf's assorted criticisms of the trial court's factual findings about the wrongfulness of plaintiffs' conduct become inconsequential. For example, Yusuf challenges the court's findings that plaintiffs wrongfully failed to produce financial documents and student records, complaining that the judge did not identify the items that they failed to supply. Although we conceivably could remand these findings to the trial court for a more specific statement of reasons pursuant to *Rule* 1:7–4, such a remand is unnecessary because those findings of plaintiff's inadequate document production are not essential to the subsection 3(c) analysis.

Yusuf further argues that the trial court erroneously blamed plaintiffs for allowing immigration problems at All Saints to "fester," even though the March 2007 incident with armed Aruba immigration authorities preceded the LLC's formation by more than a year and student enrollment continued thereafter. Although the record is suggestive that the immigration problems did indeed continue, this factual finding likewise is not critical to the statutory assessment under subsection 3(c) about whether it was "reasonably practicable to carry on" the LLC with plaintiffs.

Yusuf also takes issue with the trial court's finding that he and Paulpillai caused a deadlock that led Smith Barney and CMB to freeze the LLC's accounts. We recognize that the parties hotly dispute the wrongfulness of plaintiffs' actions as to the bank accounts. Yusuf maintains that he and Paulpillai were justified in trying to prevent Chilana from co-signing checks solely with Silberie, which appeared to be in violation of the Operating Agreement. But, regardless of whether that justification applies, the reality is that plaintiffs' objections did lead to the accounts being frozen, at a time when the school's operations vitally needed access to these accounts. The perilous situation required Chilana to make an emergency loan to pay the school's expenses, including the salaries of teachers and staff who had threatened to walk out and to report the situation to the Aruba labor authorities. Meanwhile, plaintiffs contributed no funds, and Paulpillai advised teachers, by copying them on an e-mail, that defendants were solely to blame for the financial crises. Whether or not plaintiffs' conduct concerning the bank accounts was "wrongful" under subsection 3(a), the trial court clearly had a reasonable basis under subsection 3(c) to consider those confrontational actions as indicia that it would not be "reasonably practicable" for the company to "carry on" with plaintiffs continuing as members, in the wake of the school's financial crisis.

Moreover, the trial court's discrete factual finding that plaintiffs failed to provide adequate funding to the company is highly relevant to the subsection 3(c) analysis, and is amply supported by the record. In this regard, *Sebring Associates v. Coyle,* 347 *N.J.Super.* 414, 790 A.2d 225 (App.Div.), *certif. denied,* 172 *N.J.* 355, 798 A.2d 1269 (2002), is instructive. *Sebring* involved the dissolution of a partnership and dissociation of one of its partners under another statute, *N.J.S.A.* 42:1–32(1)(d), which has been repealed, but nevertheless bore some similarities to the LLCA. *N.J .S.A.* 42:1–32(1)(d) provided that the judicial dissolution of a partnership is justified when a partner "so conducts himself in matters relating to the partnership business that it is not *reasonably practicable* to carry on the business partnership with him[.]" *N.J.S.A.* 42:1–32(1)(d) (emphasis added).

***16** *Sebring* held that a partner's failure to make capital contributions to a partnership in breach of the partnership agreement warrants dissolution of the partnership and the consequent expulsion of that partner. *Id.* at 428–32, 790 A.2d 225; *see N.J.S.A.* 42:1A–40(b) (noting that after a partner is expelled, the surviving partners may waive dissolution and resume carrying on the partnership as if the dissolution had not occurred). In reaching this holding, we indicated in *Sebring* that, even absent a proven breach of the partnership agreement, the failure by a partner to contribute capital may satisfy the "not reasonably practicable" standard expressed in *N.J.S.A.* 42:1–32(a)(d). *Sebring, supra,* 247 *N.J.Super.* at 430, 589 A.2d 648. In doing so, we acknowledged that the expulsion of a partner is a "harsh remedy," but nevertheless one that may be appropriate in certain circumstances. *Id.* at 431–32, 589 A.2d 648.

One of the authorities we relied upon in *Sebring* was *Cobin v. Rice,* 823 *F.Supp.* 1419, 1426 (N.D.Ind.1993), a case in which the United States District Court indicated that, had the partnership agreement not been breached, a partner's failure to contribute necessary capital made it "not reasonably practicable" for other partners to continue the partnership business with the defaulting partner. *Sebring, supra,* 847 *N.J.Super.* at 430. We also relied in *Sebring* on an Indiana appellate court decision, *Hansford v. Maplewood Station Business Park,* 621 *N.E*.2d 347, 351 (Ind.App.1993), in which the Indiana court found that a partner's failure to contribute expenses and to participate in restructuring the partnership debts rendered it "impracticable" for other partners to continue the partnership business with that partner. *Sebring, supra,* 347 *N.J.Super.* at 431, 790 A.2d 225.

We acknowledge that the failure by an LLC member to contribute needed capital to the LLC's business may not always provide sufficient grounds to conclude that the business is "not reasonably practicable" to carry on with that member. [13] The present case bespeaks, however, an instance where such refusal warrants judicial intervention. The record strongly reflects that plaintiffs' refusal to inject capital into All Saints could have resulted in its collapse, had Chilana not singularly assumed that burden. According to defendants' proofs, All Saints was so undercapitalized that to pay operating expenses, plaintiffs had been withdrawing funds from the students' pre-paid tuition payments, which the trial court found to be an unsustainable approach. Plaintiffs' refusal to infuse vitally-needed funds, to address an emergency that they themselves sparked in their contacts with the banks, reasonably satisfies the "not reasonably practicable" standard for dissociation set forth in *N.J.S.A.* 42:2B–24(b)(3)(c).

The Delaware Court of Chancery, interpreting the standard of "not reasonably practicable" within the Delaware LLC statute, has reached a comparable conclusion. Unlike New Jersey, Delaware does not provide for judicial dissociation of an LLC member. Dissolution is the only remedy that a Delaware court may grant if carrying on the LLC business according to the operating agreement becomes "not reasonably practicable." *Del.Code Ann.* tit. 6, § 18–802 (2011). In this respect, the Delaware statute reads:

> ***17** On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.
>
> [*Ibid.*]

In *Fisk Ventures, LLC v. Segal,* 2009 *Del. Ch. LEXIS* 7 (Del. Ch.2009), *aff'd o.b.,* 984 *A.*2d 124 (Del.2009), the court dissolved an LLC applying this provision under *Del.Code Ann* . tit. 6, § 18–802 because it had "no office, no operating revenue, and no prospects of equity or debt infusion." *Id.* at *20. The LLC in *Fisk* was in "dire financial condition," "with no reasonably practical means to operate its business," and had a deadlocked board of directors. *Id.* at *16, *20.

Here, after the bank accounts were suspended, neither Yusuf nor Paulpillai complied with Chilina's urgent plea that they help him provide the necessary capital to pay All Saints's monthly expenses. As the trial court reasonably found, Yusuf and Paulpillai perpetuated a deadlock with Chilana and Silberie by not contributing such capital to pay All Saints's expenses, such as salaries, despite severe consequences if such expenses were not paid. While the deadlock persisted, the teachers and staff nearly quit, after threatening to expose the parties to potential liability under Aruba labor laws. Despite the gravity of this problem, Yusuf and Paulpillai essentially pointed fingers at Chilana, and sought to position themselves as blameless in the eyes of the teachers. In Paulpillai's e-mail to Silberie and Chilana, which was copied to the teachers, he blamed Silberie if All Saints failed, and demonstrated an unwillingness to consider solutions to the financial crisis. To avert disaster, Chilana eventually assumed plaintiffs' obligations by infusing his own additional personal funds into the business.

Without Chilana's capital infusion, including his loan that was not yet repaid by the time of trial, the record suggests that All Saints may well have failed. Given that situation, the trial court did not err by concluding that it would "not be reasonably practicable" to continue the business of ASUMA, i.e., operating All Saints, with plaintiffs continuing as members of ASUMA. *N.J.S.A.* 42:2B–24(b)(3)(c). As the trial judge aptly phrased it in his oral comments from the bench:

> if there's any finding of fact that I think is completely unavoidable in this case, it is that these individuals [meaning Plaintiff and Mr. Paulpillai] and this individual [meaning Dr. Chilana] cannot work together to advance the interests of the LLC or the university.

Yusuf points out that under the New Jersey statutes governing corporations, it is improper for a court to order majority shareholders to sell their interests to the minority shareholders except in egregious circumstances. He argues that this same principle should apply here to the LLC, citing *Musto v. Vidas,* 281 *N.J.Super.* 548, 560, 658 A.2d 1305 (App.Div.1995), *certif. denied,* 143 *N.J.* 328 (1996). However, *Musto* was interpreting *N.J.S.A.* 14A:12–7, governing the involuntary dissolution of corporations, a statute that does not contain the "not reasonably practicable" language used in the LLCA. Thus, the analogy urged by Yusuf is inapt.

***18** Moreover, we noted in *Musto* that, in the corporate context, an appropriate remedy in the event of an "irretrievable breakdown" in the relationship among owners is for the majority shareholders to buy out the minority shareholders. *Id.* at 560–61, 658 A.2d 1305. However, such a potential solution was not an alternative here, because the Operating Agreement forbids such a forced sale.

As an alternative argument, Yusuf asserts that even if the factual record is deemed adequate to meet the criteria of dissociation under *N.J.S.A.* 42:2B–24(b)(3)(c), such dissociation is not a mandatory remedy. He further contends that the trial judge abused his discretion here in ordering dissociation. We reject these contentions for several reasons.

First, we note that *N.J.S.A.* 42:2B–24 uses the key term "shall," in providing that "[a] member *shall* be dissociated from [an LLC] upon the *occurrence* of any of the following [specified] events[.]" (Emphasis added). Although the term "shall" usually conveys a mandatory sense, we recognize that it sometimes is meant to have a non-mandatory meaning. *Cf. Natural Med., Inc. v. N.J. Dep't of Health & Senior Servs.,* —— *N.J.Super.* ——, —— (App.Div.2012) (slip op. at 12). We need not resolve here the question of statutory interpretation of what exactly the Legislature intended the term "shall" to mean within *N.J.S.A.* 42:2B–24(b). Even if, for the sake of discussion, *N.J.S.A.* 42:2B–24(b) is read to afford judges the discretion to withhold dissociation as a remedy even where the necessary criteria are met, the trial judge here did not abuse such presumed discretion.

The trial judge had sound reasons for imposing the remedy of dissociation here, given the turmoil that led to the LLC and the medical school being pushed to the brink of failure. The judge reasonably declined to continue the status quo, given the precarious financial condition of All Saints, the fractured relationship of the LLC's members, Yusuf's denial of the school's financial problems, and his unwillingness to infuse more funds into the business. In addition, Chilana, who had already provided emergency funds to save the school, understandably would not inject more capital if plaintiffs were allowed to manage the venture going forward.

Yusuf rightly points out that the ongoing costs of the court-appointed fiscal agent, Weiner, and the interim chief operating officer, Glueck, were significant expenses that added to the financial strain on the school and the LLC. Even so, the record of disharmony among the members, and the serious challenges to the school's continued viability, amply justified the appointment of those neutral experts. [14]

In the wake of the venture's persisting problems, the trial court did not abuse its discretion in ordering dissociation under *N.J.S.A.* 42:2B–24. That is particularly true in light of its amply-supported finding under subsection 3(c) of the statute that it was "not reasonably practicable to carry on the business" without implementing such a measure. *N.J.S.A.* 42:2B–24(b)(3)(c). We also must accord substantial deference to the chancery judge's "feel for the case," given the months of pretrial oversight he repeatedly devoted to the matter and his first-hand sense of the trial testimony. *See Pheasant Bridge Corp. v. Twp. of Warren,* 169 *N.J.* 282, 291–92, 777 A.2d 334 (1999) (in affirming a trial judge's decision in a non-jury case, the Court noted that "[t]hrough years of managing this litigation, including evaluating evidence and hearing witnesses, the trial court developed a 'feel' for the case that ought not be lightly disturbed"); *see also Twp. of W. Windsor v. Nierenberg,* 150 *N.J.* 111, 132–33, 695 A.2d 1344 (1997); *Caldwell v. Haynes,* 136 *N.J.* 422, 432, 643 A.2d 564 (1994).

D.

***19** Apart from challenging the dissociation remedy ordered against him and Paulpillai, Yusuf further argues that the trial court erred in reciprocally denying plaintiffs any relief as to their own affirmative contentions against defendants. In particular, Yusuf argues that defendants breached their fiduciary duties in several respects. Those alleged breaches included the co-signing of checks by Chilana and Silberie in contravention of the Operating Agreement, as well as their actions in obtaining a charter authorizing a third medical school in Aruba. Yusuf further contends that the court erred, as a matter of law, in declining to impose a remedy for such alleged breaches because they did not cause harm to the business.

We decline to second-guess the trial judge's disposition of these issues relating to defendants' own conduct. The judge fairly concluded from the evidence that plaintiffs' claims of breach of duty, breach of contract, and misappropriation against defendants had not been sufficiently proven.

Moreover, the judge explained in detail his rationale for denying relief to plaintiffs. The judge first addressed defendants' formation of the charter for the third medical school:

> *Plaintiffs have failed to prove a breach of fiduciary duty by Chilana. The allegation with respect to Chilana's role in obtaining a third charter is the most serious allegation, but it provides no basis for relief to plaintiffs.* The charter could, in theory, be used to start a new medical school in Aruba, in contravention of the All Saints Aruba charter, which limits the number of medical schools on the island to two. But no steps have been taken to make that theoretical possibility a reality. It has not diminished the value or interests of All Saints in any way, and it has not injured the interests of ASUMA, or the Foundation, or the medical school, or the fellow shareholders/members. *It was taken out as a precaution* so that a second medical school could exist on the island if All Saints Aruba ceased to exist as a result of the parties ['] deadlock, or this litigation.
>
> [Emphasis added.]

The judge similarly detailed his reasons for rejecting plaintiffs' contentions of breach of fiduciary duty concerning the check-signings:

> The secondary allegation against Chilana is that he breached his fiduciary duty by signing checks in violation of an agreement he had with the foundation, by opening additional bank accounts, paying unauthorized expenses and changing the on-line payment system. *Each of these steps was undertaken by Chilana for the purpose of maintaining the functioning and viability of the LLC and the medical school, as well as protecting his substantial financial investment.* Chilana was not enriched personally by any of the conduct complained of, and none of the conduct complained of harmed or damaged the LLC, the medical school, the Foundation, or the shareholder/members. Accordingly, the claim of breach of fiduciary duty fails. To the extent the financial practices implemented by Chilana deviated from the parties' Agreement, they caused no damages or harm whatsoever, and thus provide no basis for relief under a breach of contract cause of action. Finally, the claims that Chilana misappropriated corporate funds or things of value must be dismissed for lack of any credible facts in the record to support the allegations.
>
> ***20** [Emphasis added.]

The judge amplified his analysis of these particular issues later in his opinion, explaining why he had not dissociated defendants from the business instead of plaintiffs: [15]

> *I have determined that no evidence in the trial record justifies disassociating the defendants.* The defendants —Chilana and Silberie—have not been shown to have engaged in any material misconduct which has adversely and materially affected the business of the LLC. *Silberie has not appeared in this action, but Chilana has, and he has demonstrated that he has acted since his initial investment, his subsequent reinvestment, and up to the present, with fidelity to the LLC, the Foundation and to his fellow members, acting to preserve the medical school and help to be sustainable into the future. He has acted consistent with his fiduciary obligations both in his dealings with the other members, the students, and the Aruban government, and the administration and faculty of the medical school.*
>
> It is true that [Chilana] participated in securing a third charter, as aforesaid, which could, in theory, be used to start a new medical school in Aruba, in contravention of the All Saints Aruba charter, which limits the [number] of medical schools on the island to two. But no steps have been taken to make that possibility a reality. It has not diminished the value of interests of All Saints in any discernible way. It has not injured the interests of ASUMA, or the Foundation, or the medical school, or the fellow shareholder/members in any way whatsoever. It was taken out as a precaution so that a medical school could exist if All Saints Aruba ceased to exist as a result of the parties' deadlock, and this litigation. *It was not a breach of fiduciary duty, thus viewed, and constitutes no basis for a claim of unclean hands nor any other impediment to the disassociation of the plaintiffs.*
>
> [ (Emphasis added) (footnote omitted).]

We sustain the trial judge's analysis of these points. The judge articulated sound reasons, amply grounded in the record, for regarding defendants' actions as essentially benign, and in the ultimate interests of the continued viability of All Saints and the LLC.

Although defendants should have been attentive to the check-signing restrictions in the Operating Agreement, the judge had a reasonable basis to conclude that their inattentiveness to those restrictions was not injurious to the venture and did not occur for personal gain. The judge also reasonably regarded defendants' procurement of the charter for another medical school as justifiable protective action in the event that All Saints collapsed. Had, of course, defendants acted on that third charter and opened up a competing medical school [16] while All Saints was still in operation, such competitive action would surely have had different legal implications. But such competition did not occur here. *See also Bartfield v. RMTS Assocs., LLC,* 11 A.D.3d 386, 783 *N.Y.S.2d* 560, 561 (App.Div.2004) (dismissing claims of breach of fiduciary duty brought against members of a New York LLC, who had taken steps to create a competitor company, because there was no proof that they had actually made improper use of the LLC's time or facilities, disseminated confidential information, or usurped the LLC's business opportunities, in favor of the new entity).

***21** In the absence of a proven breach of fiduciary duty, and proven resulting harm, the trial judge was not obligated to grant remedial measures to plaintiffs based upon defendants' alleged breaches. *See Fitzgerald v. Linnus,* 336 *N.J.Super.* 458, 467, 765 A.2d 251 (App.Div.2001) (noting, by analogy, that proof of the proximate causation of damages is an element of a malpractice cause of action alleging breach of fiduciary duty by an attorney). Courts are not obligated to impose a remedy when no damage has resulted from a party's allegedly wrongful acts. *See, e.g., Paternoster v. Shuster,* 296 *N.J.Super.* 544, 559, 687 A.2d 330 (App.Div.1997); *see also Beseman v. Pa. R.R. Co.,* 50 *N.J.L.* 235, 237–38, 13 A. 164 (Sup.Ct.1888), *aff'd,* 52 *N.J.L.* 221, 20 A. 169 (E. & A. 1889). We therefore sustain the trial judge's denial of relief to plaintiffs on their affirmative claims.

III.

The final issue raised by Yusuf concerns the trial court's determination that his ownership interest in the LLC had no positive value as of the stipulated date of valuation, July 31, 2008. In particular, Yusuf contends that the court should have rejected the opinion of Leslie M. Solomon, defendants' valuation expert. He contends that Solomon's testimony represented improper net opinion, based on inaccurate facts and hearsay supplied by Symeonides, the accountant.

As we have previously noted in Part II(B), *supra,* of this opinion, dissociation pursuant to *N.J.S.A.* 42:2B–24(b) does not mandate a forced sale of a dissociated member's shares. Nor does the parties' Operating Agreement in this case allow for such a forced sale. Hence, no valuation of plaintiffs' shares in the LLC was necessary unless plaintiffs, once dissociated, elected to have their shares valued and to tender them to defendants. *See N.J.S.A* .42:2B–39. Alternatively, plaintiffs could have retained their economic interests in the LLC as passive assignees. *See N.J.S.A.* 42:2B–44.

We are mindful that the parties, apparently based upon off-the-record discussions that are not fully explained in the trial transcripts, stipulated to a July 31, 2008 valuation date for plaintiff's shares. Given the murky genesis of that stipulation, it is possible that the parties may have entered into it with a mistaken assumption that dissociation under the statute would compel the dissociated members to tender their shares to the remaining members, regardless of whether they wanted to do so. If the parties were indeed mistaken as to this, then it may be unfair, in hindsight, to enforce the stipulation and to now require Yusuf to tender his shares in the LLC for zero value.

Consequently, we shall permit Yusuf to file a motion with the trial court within thirty days of this opinion if he, in fact, wishes to have the court consider whether he can withdraw from the previous stipulation and, in light of the statutory clarification we have now provided in this opinion, continue to retain the economic benefit of his shares as assignee under *N.J.S.A.* 42:2B–44 while being dissociated from the entity's management and operations. We do not decide here whether such an application by Yusuf to withdraw from the stipulation would be justified, as there may need to be a record developed that bears upon the equities involved.

***22** Given this open question about whether or not a sale of plaintiffs' shares will be effectuated, it may be unnecessary for us to review the trial court's determination that plaintiffs' shares had no value as of July 31, 2008. Nevertheless, we offer the following discussion for sake of completeness.

The "net opinion" rule generally bars an expert from testifying about his or her bare conclusions, where they are unsupported by factual evidence or other data. *Pomerantz Paper Co. v. New Cmty. Corp.,* 207 *N.J.* 344, 372–73 (2011); *Buckelew v. Grossbard,* 87 *N.J.* 512, 524, 435 A.2d 1150 (1981). An expert must give the "why and wherefore" of his or her opinion, rather than a mere conclusion. *Pomerantz, supra,* 207 *N.J.* at 372. The trial judge concluded that Solomon's valuation opinion was not such an improper net opinion. We agree.

Among other things, Solomon testified that he employed the "income approach" to determining the fair value of the LLC. He concluded that the LLC had no positive value as of July

31, 2008, the stipulated date of valuation. To determine value Solomon relied on data and income projections supplied by Symeonides, as well as student enrollment trends. Solomon analyzed those projections, and deduced that ASUMA would operate at a loss until 2013, assuming, however, that the parties would continue to make equity contributions. In particular, Solomon opined that the parties would need to provide additional equity contributions of $556,000, or the school would fail. Therefore, as of July 31, 2008, Solomon concluded that ASUMA and All Saints had zero net equity. [17]

Solomon explicitly rejected other potential approaches to determining value. He did not use an "asset approach" because, although All Saints owned $230,000 in assets, "the value here is as a going concern," not liquidation, and All Saints "was losing money." Solomon also rejected a "market value approach," which considers transactions that are similar, because he could not find sufficiently similar transactions. Solomon declined to consider Chilana's 2007 purchase of his shares in All Saints as such a similar transaction, because that $500,000 purchase price did not derive from a financial valuation conducted prior to the sale, but rather had resulted from the parties' negotiations.

On cross-examination, Solomon acknowledged that his income projections did not include all of the students from All Saints who may have been "in limbo," that is, those who "hadn't come back yet for their clinical rotation[.]" However, no evidence was presented about the number of students who were in such limbo, whether they intended to return, or if they did, when they would return.

Plaintiffs' counsel elicited testimony from Glueck on cross-examination regarding the income projections prepared by Symeonides. He questioned Glueck about whether, if fifty-five students and twenty clinical students paid tuition, and the litigation fees, such as Weiner's fee and his fee, were subtracted from the cost of operation, the school's annual profit hypothetically would be $580,220. Although Glueck agreed with that arithmetic, he disagreed with plaintiffs' inclusion of revenue from fifteen students who were scheduled to graduate soon.

***23** Significantly, plaintiffs did not offer any expert testimony to substantiate Yusuf's position that All Saints would generate profit at approximately $580,000, a figure which contradicted Solomon's analysis. Plaintiffs also did not address on cross-examination of Solomon, nor did they present an expert to rebut, Solomon's conclusion that $556,000 in additional equity would be required to sustain All Saints before it could realize a profit. As Solomon explained:

> [DEFENDANT'S ATTORNEY]: And your reason for determining that as of July 31, ' 08, the value was zero? In a nutshell—
>
> A: The reason being, although the school did have [$]230,000 of net assets at that time, it was going to need an infusion of about $550,000 over the next four or five years to sustain itself until it reached profitable levels.

In light of these proofs, we reject Yusuf's claim that Solomon's testimony on valuation comprised improper net opinion. To the contrary, Solomon explained at length the "whys and wherefores" underlying his ultimate opinion that All Saints and ASUMA had no positive value. The trial judge was entitled to consider that opinion as competent proof.

Although Solomon relied on income projections prepared by Symeonides, we reject Yusuf's assertion that Solomon could not rely on the same information that a willing buyer or seller would presumably rely on to make such assessments of value. *See N.J.R.E* . 703 (authorizing expert witnesses to rely on facts and data reasonably relied upon by others in the expert's field, even if such facts and data are not admitted as evidence). [18]

Symeonides was ASUMA's company accountant, appointed by the Special Fiscal Agent, and thus a logical source for financial information. Solomon did acknowledge that he took Symeonides's general ledger at face value due to Symeonides's reputation, but he did not do the same with Symeonides' income projections. At one point, Solomon asked Symeonides to revise the projections, and he also inquired into the basis of the calculations for the large items, such as rent, salaries and advertising. Solomon testified that Symeonides provided him with "adequate backup" for the numbers used. He also had discussions with Glueck, Chilana, and Symeonides about All Saints. Solomon also apparently requested to speak with plaintiffs, but he was unable to do so.

The trial court was not obligated to reject Solomon's opinion on valuation. Valuation is an art, not a science. There is no inflexible test for determining fair value in business valuation disputes, which "frequently become battles between experts." *Balsamides v. Protameen Chems., Inc.,* 160 *N.J.* 352, 368, 734 A.2d 721 (1999); *see also Lawson Mardon Wheaton, Inc. v. Smith,* 160 *N.J* . 383, 397, 734 A.2d 738 (1999) (observing that "[t]here is no inflexible test for determining fair value").

Here, plaintiffs offered no competing expert to take part in the proverbial battle of experts. If Solomon's opinion was deficient in some respects, such as in failing to use a different approach to calculating value, or in not considering intangibles like All Saints's reputation, plaintiffs could have provided their own valuation expert, which they elected not to do. The trial judge was free, in his discretion, to rely on Solomon's unrebutted expert opinion. *See Angel v. Rand Express Lines, Inc.,* 66 *N.J.Super.* 77, 85–86, 168 A.2d 423 (App.Div.1961) (noting the trial judge's prerogative to accept or reject an expert's opinion); *see also Peer v. Newark,* 71 *N.J.Super.* 12, 31, 176 A.2d 249 (App.Div.1961) (same), *certif. denied,* 36 *N.J.* 300 (1962).

***24** In determining the fair value of Yusuf's ownership interest, the trial court appropriately considered the facts, including the "undercapitalization of the school," from which it independently concluded that ASUMA "has no proven value." This finding is supported by the lack of any credible evidence that the LLC had positive value as of the valuation date of July 31, 2008.[19] Indeed, following trial, Paulpillai sold his interest in ASUMA to Yusuf for a mere $10.

IV.

We have duly considered all of the other contentions raised by Yusuf and conclude they lack sufficient merit to warrant discussion in this written opinion. *R.* 2:11–3(e)(1)(E).

The order of final judgment is affirmed, subject to the caveat concerning the sale of plaintiffs' shares discussed in Part III of this opinion.

**All Citations**

Not Reported in A.3d, 2012 WL 6652510

Footnotes

1 Although Yusuf and Chilana have professional degrees, we refrain, solely for stylistic reasons and without any disrespect, from referring to them as "Dr. Yusuf" and "Dr. Chilana." We also note that the parties' respective briefs are inconsistent in their use of the "Dr." title for the opposing litigants.

2 Co-plaintiff Paulpillai has not participated in the appeal, nor has co-defendant Silberie.

3 At trial, the parties disputed whether the agreement was an LLC "operating agreement" under *N.J.S.A.* 42:2B–2. However, on appeal, the parties do not challenge the trial court's finding that the agreement qualified as such under that statute.

4 Chilana testified that, as of the time of trial, he had not been reimbursed for his emergency cash infusion.

5 The tax problem apparently was tied to the school's ability to obtain student and teacher visas from the Aruba government.

6 Meanwhile, Chilana infused at least $250,000 in funds to All Saints since obtaining the other charter.

7 Symeonides had been retained by Weiner.

8 The enforceability of this agreement is unclear. Although the Operating Agreement bars "shareholder(s)" from "buy[ing] out other shareholder(s)," that provision is contained in the paragraph allocating shares to the parties in *All Saints,* but not in *ASUMA.*

9 The Legislature very recently passed comprehensive new legislation concerning New Jersey's LLCs, *L.* 2012, *c.* 50. The new "Revised Uniform Limited Liability Company Act" ("RULLCA"), which is based upon the uniform law developed by the National Conference of Commissioners on Uniform State Laws, was enacted on September 19, 2012. The RULLCA will not take effect until 180 days beyond that enactment date, which is March 18, 2013. At that future time, the new statute will apply to all LLCs formed after its effective date and to any LLC that changes its operating agreement to implement the RULLCA's provisions. *L.* 2012, *c.* 50, §§ 91, 95, and 96. On March 1, 2014 (the first day of the eighteenth month following the enactment), the current LLC law (*L.* 1993, *c.* 210, and its 1997 and 2003 amendments) will be repealed, and the RULLCA will then be effective as to all LLCs. *Ibid.* Given this delayed effective date, the change in the statutory scheme has no effect on the issues in the present appeal. We note that the new statute uses similar, but not identical, provisions as the LLCA concerning dissociation by judicial order. *Id.* at § 46(e)(1)-(3). It also contains a more detailed section regarding the effect of a person's dissociation as a member. *Id.* at § 47.

10 We note the adjective "wrongful" is not defined in the statute.

11 We note that defendants' appellate brief similarly focuses upon the application of subsection 3(c), with little discussion of the proofs or legal analysis relating to subsection 3(a).

12 We offer no comment about the impact, if any, that our exclusive reliance upon subsection 3(c) may have on the Aruba court's May 22, 2010 decision relying upon the Chancery judge's findings of wrongful conduct by plaintiff.

13 For example, we do not reach here the question of whether a passive investor in an LLC could be ousted solely because he or she declines to invest more funds into the entity when asked to do so, having done nothing to precipitate the company's financial or operational distress. Our holding is limited to the facts of this rather unusual case.

14 We have no occasion here to review the reasonableness of the fees charged by Weiner and Glueck, and no orders establishing or approving their terms of compensation have been appealed.

15 Although plaintiffs initially had sought dissociation of defendants from the LLC, Yusuf has not sought such a remedy on appeal.

16 We also do not lose sight of the fact that plaintiffs themselves have an eighty percent interest in another medical school in Dominica.

17 For purposes of Solomon's valuation, he treated All Saints and ASUMA as a single entity because, evidently, his understanding was that All Saints was ASUMA's business. None of the parties objected to this characterization of All Saints for purposes of the valuation.

18 We reject Yusuf's misplaced reliance on *Agha v. Feiner,* 198 *N.J.* 50, 63–64, 965 A.2d 141 (2009), in which the Supreme Court held that a medical expert cannot testify about a disputed MRI finding made by a non-testifying radiologist if the expert has no skill or competency to interpret such MRI films himself or herself. The context here, involving a financial valuation expert relying upon the input of a company accountant and the company's principals, is fundamentally different. Indeed, by analogy, Solomon's consultations with Symeonides and defendants are comparable to a medical expert properly considering information from a patient about his or her own symptoms and condition.

19 As for the valuation date used, the court in *Denike v. Cupo,* 394 *N.J.Super.* 357, 381, 926 A.2d 869 (App.Div.2007), *rev'd on other grounds,* 196 *N.J.* 502, 958 A.2d 446 (2008), held that the appropriate valuation date in the event of dissociation is the date of the dissociation itself. Here, that presumptive date would have been the date of the final order of January 6, 2010. However, the court noted in its opinion that the parties had stipulated to July 31, 2008, as the applicable valuation date.

**End of Document** 

# ATTACHMENT C

2011 WL 6378837
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Robert KREBS, Plaintiff–Appellant,
v.
The CITY OF LONG BRANCH, a New Jersey Municipal Corporation, Defendant–Respondent.

Argued Sept. 14, 2011.
|
Decided Dec. 16, 2011.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L–1316–10.

**Attorneys and Law Firms**

Peter Dickson argued the cause for appellant (Potter and Dickson, attorneys; Mr. Dickson, on the brief).

Robert Beckelman argued the cause for respondent (Greenbaum, Rowe, Smith and Davis, L.L.P., attorneys; Mr. Beckelman, on the brief).

Before Judges AXELRAD, SAPP–PETERSON and OSTRER.

**Opinion**

PER CURIAM.

*1 Plaintiff, Robert Krebs, appeals the trial court order granting summary judgment to defendant, City of Long Branch ("City"), and dismissing his complaint arising out of his challenge to the City's adoption of the January 2010 Ordinance and Resolution approving a redevelopment project in an area known as Beachfront South. Plaintiff also appeals the denial of his summary judgment motion. In granting summary judgment to defendant, Judge Lawrence Lawson found plaintiff failed to exhaust his administrative remedies, his action was time barred, and his substantive challenges to the ordinance were unsupported by the law. In denying summary judgment to plaintiff, Judge Lawson found that plaintiff's substantive arguments were not only irrelevant, since plaintiff had failed to exhaust his administrative remedies, but the contentions were either lacking in merit or not ripe for summary judgment. We affirm.

Plaintiff is the owner of a single-family home in Beachfront South. He purchased the property in 2000, four years after the City adopted its Oceanfront–Broadway Redevelopment Plan ("Plan"), which included the Beachfront South area. Plaintiff purchased the property "with the intention of residing in it, improving it or redeveloping it consistent with normal municipal land use laws and ordinances." At the time, he was aware the property was located in an area designated as in-need-of-redevelopment. His property, although in need of repairs, was nonetheless habitable.

The in-need-of-redevelopment designation resulted from adoption of the Plan in 1996. Notwithstanding its adoption and the City's subsequent entry into an agreement with a developer to implement the Plan, redevelopment has not occurred. There have, however, been a number of amendments to the Plan, including a January 26, 2010 resolution amending and supplementing Chapter 345–10 of the City's land use ordinances to clarify the design guidelines for redevelopment zoning in the Beachfront South sub-area, which area included plaintiff's property. This resolution followed a number of discussions between Beachfront South property owners and the City's planning team. The resolution specified that existing structures not in conformity with redevelopment guidelines may remain non-conforming, but any additions to those structures required compliance with certain conditions.

On January 27, 2010, the City adopted Resolution No. 10–10, eliminating the use of eminent domain for the Beachfront South redevelopment sub-area. The resolution indicated the City had "determined that an overwhelming majority of property owners now wish to develop and/or sell their properties within the development rights and restrictions spelled out in the City's Redevelopment Design Guidelines[.]" The resolution stated further that "eminent domain shall not be used for property acquisition in the Beachfront South" sub-area.

On March 12, 2010, plaintiff filed a complaint and jury trial demand [1] alleging one count of "invalid and unconstitutional blight and in[-]need[-]of [-]redevelopment designation"; a second count claiming "unconstitutional use of power authorized by [the] blighted areas clause"; a third count charging "illegal use of local redevelopment and housing law"; a fourth count challenging, as unconstitutional, the "in[-]need[-]of[-]redevelopment designation"; and a fifth count alleging "unconstitutional unequal treatment of private redevelopers and residents." Plaintiff sought a declaration that his property, as well as the Beachfront South Area, are "not 'blighted' or 'in need of redevelopment,' " and an order vacating that designation. Plaintiff also sought to "[e]njoin the City from exercising any powers of the [LRHL [2]] with respect to the [property] or the Beachfront South Area[,]" as well as damages and other relief as the "interests of justice may require."

*2 The City filed an answer denying the allegations in the complaint and asserting affirmative defenses, including statute of limitations, laches, estoppel, and plaintiff's failure to exhaust his administrative remedies. Both sides subsequently moved for summary judgment.

In support of the City's motion, Howard H. Woolley, Jr. ("Woolley"), Business Administrator, certified that over a one-year period, beginning in August 2008, the City held public hearings with Beachfront South property owners to discuss concerns about the Plan. As a result of those meetings, the City "determined that the major concern of Beachfront South property owners was the potential use of eminent domain" and that "their interests in the use and value of their properties [were] better served by maintaining the ... Plan zoning[.]" Woolley stated that at the final November 2009 meeting, "plaintiff (and plaintiff alone) expressed his disagreement." Woolley also indicated that after the City adopted the January 2010 resolution and ordinance, "the City and Planning Board ... approved a redevelopment project in Beachfront South for the development of [eleven] townhome units" and the City entered into negotiations with developers interested in pursuing projects. Woolley stated further that plaintiff "never made any proposals to the City to develop the [p]roperty and has never submitted any applications for development approvals to the City." Krebs did not dispute that he failed to submit any applications for development approval.

Judge Lawson issued a written opinion and order granting the City's motion and denying plaintiff's motion. In granting relief to the City, the judge first found that plaintiff lacked standing to initiate an action pursuant to *Rule* 4:69 because he failed to exhaust his administrative remedies and also failed to raise an "actual" and "justiciable claim." Specifically, the judge noted that plaintiff failed to present any "tangible evidence" of any development plans he pursued in connection with his property, the City's knowledge of these plans, and any action by the City precluding plaintiff from going forward with his plans on the basis that they were inconsistent with the redevelopment scheme.

Judge Lawson additionally concluded that "because [p]laintiff has not taken any action with respect to his property which could have led to an adverse administrative determination by the City, he has failed to establish the existence of a justiciable claim for adjudication and therefore lacks standing [.]" Further, the judge reasoned that because plaintiff failed to demonstrate "how the City's alleged unconstitutional actions caused any actual injury [,]" the record was devoid of any "compelling argument that 'irreparable harm' would result if the exhaustion requirement of [*Rule* ] 4:69–5 is enforced."

The court similarly rejected plaintiff's claim that adoption of the 2010 Resolution and Ordinance resulted in an unconstitutional deprivation of the reasonable use and enjoyment of his property:

> *3 Plaintiff fails to demonstrate how his use of the property has in any way been restricted or otherwise affected, as he has never sought to develop the property and has never approached the City with plans for development. In addition, when the City adopted the Ordinance and Resolution at issue, the zoning of the Beachfront South area continued to reflect the same zoning that was in effect when [p]laintiff purchased the property in 2000.

Likewise, the court rejected plaintiff's contention that there were no administrative remedies available to pursue beyond waiting until he expends funds to " 'put together a very expensive and very detailed application to the City and gets turned down.' " The court explained that by presenting a "proposal for development that was rejected by the governing authority because it could not meet the exacting standards for redevelopment in Beachfront South, [p]laintiff could have at least identified an adverse administrative determination upon which to base his challenge."

While recognizing that our Supreme Court stated in *Lyons v. City of Camden*, 52 *N.J.* 89, 99 (1968), that "a declaration of blight ordinarily adversely affects the market value of property involved," Judge Lawson concluded that this statement "must be considered in the context of the Court's subsequent declaration that a municipality may not designate an area as blighted and then fail to effectuate a redevelopment plan with reasonable dispatch." The judge noted that the City had not abandoned its redevelopment plans, as had been done in *Lyons*. He noted further there was no evidence that the properties near plaintiff's property had been boarded up, as were the circumstances in *Washington Market Enterprises Inc. v. City of Trenton,* 68 *N.J.* 107 (1975), also cited by plaintiff in opposition to defendant's motion.

The court additionally found that plaintiff was not entitled to relief based upon procedural grounds. Specifically, plaintiff filed his prerogative writs action beyond the forty-five-day time limit set forth under *Rule* 4:69–6(a), and the complaint failed to raise "constitutional questions or matters of important public interest such that an enlargement [was] warranted." Further, the court found no merit to plaintiff's contention that because the notice to property owners in connection with the original 1996 in-need-of-redevelopment designation was defective, his action was not untimely and, therefore, he was entitled to present his proofs demonstrating that the designation was improper in the event condemnation proceedings are ever initiated. Judge Lawson observed that the triggering event, to which the time bar would not apply, would be the initiation of condemnation proceedings, which he found "entirely absent here." Moreover, Judge Lawson noted that "the City has in fact adopted an Ordinance and Resolution foreclosing the City from further exercise of its eminent domain powers."

In response to plaintiff's claim that his prerogative writs action was timely because it was filed within forty-five days of the 2010 Resolution and Ordinance, the court stated that the "thrust of [p]laintiff's challenge concerns the original redevelopment designation of the Ocean Avenue property, which dates back fourteen years." As such, the court concluded that it would "not allow [p]laintiff to bootstrap his claims against the redevelopment designation on the basis that the complaint was filed within forty-five days of the Resolution and Ordinance[.]"

*4 Next, the court concluded that plaintiff failed "to demonstrate that his complaint raises important issues affecting the public." The court pointed to the absence of a challenge from any other affected party of the redevelopment designation and noted there was no evidence before the court that "the challenged redevelopment designation will result in the expenditure of public funds or have some similarly detrimental effect on the public" or that his challenges "reflect the general sentiments of the property owners in Beachfront South."

Turning to plaintiff's substantive arguments in support of his summary judgment motion, the court found that plaintiff's substantive challenges were irrelevant in light of its determination that plaintiff had failed to exhaust his administrative remedies, failed to present a justiciable controversy, and filed an untimely prerogative writs action. The court nonetheless considered the arguments and found them lacking in merit or not ripe for summary judgment.

First addressing plaintiff's claim of collateral estoppel, the court noted that the unpublished decision in *Cottage Emporium, Inc. v. Broadway Arts Center,* Nos. A–0048–07, A–4415–07, A–4416–07 (App.Div. Apr. 16, 2010), upon which plaintiff relied to advance his constitutional challenges, limited its holding to the constitutional infirmities surrounding the Broadway Corridor of the City, not Beachfront South. Second, the court determined that under *N.J.S.A* . 40A:12A–8, "a municipality *may* acquire land by eminent domain in order to effectuate its redevelopment plan, but is in no way *compelled* to do so [,]" and that "[a] municipality's authority under the LRHL to designate an area as in[-]need[-]of[-] redevelopment is akin to the typical zoning authority vested in zoning boards of adjustment." Third, the court rejected plaintiff's claim that he was entitled to summary judgment as a matter of law in connection with his claim that the 2010 Resolution and Ordinance were arbitrary and capricious, as well as his claim that defendant violated his right to equal protection. The court found that such claims were based upon supported facts and that the "viability" of those claims was immaterial because plaintiff failed to exhaust his administrative remedies, failed to present a justiciable controversy, and the action was time-barred. The present appeal followed.

On appeal, plaintiff raises the following arguments for our consideration.

II. THE LOCAL REDEVELOPMENT AND HOUSING LAW CANNOT BE USED AS A "SUPER LAND USE LAW[";] THE CITY OF LONG BRANCH CANNOT DESIGNATE AN AREA AS BLIGHTED OR IN NEED OF REDEVELOPMENT AND THEN REFUSE TO REDEVELOP THE AREA,

WHICH ECONOMICALLY IMPRISONS PROPERTY OWNERS.[3]

A. MUNICIPAL LAND USE LAW IS INTENDED TO GIVE PROPERTY OWNERS "CONSISTENCY, UNIFORMITY AND PREDICTABILITY."

B. THE REDEVELOPMENT LAW GIVES MUNICIPALITIES SWEEPING AND LARGELY UNREVIEWABLE POWERS, AIMED AT TRULY BLIGHTED AREAS.

*5 C. LONG BRANCH'S REDEVELOPMENT PLAN GIVES THE CITY SWEEPING DISCRETIONARY POWERS, FAR IN EXCESS OF THOSE IN THE MLUL.[4]

III. THE LOWER COURT'S RULING CONFLICTS WITH THE SUPREME COURT'S DECISIONS IN *LYONS V. CAMDEN* AND *WASHINGTON MARKET ENTERPRISES V. [CITY OF] TRENTON* IN ALLOWING THE BEACHFRONT SOUTH AREA TO BE DESIGNATED AS "BLIGHTED" OR "IN NEED OF REDEVELOPMENT," AND THEN DOING NOTHING TO REDEVELOP THE AREA FOR OVER A DECADE.

IV. THE CITY IS ESTOPPED FROM CONTENDING THAT THE STUDY THAT DESIGNATED BEACHFRONT SOUTH AS BLIGHTED IS VALID.

V. THE LOWER COURT ERRED IN CREATING AN UNPRECEDENTED REQUIREMENT TO "EXHAUST ADMINISTRATIVE REMEDIES" WHEN NO SUCH ADMINISTRATIVE REMEDIES EXIST.

VI. THE LOWER COURT ERRED IN REFUSING TO EXTEND THE FORTY[-]FIVE[-]DAY PERIOD FOR CHALLENGING THE BLIGHT DESIGNATION AS APPLIED TO BEACHFRONT SOUTH.

VII. RESOLUTION 10–10 AND ORDINANCE 25–09 ARE ARBITRARY AND CAPRICIOUS: THEIR ONLY PURPOSES ARE TO MAINTAIN A DEGREE OF CONTROL OVER PROPERTIES IN BEACHFRONT SOUTH THAT IS INCONSISTENT WITH LAND USE LAW AND TO PREVENT ANY CHALLENGES TO THE REDEVELOPMENT AREA DESIGNATION.

VIII. IT IS A DENIAL OF EQUAL PROTECTION TO USE REDEVELOPMENT POWERS TO CONTROL LAND USES IN A MANNER INCONSISTENT WITH THE MUNICIPAL LAND USE LAW.

IX. IT IS A DENIAL OF EQUAL PROTECTION TO GRANT REDEVELOPERS BETTER CONTRACTS THAN TAXPAYING RESIDENT HOMEOWNERS.

We have carefully considered each of plaintiff's arguments in the context of the entire record and in light of the briefs, oral argument, and applicable legal principles. We reject each of the arguments advanced and conclude they are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E). We affirm substantially for the reasons expressed by Judge Lawson in his comprehensive November 16, 2010 written decision to which we have referred extensively throughout this opinion. We add the following brief comments related to the nature of the cause of action asserted by plaintiff.

Because the factual record before the motion judge here was largely undisputed, we focus our discussion upon the motion judge's legal determination. We accord no deference to the motion judge's conclusions on issues of law, *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378 (1995), which we review de novo. *Spring Creek Holding Co. v. Shinnihon U.S.A. Co.,* 399 *N .J.Super.* 158, 180 (App.Div.2008); *Dep't of Envtl. Prot. v. Kafil,* 395 *N.J.Super.* 597, 601 (App.Div.2007). We, nonetheless, are in complete agreement with Judge Lawson's conclusion that plaintiff's action was time-barred and that plaintiff set forth no basis for enlargement of the time period in which to bring an action in lieu of prerogative writs.

Moreover, we note plaintiff commenced this proceeding not as an action in lieu of prerogative writs, but as an action seeking declaratory relief from the City's "refusal to vacate the designation of 'blighted' despite its unconstitutionality[.]" A declaratory judgment action is appropriate when the controversy presented is actual and bona fide:

> *6 Stated somewhat differently, declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain. "It is clear that relief by way of a declaratory

> judgment should be withheld when the request is in effect an attempt to have the court adjudicate in advance the validity of a possible [claim or] defense in some expected future law suit." By the same token, "the declaratory judgment procedure may not be used to prejudge issues that are committed for initial resolution to an administrative forum, any more than it may be used as a substitute to establish in advance the merits of an appeal from that forum."
>
> [*Indep. Realty Co. v. Twp. Of N. Bergen*, 376 *N.J.Super.* 295, 302 (App.Div.2005) (citations omitted).]

Here, as Judge Lawson correctly observed, plaintiff may have purchased the property with the intention to develop it, but he never filed any application with the appropriate government official or board seeking approval to develop the property. Thus, plaintiff is unable to demonstrate any harm to his property rights resulting from the in-need-of-redevelopment designation for the Beachfront South area. Nor may plaintiff claim that his ability to develop his property has been adversely affected by any municipal decision affecting his property rights. Plaintiff purchased the property aware of the in-need-of-redevelopment designation, and since that time, the only municipal action taken affecting his property was adoption of the 2010 Resolution and Ordinance, memorializing the City's decision not to commence condemnation proceedings for properties in the Beachfront South area.

As such, any right plaintiff claims has been violated as a result of his property being located in an area designated as in-need-of-redevelopment is purely speculative and not ripe for adjudication through a declaratory judgment action. Additionally, because administrative remedies are available to plaintiff, declaratory relief may not be used to supplant that process. *Indep. Realty Co., supra,* 376 *N.J.Super.* at 302.

Affirmed.

**All Citations**

Not Reported in A.3d, 2011 WL 6378837

Footnotes

1 Plaintiff's complaint is not referred to as a complaint in lieu of prerogative writs.

2 Local Redevelopment and Housing Law (LRHL), *N.J.S.A.* 40A:12A–1 to –73.

3 Point I is entitled "Standard of Review."

4 Municipal Land Use Law, *N.J.S.A.* 40:55D–1 to –129.

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# ATTACHMENT D

2010 WL 3075565
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Konstantinos NATSIS and Helen Natsis, Plaintiff-Respondents,
v.
TOWNSHIP OF WEEHAWKEN, Edward McClary, Gregory McClary, d/b/a H. Cross & Company, and Maria Proochansky, Defendants,
and
Kim Pamperin and Tracy Pamperin, Defendants-Appellants.

Argued March 15, 2010.
|
Decided Aug. 6, 2010.

West KeySummary

1 **Pleading**
Amendment on Court's Own Motion
**Pleading**
Amendment to Conform to Proofs

Court did not abuse its discretion in amending, sua sponte, servient tenement owners' pleadings to include a claim for nuisance against dominant tenement owners arising from a leaking sewer line that ran through servient owner's basement. The proofs fell within a nuisance claim and dominant owners failed to show how their proofs would have been different if servient owners had originally pled a nuisance claim.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3774-02.

**Attorneys and Law Firms**

Daniel Louis Grossman argued the cause for appellants (De Luca & Forster, attorneys; Mr. Grossman, on the brief; Thomas G. De Luca, on the brief).

Paul Faugno argued the cause for respondents (Faugno & Associates, L.L.C, attorneys, Mr. Faugno, on the brief).

Before Judges RODRÍGUEZ and CHAMBERS.

**Opinion**

PER CURIAM.

***1** Defendants Kim Pamperin and Tracy Pamperin seek to overturn a jury verdict against them in the sum of $157,000, for failure to maintain a sewer line pursuant to an easement that they held across the property of plaintiffs Konstantinos Natsis and Helen Natsis. Finding no error, we affirm.

I

This unusual easement case arises from the following circumstances. Defendants own a two-family home located on a hill above and bordering plaintiffs' property. Neither defendants nor plaintiffs were aware when they purchased their respective homes that defendants' property had the benefit of a 1923 sewer easement across plaintiffs' property and that the sewer pipe ran through the basement of plaintiffs' home. The easement required the dominant easement holder, namely, defendants, to maintain the easement.

This situation was not discovered until April 2000, shortly after plaintiffs moved into the home, when, in cleaning up the property, they discovered the sewer pipe which was leaking. A subsequent title search revealed the existence of the easement. They also discovered that the sewer lines of two other neighbors were tied into the easement sewer pipe without a right under the easement to do so.

When advised of these circumstances, the defendants, along with one of the other neighbors, hired a plumber who did certain repairs to address the problem. However, the pipe continued to leak raw sewage. Plaintiffs contended that they continued to advise defendants of the persistent problems with the sewer line, but the latter were unresponsive. At one point, Mr. Natsis rerouted the sewer line away from his house. Defendants maintained that Mr. Natsis, who was not a licensed plumber, repeatedly tampered with the sewer line, thereby causing a continuing problem with it. Defendants also asserted that plaintiffs refused to allow the Pamperins' and their plumber access to make repairs.

Due to the health issues presented by the leaking sewer pipe over a number of years, Township officials declared the situation a public health nuisance and, eventually, pursuant to a court order dated February 19, 2004, the Township undertook the repair. The issue was finally resolved in 2007, when defendants sewer line was rerouted so that it did not cross plaintiffs' property. Plaintiffs contended that from the time they purchased the house in April 2000 until August 2007, when the matter was finally resolved, they were plagued with leaks from the sewer pipe.

We will not review the complex procedural history of this case which was commenced in 2002, while events were still unfolding. The relevant procedural history is set forth in our earlier decision, reversing the judgments entered after the first trial and remanding the case to the trial court. *Natsis v. Twp. of Weehawken,* No. A-2552-04 (App.Div. Jan. 9, 2007). On remand, the claims involving all of the other parties were resolved before the second trial, so that only the claims regarding plaintiffs and the Pamperins were tried.

***2** After a jury trial, in which defendants appeared pro se, the jury found that defendants had breached their duty under the easement by failing to maintain the sewer line and that they had maintained a nuisance. [1] The jury concluded that this conduct was a proximate cause of harm to plaintiffs and awarded plaintiffs damages of $157,000.

On appeal, defendants contend that the trial court erred in submitting the issue of nuisance to the jury. They also maintain that the trial court should have dismissed the complaint at the end of plaintiffs' case because plaintiffs had wrongfully moved the sewer line and plaintiffs had not provided proof of economic loss or diminution in the value of their property. Defendants further assert that "[t]he trial court prejudiced defendants by allowing plaintiffs to portray defendants as wealthy and of bad character while permitting the interpreter to deodorize defendant [Konstantinos Natsis'] language."

II

Although plaintiffs had not pled nuisance in their complaint, the trial court initiated the introduction of a nuisance claim at the time of oral argument on defendants' motion to dismiss at the end of plaintiffs' case. At the conclusion of the proofs, before the summation and charge, the trial court, on its own motion, with the concurrence of plaintiffs and the objection of defendants, amended the complaint pursuant to *Rule* 4:9-2 to include a nuisance count.

Defendants contend that inclusion of the nuisance claim was error because use of an easement does not give rise to a cause of action in tort, that the late amendment of the complaint was unfair to defendants, and that the court's charge contained errors related to the nuisance claim.

A nuisance has been defined as "an unreasonable interference with the use and enjoyment of land." *Sans v. Ramsey Golf & Country Club, Inc.,* 29 *N.J.* 438, 448, 149 A.2d 599 (1959). The circumstances that may give rise to a nuisance are varied. *Ibid.* (stating that "[t]he elements [of nuisance] are myriad. The law has never undertaken to define all of the possible sources of annoyance and discomfort which would justify such a finding.") The flow of sewage on one's land certainly constitutes an "unreasonable interference with the use and enjoyment of land." *See Sheppard v. Twp. of Frankford,* 261 *N.J.Super.* 5, 8, 617 A.2d 666 (App.Div.1992) (concluding that under the facts of that case "storm water discharge constituted a nuisance in that it unreasonably interfered with plaintiffs' use and enjoyment of their summer lakeshore properties"). Here, plaintiffs presented proofs that sewage was escaping from the easement's sewer pipe, that defendants had a duty to maintain the pipe, and that the flow of sewage was caused by their failure to do so. This was sufficient to make out a cause of action in nuisance. *See Am. Metal Co. v. Fluid Chem. Co.,* 121 *N.J.Super.* 177, 181, 296 A.2d 348 (Law Div.1972) (noting that a claim for damages for interference with the easement's holder's rights is an action in nuisance).

***3** While *Rule* 4:9-2 allows a court to permit the pleadings to be amended even after the conclusion of proofs as was done here, when entertaining such an application, the court must take care that in doing so, the objecting party is not unfairly prejudiced by the late amendment. *See R.* 4:9-2 (providing that the application may be granted when "the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits"). The court has the discretion to deny the amendment where prejudice is found, but it also may counter any prejudice by granting a continuance, *ibid.*, or, if necessary, by granting a mistrial, Pressler, *Current N.J. Court Rules,* comment on 4:9-2 (2010). We find no abuse of discretion in the court's amendment of the pleadings here. The proofs squarely fell within a nuisance cause of action, and defendants have not shown how their proofs would have been different if nuisance had been formally pled earlier.

We find no error in the charge, and conclude that the balance of the arguments of defendants are not of sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(e).

Affirmed.

**All Citations**

Not Reported in A.2d, 2010 WL 3075565

Footnotes

1 The jury also rejected defendants' contention that plaintiffs had created a nuisance.

End of Document

# ATTACHMENT E

KeyCite Yellow Flag - Negative Treatment
Distinguished by Financial Cas. Sec. Co., Inc. v. Mascola, D.N.J., July 19, 2013

2012 WL 2737802
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

YARDLEY TRAVEL LTD., Plaintiff,
v.
Greg BETAR and Donna Betar, Defendants/Third–Party Plaintiffs–Respondents/Cross–Appellants,
v.
Rick Wilson, a/k/a Richard Wilson and Marricio Wilson, Third–Party Defendant–Appellant/Cross–Respondent.

Submitted March 26, 2012.
|
Decided July 10, 2012.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L–853–08.

**Attorneys and Law Firms**

Merrick Wilson, appellant/cross-respondent pro se.

Santo J. Bonanno, attorney for respondents/cross-appellants.

Before Judges SABATINO and ASHRAFI.

**Opinion**

PER CURIAM.

*1 Third-party defendant Merrick Wilson [1] appeals from judgment after trial before a jury in favor of third-party plaintiffs Greg and Donna Betar for $61,289.93 plus prejudgment interest and costs awarded by the court totaling $5,843.78. Wilson contends that certain prejudicial trial errors occurred, but primarily, he argues that the trial court erroneously permitted the jury to find him personally liable for breach of a settlement agreement with the Betars that he executed only on behalf of the corporate plaintiff, Yardley Travel Ltd. The Betars cross-appeal from the trial court's denial of their motion to amend their third-party complaint to add claims of fraud. We reject the arguments in both the appeal and the cross-appeal and affirm the judgment.

I.

Yardley Travel Ltd. was a Pennsylvania corporation engaged in the travel business and owned by appellant Wilson's wife, Susan Wilson. In 2006, Yardley hired Greg and Donna Betars' son as a travel agent. The following year, Yardley added a ticket brokerage service to its business, and the Betars' son was given primary responsibility for running that service.

In early January 2008, Susan Wilson discovered that a large number of event tickets had been purchased by unauthorized use of her personal American Express card, Yardley's corporate American Express card, and several credit cards of Yardley's clients. Appellant Wilson investigated the unexplained credit card charges and concluded that the Betars' son had carried out a fraudulent ticket purchase scheme. Wilson calculated a loss of $61,298.92 to Yardley and the credit card holders.

On January 4, 2008, Wilson confronted the son, who immediately left the office complaining of health problems. Wilson was not able to contact him after he left. On the same day, Wilson contacted the police in Lower Makefield Township, Pennsylvania, and relayed his belief that the Betars' son had engaged in credit card fraud and theft of the tickets.

Within days, Wilson contacted Greg and Donna Betar, who lived in Oak Ridge, New Jersey. Donna Betar testified at trial that Wilson and his son, Matt Wilson, left threatening messages on her answering machine about her son's potential criminal liability. She testified that the Wilsons told her of an imminent meeting with the police scheduled for the afternoon of January 7, 2008. They offered to cancel the meeting and withdraw their police complaint if the Betars reimbursed Yardley for the losses attributed to their son. In his testimony, Wilson stated he did not recall whether he agreed not to press charges if the Betars paid for the loss.

After many phone conversations, Donna Betar reached an agreement with Wilson to make payment to avoid criminal and other accusations against her son. At trial, Wilson acknowledged that an agreement was reached but could not recall the substance of the agreement. Donna Betar testified that the agreement was that the Betars would pay Yardley $61,289.93, and in exchange all claims or charges before the police, Yardley's insurance carrier, and American Express would be withdrawn and no further action would be taken against any of the Betars.

*2 On January 7, 2008, the Betars went to Yardley's office in Yardley, Pennsylvania, to complete the settlement. The Betars and Wilson had each prepared a written document for signature by the other party to the oral agreement. The relevant terms of Wilson's settlement document provide:

> [The Betars] have given Yardley Travel Ltd. a certified check in the amount of $61,298.92 as consideration to pay for the expenses of the alleged theft, alleged criminal activities, and losses perpetrated by your son ... against Yardley Travel Ltd. and Yardley Tickets, which have been discovered to date and are outlined in the attached spreadsheet.... Yardley Travel Ltd., at your request and as consideration to you, will notify the Lower Makefield Township police department, Selective Insurance Company, and American Express Co. that $61,298.92 has been received to cover the alleged losses....
>
> [The Betars] recognize that the ... payment is only for the alleged criminal activities that have been discovered and identified as of January 6, 2008 and outlined on the attached itemized spreadsheet....

The Betars' handwritten settlement document provides:

> The checks in the total amount of $61,289.93 are to reimburse Yardley Travel in full for the alleged fraudulent credit card charges that were done by [the Betars' son].
>
> This payment is being made after the verbal agreement between Donna Betar and Rick Wilson and Matt Wilson via telephone stating that upon receipt of the agreed amount ... Yardley Travel would guarantee all claims and charges would be dismissed with American Express, the Insurance Company, and the police department....
>
> This payment now makes Yardley Travel whole and fully compensated and allows no further action to be taken against [the Betars' son], Donna Betar, and Gregory Betar.

The parties simultaneously signed the two documents, and the Betars made the promised payment by certified checks payable to "Yardley Travel."[2] The Betars agreed to sign Wilson's settlement document only on the condition that Wilson sign their settlement document. Despite the contradictory terms of the two documents as to the scope of matters covered by the settlement, the parties acknowledged at trial that both documents are part of the settlement agreement.

Wilson testified that he signed the settlement documents on behalf of Yardley in his capacity as vice-president of the corporation. His signature on both agreements is accompanied by the title "Vice President, Yardley Travel Ltd." However, Wilson produced no documentary evidence at trial to verify his status as an officer of the corporation, and he conceded at trial that there was no formal appointment of him as vice-president. In another document, Wilson indicated he was Yardley's president, and in yet other documents, he had no title related to the corporation.

A month after the settlement agreement was executed, Wilson learned that the Betars' son had arranged an October 2007 trip to Las Vegas for his parents without receiving payment. Yardley sent the Betars a demand letter for $2,342.30 for the Las Vegas trip. The Betars refused to pay the amount demanded, taking the position that others owed part of that sum. Wilson then contacted the local police department and accused the Betars of conspiring in their son's credit card scheme.

*3 Wilson continued to communicate with the police in furtherance of criminal proceedings against the son in Bucks County, Pennsylvania. He did not withdraw the criminal complaint he had filed earlier because, he said, he felt morally obligated to cooperate with the police and the prosecutor and the settlement agreement did not apply to additional losses he discovered.[3]

After the agreements were executed, Susan Wilson contacted American Express to file a fraud complaint. Also after the agreements were executed, Wilson contacted Yardley's insurer to file a claim for losses related to the credit card scheme.

On February 15, 2008, Wilson filed a Small Claims complaint on behalf of Yardley in the Superior Court of New Jersey, Special Civil Part, to recover $2,342.30 allegedly owed by the Betars for the Las Vegas trip. The Betars filed a counterclaim against Yardley and a third-party complaint against Wilson alleging that he breached the settlement agreement. As damages, the Betars sought a refund of the settlement payment they had made to Yardley. Because the relief sought exceeded the jurisdictional limit of the Special

Civil Part, the matter was transferred to the Law Division pursuant to *Rule* 6:4–1(c).

While trial was pending, Yardley filed for Chapter 7 bankruptcy protection, and the corporation ceased to exist on April 4, 2009. As a result, the Betars' counterclaim for breach of contract against Yardley was dismissed.

The Law Division conducted a four-day trial in June 2010 on Yardley's Small Claims complaint and the Betars' third-party complaint against Wilson. At the close of evidence, the Betars moved to dismiss Yardley's complaint, arguing that Wilson lacked capacity to sue on Yardley's behalf. They also moved to amend their third-party complaint to add fraud claims against Wilson based on his testimony at trial. Wilson moved to dismiss the Betars' third-party complaint, arguing no reasonable jury could conclude that he agreed to be bound personally by the settlement agreement. The court denied all three motions.

In its final charge to the jury, the court gave instructions as to the limited liability of a corporate officer undertaking acts on behalf of the corporation. The jury found that the Betars owed Yardley $300 for the Las Vegas trip. As to the third-party complaint, the jury found that "a contract was formed between the Betars and Merrick Wilson on the subject of reimbursement for the alleged thefts," that Wilson breached the contract, and that the Betars were entitled to damages in the amount of $61,289.93. The court entered judgment on July 15, 2010, for the amounts found by the jury plus prejudgment interest.

## II.

Four issues are presented by Wilson's appeal and the Betars' cross-appeal: (1) whether there was sufficient evidence to permit the jury to find that Wilson was bound personally by the settlement agreement; (2) whether testimony that Yardley went out of business prejudiced Wilson; (3) whether the court erred by allowing the jury to hear the answering machine messages left by Wilson and his son for the Betars; and (4) whether the court erred in denying the Betars' motion to amend their third-party complaint to add claims for fraud.

### A.

*4 To the extent Wilson may be challenging the jury verdict as against the weight of evidence, *Rule* 2:10–1 precludes the argument on appeal because he did not move for a new trial on that ground. In the absence of a motion for a new trial raising the issue, an appellate court will usually not consider an appeal challenging the jury verdict as against the weight of the evidence. *Ogborne v. Mercer Cemetery Corp.*, 197 *N.J.* 448, 462 (2009); *Gebroe–Hammer Assocs., Inc. v. Sebbag,* 385 *N.J.Super.* 291, 295 (App.Div.), *certif. denied,* 188 *N.J.* 219 (2006).

We view Wilson's appeal as alleging error in the trial court's denial of his motion to dismiss the Betars' claims at the close of evidence pursuant to *Rule* 4:37–2(b). He argued that he was merely an agent of Yardley when he negotiated the settlement and signed the documents, and that there was no proof he undertook to be personally bound by Yardley's agreement with the Betars. The trial court denied Wilson's motion because it found sufficient evidence for reasonable minds to differ as to whether Wilson had agreed to be a party to the oral agreement negotiated over the telephone and whether Wilson was acting exclusively as an agent of Yardley when he signed the settlement documents.

Our standard of review on an appeal from denial of a motion to dismiss under *Rule* 4:37–2(b) is whether the evidence, together with all legitimate inferences, could sustain a judgment in favor of the party opposing the motion, here, the Betars. *See R.* 4:40–1; *Besler v. Bd. of Educ. of W. Windsor–Plainsboro Reg'l School Dist.*, 201 *N.J.* 544, 572 (2010); *Potente v. Cnty. of Hudson,* 187 *N.J.* 103, 111 (2006). We are "not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence." *Dolson v. Anastasia,* 55 *N.J.* 2, 5–6 (1969). In reviewing the sufficiency of the evidence, we will accept as true all evidence supporting the third-party complaint and accord that evidence all favorable inferences. *Ibid* . If reasonable minds could differ, the denial of the motion must be affirmed. *Ibid.* Under this standard of review, we will not re-weigh witness credibility. *Alves v. Rosenberg,* 400 *N.J.Super.* 553, 565–66 (App.Div.2008); *Cavanaugh v. Skil Corp.,* 331 *N.J.Super.* 134, 176 (App.Div.1999), *aff'd,* 164 *N.J.* 1 (2000). That function belonged to the jury.

Wilson contends the evidence could not sustain the finding that he was a party to the agreement because he was a disclosed agent of Yardley and therefore not liable for Yardley's contract of settlement, and because he was an officer of Yardley and the circumstances do not justify piercing the corporate veil. We can dispense quickly with the argument regarding piercing the corporate veil because the jury's verdict rests on the Betars' claim that Wilson agreed to be bound personally by the terms of the agreement.

We can also dispense with discussion of Wilson's choice-of-law contentions because the law of personal liability for corporate actions is not different in New Jersey and Pennsylvania. *See Gantes v. Kason Corp.*, 145 *N.J.* 478, 484 (1996); *Veazey v. Doremus*, 103 *N.J.* 244, 248 (1986). The law in both states is that a corporation acts only through its agents, and the personal liability of an agent for a corporation's contract is determined under the common law of agency. *African Bio–Botanica, Inc. v. Leiner*, 264 *N.J.Super.* 359, 363 (App.Div.) (citing *Looman Realty Corp. v. Broad St. Nat'l Bank of Trenton*, 32 *N.J.* 461, 476–79 (1960)), *certif. denied*, 134 *N.J.* 480 (1993); *see Bucks v. Buckwalter*, 215 *A.*2d 625, 627 (Pa.1966). In both jurisdictions, the general rule is that "[u]nless the parties agree otherwise ... an agent who contracts on behalf of a fully disclosed principal is not personally liable on the contract." *African Bio–Botanica, supra*, 264 *N.J.Super.* at 363–64 (citing *Looman, supra*, 32 *N.J.* at 476–78); *see Revere Press, Inc. v. Blumberg*, 246 *A.*2d 407, 409 (Pa.1968); *Pa. Gas & Water Co. v. Nenna & Frain, Inc.*, 467 *A.*2d 330, 336 (Pa.Super.Ct.1983); *accord Restatement (Third) of Agency* § 6.01 (2005).

*5 When a claimant contends an agent agreed to be a party to a contract, that party "has the burden of showing a manifestation of assent by the agent...." *Restatement, supra*, § 6.01 comment d(1); *e.g., Leutwyler v. Royal Hashemite Ct. of Jordan*, 184 *F.Supp.*2d 303, 309 (S.D.N.Y.2001). "An agent is not a party ... if any portion of the parties' writing makes clear that the agent acts solely in a representative capacity...." *Restatement, supra*, § 6.01 comment d(1). "The manner in which an agent's name appears in a contract is often relevant to establishing ... whether the agent has manifested assent to become a party to the contract." *Ibid.* However, "[u]sing language that simply describes a person as an agent is insufficient to indicate that the person acts *only* in a representative capacity...." *Ibid.* (emphasis added). "The nature of the parties' contract may also establish whether an organizational executive agreed to be individually liable." *Id.* at comment d(2).

Wilson admitted he understood and assented to the terms of the Betars' handwritten document after he had entered into an earlier oral agreement. The Betars' document provides that they were making payment in reliance upon "the verbal agreement between Donna Betar and Rick Wilson and Matt Wilson via telephone." Donna Betar testified she believed as a result of the telephone conversations that her agreement was with the Wilsons as well as with Yardley. It makes little sense in the factual circumstances presented that the Betars would agree to pay $61,289.93 without an undertaking by the Wilsons not to do in their personal capacities what they could not do on behalf of Yardley, that is, continue pursuit of criminal or fraud charges against any of the Betars.

Wilson's signature on both settlement documents included the title "Vice President, Yardley Travel." Federal and New York courts have held that an officer cannot negate express terms indicating personal liability by simply adding his or her title to the signature line of the agreement. *E.g., Am. Mgmt. Corp. v. Dunlap*, 784 *F.Supp.* 1245, 1250–51 (N.D.Miss.1992); *PNC Capital Recovery v. Mech. Parking Syss.*, 726 *N.Y.S.*2d 394, 397 (N.Y.App.Div.2001), *appeal dism.*, 781 *N.E.*2d 911 (N.Y.2002); *Chem. Bank v. Masters*, 574 *N.Y.S.*2d 754, 755 (N.Y.App.Div.1991); *see also In re Estate of Duran*, 692 *A.*2d 176, 179 (Pa.Super.Ct.1997) ("The mere presence of the corporate name above the signature line does not exclusively indicate corporate liability.").

Wilson's reliance on the designation of his purported title is undermined by the fact that the signing occurred after the oral agreement had been reached and also by the nature of the agreement itself. *See Chem. Bank, supra*, 574 *N.Y.S.*2d at 755. The disputed factual issue of whether Wilson signed the agreement only on behalf of the corporation or also on his own behalf was for the jury to determine based on all the evidence.

*6 The jury could take into consideration the particular nature of the agreement to conclude that Wilson had personally agreed not to pursue criminal or other fraud charges against any of the Betars provided that they made payment to Yardley of the amount then known to have been lost, which they did. The jury could also consider the fact that Susan Wilson had personally incurred potential liability because her own American Express card had been used in furtherance of the fraudulent ticket purchase scheme and therefore could seek charges against the Betars' son on her own behalf. The jury could conclude that the duties under the settlement agreement did not fall entirely within the scope of Wilson's capacity as a purported corporate officer.

In his brief, Wilson fails to undermine the evidence favoring the Betars' view of the agreement or to reconcile the terms of the conflicting settlement documents. Instead, he points to evidence indicating the parties' intent that Yardley would be bound by the contract, for example, Donna Betar's testimony to that effect, the use of Yardley letterhead for his settlement document, the signing of the documents at Yardley's office, and the designation of Yardley as the payee on the settlement checks. But Wilson does not explain why evidence that Yardley was a party to the agreement demonstrates that he was not a party as well. *See Sherman v. Josephson,* 44 *N.J.Super.* 419, 426–27 (App.Div.1957) (it does not follow as "a necessary inference" that because the subject matter of a contract was owned by the corporation that the officer was only acting in the capacity of an agent of the corporation (quoting *Sadler v. Young,* 78 *N.J.L.* 594, 596 (E. & A.1910))).

Wilson testified that he is an officer of five other corporations and is familiar with the execution of corporate contracts. Yet he did not follow the best practice under these circumstances by signing in a manner that clearly indicates he was acting only in a representative capacity, such as, "Merrick Wilson for Yardley Travel" or "Yardley Travel by Merrick Wilson," *Restatement, supra,* § 6.01 comment d(1); *see Sherman, supra,* 44 *N.J.Super.* at 426 (affirming denial of motion to dismiss because agent "signed individually ... without any qualification or designation denoting agency"). Wilson's argument is also undermined by his inability to produce any corroborating evidence at trial to support his claim that he was in fact an officer of the corporation. *See Bennett v. T. & F. Distrib. Co.,* 117 *N.J.Super.* 439, 441–44 (App.Div.1971), *certif. denied,* 60 *N.J.* 350 (1972) (agency is generally a question of fact for the jury).

Ultimately, the outcome of this case turned on the jury's understanding of the conflicting terms of the settlement documents as developed through the testimony of Wilson and Donna Betar. Where a jury's verdict turns on witness credibility, we defer to the jury's determination.

*7 In sum, we reject Wilson's argument that he was entitled to dismissal of the third-party complaint because he was not personally bound by the settlement agreement.

### B.

Citing *Brodsky v. Grinnell Haulers, Inc.,* 362 *N.J.Super.* 256, 265–66 (App.Div.2003), *aff'd,* 181 *N.J.* 102 (2004), Wilson contends he was prejudiced when the jury learned that Yardley was no longer "financially viable" because that knowledge may have caused the jury to shift responsibility to him.

The trial transcript alludes to an in limine ruling instructing the Betars' attorney not to reveal Yardley's bankruptcy. On direct examination, Wilson's attorney asked him what his involvement was with Yardley. Wilson responded: "At this moment in time ... Yardley Travel Limited doesn't exist." During cross-examination, the Betars' attorney asked Wilson: "When did the company cease to exist?" Wilson's attorney objected, but the court overruled the objection because the question did not seek to reveal Yardley's bankruptcy or insolvency.

In *Brodsky,* an automobile negligence case, we stated that efforts to focus the jury "on irrelevant and prejudicial facts, such as a party's financial status or insurance status ... may constitute reversible error" when the statements "reinforc[e] in the jurors' minds the need to shift sufficient blame to the apparently-solvent defendants...." *Id.* at 265–66. In this case, there was no reference to the solvency or insurance status of Yardley. Moreover, Wilson himself informed the jury that Yardley no longer existed at the time of trial.

There was no abuse of discretion in the court's permitting on cross-examination a question to establish the time at which Yardley went out of business. *See Estate of Hanges v. Met. Prop. & Cas. Ins. Co.,* 202 *N.J.* 369, 382 (2010).

### C.

Wilson contends the trial court erred in allowing the jury to listen to recorded messages left by him and his son on the Betars' answering machine. He contends the Betars recorded those messages in violation of the "Pennsylvania Wiretap Act," which he does not cite in his brief.

Wilson's attorney objected at trial to admission of the recordings, arguing they were cumulative and inflammatory. The court overruled the objections and allowed the jury to hear the messages because they were relevant to the terms of the oral agreement between Wilson and the Betars.

The short answer to Wilson's contention on appeal is that Pennsylvania's Wiretapping and Electronic Surveillance Control Act, 18 *Pa.C.S.A.* §§ 5701–5782, even if applicable to a message on an answering machine located in New Jersey, does not bar voluntary recordings left on a telephone answering machine or on voice mail. The persons who left the messages, Wilson and his son, Matt Wilson, knew they were leaving recorded messages and therefore consented to the recordings. *See id.* at § 5704(4).

D.

In their cross-appeal, the Betars contend the trial court erred in denying their motion pursuant to *Rule* 4:9–2 to amend the pleadings at the close of evidence to add claims of fraud. They pointed to Wilson's testimony at trial that his motivation in signing their handwritten settlement document was to induce them to make the payment. The court acknowledged New Jersey's liberal approach to amending pleadings but denied the Betars' motion because there was insufficient evidence to establish the "material misrepresentation" element of fraud.

***8** "*Rule* 4:9–2 requires that motions for leave to amend be granted liberally." *Kernan v. One Wash. Park Urban Renewal Assocs.,* 154 *N.J.* 437, 456 (1998). The court must balance "undue delay or prejudice from the amendment" against "the overriding need to seek justice." *Adron, Inc. v. Home Ins. Co.,* 292 *N.J.Super.* 463, 475–76 (App.Div.1996).

The standard of review for denial of a motion to amend in these circumstances is abuse of discretion. *See Kernan, supra,* 154 *N.J.* at 457. We find no abuse of discretion in the trial court's ruling, especially since the Betars prevailed in the jury's verdict without the requested amendment.

Affirmed.

**All Citations**

Not Reported in A.3d, 2012 WL 2737802

Footnotes

1 Merrick Wilson, Rick Wilson, Richard Wilson, and Marricio Wilson are alternative names in the record for the same person. The caption of the case is from the trial court's judgment. Appellant identifies himself as Merrick Wilson in his pro se brief. We will refer to him by his last name.

2 There is a small discrepancy in the settlement figures recited by the parties. The checks the Betars subsequently issued to Yardley matched their $61,289.93 figure, and the jury's award also used that figure.

3 Our record does not indicate the outcome of any criminal prosecution of the son in Pennsylvania, and we make no determination as to whether criminal offenses were committed.

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|---|---|
| JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>GREENBERG FARROW ARCHITECTURE INCORPORATED, ESMAIL GHADRDAN, and KEITH JOHNSTON,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY<br><br>DOCKET NO.: MON-L-1021-17<br><br>Civil Action |

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR DECLARATORY JUDGMENT EXPELLING OR DISASSOCIATING FORMER MEMBER GREENBERG FARROW ARCHITECTURE INC. FROM ENGENUITY INFRASTRUCTURE, LLC**

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**PRELIMINARY STATEMENT**

Plaintiffs, by and through their counsel, Sichenzia Ross Ference LLP, submit this *post*-trial brief ***reply*** to GreenbergFarrow's Opposition to Plaintiffs' Cross-Motion for Declaratory Judgment Expelling or Disassociating Former Member GreenbergFarrow Architecture Inc. (the "Opposition"). As set forth below, the Court should enter an order, pursuant to Section 46 of the RULLCA, declaring the disassociation and expulsion of GreenbergFarrow, as a member of ENGenuity.[1]

The Opposition largely repeats arguments made by GreenbergFarrow's attorneys, for the first time, during the trial.[2] The crux of these arguments, which are based on some vague notion of fairness concocted by GreenbergFarrow's attorneys, is that GreenbergFarrow should "get something" if it is ordered to pay money damages that were awarded by the jury for GreenbergFarrow's breach of contract and breach of the covenant of good faith and fair dealing. No case stands for that proposition, and GreenbergFarrow cites to none. Nonetheless, according to GreenbergFarrow, *that* "something" is all or a portion of the membership interest GreenbergFarrow could have obtained *if* it had not: breached the contract on or before October 3, 2016; abdicated all of its duties as a minority member; terminated all contact, communication and cooperation with Plaintiffs; abandoned ENGenuity; and left the start-up to fail or fend-off financial ruin in 2016, 2017, 2018 and 2019. In other words, *if* it had made its contribution for its interest.

[1] All capitalized terms not otherwise defined in this reply brief shall have the meanings ascribed to them in Plaintiffs' Cross-Motion.

[2] To the extent that ENGenuity's opposition to GreenbergFarrow's omnibus *post*-verdict motion addresses some of these rehashed arguments, ENGenuity incorporates by reference these arguments into this brief reply.

The Opposition cannot overcome the substantial evidence presented at trial that warrants the relief sought by ENGenuity, to wit: GreenbergFarrow's *pre*-termination wrongful conduct that materially and adversely harmed ENGenuity, and a combination of *post*-termination conduct that was so disruptive to the business and significant developments in the single-member business since GreenbergFarrow severed all relations that make it not reasonably practicable to carry on ENGenuity with GreenbergFarrow as a member. For all of the reasons that follow, the Court should reject the Opposition and grant the Cross-Motion in its entirety.

## PROCEDURAL HISTORY

To the extent that GreenbergFarrow is to be heard for the proposition that the Court should not consider the Flor Affidavit because the Court had the opportunity to fully consider all facts and arguments at trial, this argument is less than candid. At trial and outside of the presence of the jury, GreenbergFarrow advocated limiting the jury hearing certain claims and evidence. The Court withheld the Sixth Cause of Action from the jury, which circumscribed the documentary and testimonial evidence presented to it.

> THE COURT: So then what are we -- you know -- I almost feel like I'm kind of going in a little bit of a circle now that -- as it relates to that statutory count, I almost think, and I don't want this to be construed as I'm giving any legal advice to Mr. Furst, but I almost feel that based upon the proofs as submitted, the Court -- and the testimony of Ms. Flor that she has basically run the company by herself since October 2016 -- whatever the 1st or whatever that date was -- and the testimony of the Defendants that they really had no involvement with the company for roughly three-plus years -- Don't the proofs warrant that I grant -- I know we kind of started talking about this right before we broke for lunch. But don't the proofs warrant that as a matter of law, I can find the Defendant has abandoned the partnership? I'm looking -- you know --
> MR. FURST: Okay. I didn't know if you --
> THE COURT: -- at both of you. You know? Mr. Furst, and then I'll hear from the Defendants, but I mean, I do think the evidence is undisputed on this. You had your clients testify that both of the gentlemen -- you know -- the individual defendants, or certainly senior management, were the ones that were actively involved in this -- if you want to say failed partnership. But as of that October

date -- no later than October of 2016, there has been no involvement, and it's really been Ms. Flor running her own company.

So how do I not -- I mean, what question of fact is there for the jury to find?

MR. FURST: So again, just for purposes of completeness -- and I'm sorry, we may have covered it before, I just don't remember if we were --

THE COURT: Right. Right.

MR. FURST: -- on the record or not. But I agree that we have learned things through the testimony of each of the individuals in this case that, at least, some of which had not been previously disclosed at the time of the underlying pleading, and its original or amended form was served and filed. Including, with respect to Ms. Flor testifying that this is a single member, limited liability company. It has been operated as a single member liability company, and that it is credentialed with the State as her running that entity. And I do believe that I agree that the testimony has been unequivocal on the parts of Mr. Ghadrdan and Johnston that be it October 3rd, or sometime thereabout of 2016, at the latest, they terminated all interests in ENGenuity Infrastructure.

THE COURT: Right.

MR. FURST: All claims to any membership interest in the company and cut off all funding for both the entity and for Ms. Flor. I also believe that that testimony is consistent with Section 42-2 of the New Jersey Revised Limited Liability Company Act, which speaks to the conduct of a member when they no longer -- when it's no longer reasonably practical to carry on the activities of that member because they've engaged in conduct that makes that operation impractical.

So in this instance, I think the unrefuted testimonial evidence is that they've abandoned the company; they've relinquished their membership interest; they've never endeavored to reclaim their membership interest; they did nothing to help mitigate the harm that, ultimately, this caused to the business. And the business has, through whatever forms of testimony we've already provided, a line of credit, cash flow --

THE COURT: Right.

MR. FLINT: Your Honor, I don't think you need to decide this right now. We agree it doesn't need to go to the jury. So I would request that you hang onto it and deal with it later, and here's why. If there's no agreement at -- on – there's no letter of intent; no operating agreement. What you have is a two-member LLC that was formed without an operating agreement. And I don't know what the statute says about how you dissolve that or how somebody abandons their interest or how -- you know? Did she run with it first, or did they abandon their interest first? Those things are things – there's no case law on it, and --

THE COURT: Well, we know that certainly as of September 12th when -- if not beforehand -- you know -- when, I believe the testimony from Ms. Flor was when she got the LOI she waited sometime before responding. And then we know that she was basically terminated. The relationship was terminated during that September 12th

MR. FLINT: You need to hear tomorrow's evidence before you decide on this then if that's part of what goes into it because that's not the whole story. My point

> is that I don't -- we don't want the jury to hear this. We think it's your decision, but it can wait until the close of all evidence. That doesn't need to be decided right now. We have some evidence on that that shows that it might be a little different than what you heard in their case. But my biggest point is, I don't think that there's any authority for how you end -- if there is no agreement, which we contend, then you go to the default rules --
> THE COURT: I know, but --
> MR. FLINT: -- and I'm not sure --
> THE COURT: But the --
> MR. FLINT: I haven't seen a case on how it ends there.
> THE COURT: Well, the -- a member shall be dissociated -- if you read the -- you know -- New Jersey Revised Uniform Liability -- Limited Liability Company Act -- a member shall be disassociated by an application -- by a company -- the person is expelled as a member by judicial order. Isn't that the application that is now here in front of me?
> MR. FLINT: What -- I haven't looked at – what's the criteria for expulsion? I --
> THE COURT: Well --
> MR. FLINT: My whole point is that this is something -- since we don't insist that it goes to the jury, it's something that can wait until the full body of evidence is developed.
>
> THE COURT: What I will --
> MR. FURST: -- even appropriately before the Court.
> THE COURT: -- do is I'm going to reserve on this. I think this is purely an equitable form of relief that the Court should address. I think -- candidly, I think based upon the testimony of the Plaintiff, as well as the principles of the Defendant, I don't see how I reach any conclusion other than the Defendants abandon -- or the Defendant, Greenberg Farrow abandon their claim in the LLC. But I don't need to address this now. That issue is not going to go to the jury. Mr. Furst, you could address that in a post-trial application.
> MR. FURST: Okay. And I actually have a brief on the subject --
> THE COURT: Yep.
> MR. FURST: -- in terms of equity and law considerations --
> THE COURT: Right.
> MR. FURST: -- that will be available whenever you want.
> THE COURT: I don't think this is an appropriate jury question.

(Oct. 15, 2019 Tr., at 134:24-143:25.)

That GreenbergFarrow now argues "the Court is limited solely to the evidence that was actually adduced at trial" is misleading and inconsistent with the Court's prior rulings. (See Opposition, p. 2.)

# LEGAL ARGUMENT

## GREENBERGFARROW'S ADMISSIONS AT TRIAL DOOM ITS OPPOSITION, FAIL TO OVERCOME STATUTORY AUTHORITY AND REQUIRE THE COURT TO AFFIRM, BASED ON THE TRIAL RECORD, THAT GREENBERGFARROW IS NOT A MEMBER OF ENGENUITY

### A. GreenberFarrow's Objections to Declaratory Relief That Affirms Its Voluntary Membership Termination Are Meritless

GreenbergFarrow's objections to the Court declaring, pursuant to Section 42:2C-46(a) of the RULLCA, that GreenbergFarrow had voluntarily terminated its membership in ENGenuity and had disassociated from the start-up on or before October 3, 2016, are contrary to the sworn trial admissions of its officers and established law, and the Court can and should consider same.

According to GreenbergFarrow, an amendment to conform a pleading to the evidence may only be made on notice and at the "behest of a party," which was not done in this instance. (See Opposition, pp. 8-9 (citing Gruccio v. Baxter, 135 N.J. Super. 290, 294, 343 a.2D 145 (1975)) and Wilson Plumbling & Heating, Inc. v. Waderman, 246 N.J. Super. 615, 618, 588 a.2D 444 (1991) (internal citation omitted), respectively.) It further argues that, as ENGenuity did not plead a claim under Section 42:2C-46(a), and GreenbergFarrow did not consent to this additional basis for disassociation under Section 42:2C-46, the Court may not construe the Cross-Motion's arguments of voluntary disassociation a valid amendment to that pled in the Sixth Cause of Action. (See Opposition, p. 9.) GreenbergFarrow also argues that it was not "accorded its right to a full hearing on the Plaintiffs' new legal theory relating to subsection (a) of Section 42:2C-46," which is essentially an argument that it was deprived of due process under Rule 4:9-2. (Id., p. 10.) According to GreenbergFarrow, any consideration of voluntary expulsion under Section 42:2C-46(a) of the RULLCA that is presented in a *post*-verdict motion would "prejudice" the company. (Id., p. 11.) GreenbergFarrow's "kitchen sink" defense is without merit and contrary to established law.

Aware of the fatal impact of the trial testimony of Messrs. Ghadrdan and Johnston, *i.e.*, that GreenbergFarrow had voluntarily and expressly terminated its membership in ENGenuity in 2016 and had abandoned the company in every regard thereafter, the Opposition commits no less than eight (8) of twenty-two (22) pages of opposing arguments, trying to fashion a "last defense" to voluntary disassociation *over three years ago*. (See Opposition, pp. 6-13.) Those facts, of course, were admitted, for the first time, in the midst of the trial, and, therefore, were never pled in the Amended Complaint or developed in pre-trial discovery.

Still, Mr. Johnston admitted that GreenbergFarrow had terminated its membership in ENGenuity on September 9, 2016. He testified that he had done so, in writing, and with the approval of Mr. Ghadrdan:

> Q: Do you remember sending an e-mail to Ms. Flor at or about 4:45 p.m. on Friday evening, the 9th of September terminating the relation - - the membership interest of Greenberg Farrow [*sic*] in Engenuity [*sic*] Infrastructure?
> A: Yes.
> Q: Okay. And when you sent that communication you were authorized to send it?
> A: Yes.
> Q: Who authorized that?
> A: Mr. Ghadrdan.
> Q: Okay. So is it safe for me to assume that as of at least September 9$^{th}$ Greenberg Farrow [*sic*] has terminated its membership interest in this entity?
> A: Yes.

(Oct. 10, 2019 A.M. Tr., at 156:19-22.)

Mr. Johnston also testified that, on October 3, 2016, GreenbergFarrow again terminated its membership in ENGenuity for a second and final time. (See id., at 117:19-23.) Consequently, the Court can and should now affirm and declare that on or before October 3, 2016, GreenbergFarrow terminated its membership interest in ENGenuity.

Nonetheless, the Opposition desperately argues that the Court should reject any request for a declaration under Section 42:2C-46(a), because relief under that subsection was not pled in the Amended Complaint. (See Opposition, p. 7-8.) Further, it contends that it would be improper to consider disassociation of its membership interest pursuant to subsection (a), because ENGenuity did not seek leave at or after trial to amend the pleading and add this additional subsection to the others claims under Section 42:2C-46 that were pled in the Sixth Cause of Action. (Id.) Of course, these arguments fail, because GreenbergFarrow admitted to its voluntary termination, *for the first time*, during the trial when it presumably believed it would persuade the triers of fact of its defenses to liability.[3]

Rule 4:9-2 states:

> When issues not raised by the pleadings and pretrial order are tried . . . without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings . . . . Such amendment of the pleadings . . . as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits.

---

[3] Of note, pursuant to Section 42:2C-7 of the RULLCA, the Court may also consider "principles of law and equity [to] supplement [the] act." Relying on "law and equity," the Court should give emphasis to the fact that where, as in this instance, a member *admits* to its voluntary and express membership termination, *admits* to its failure and refusal to make its contributions to purchase its membership interest and *admits* to abandoning the company, by every measure, for over three years, and that same member participates in a trial in which it defends against myriad other forms of disassociation under the RULLCA and examines and cross-examines trial witnesses as to events that are probative of its breach of contract, breach of the implied covenant of good faith and fair dealing and multiple forms of misconduct that all warrant disassociation under Section 46 of the RULLCA, "law and equity" guide the Court to consider the foregoing. Under such circumstances, the Court's consideration of that additional and related claim under Section 42:2C-46 will not constitute surprise or prejudice to the defendant.

(Id.)

In addition, New Jersey law recognizes that "[t]rial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice,' and are upheld wherever they are 'supported by adequate, substantial and credible evidence.'" Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475, 541 a.2D 1063 (1988) (internal citation omitted). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility.." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169, 14 A.3d 36 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12, 713 a.2D 390 (1998)).[4]

As to the Opposition's contention that the Court may only consider GreenbergFarrow's voluntary termination admissions if ENGenuity moves to conform the pleading to the evidence, it is established law that "the decision to grant or deny . . . a motion [to amend a pleading] lies within the [trial] court's sound discretion." Balthazar v. Atlantic City Med. Ctr., 358 N.J. Super. 13, 27, 816 A.2d 1059 (App. Div. 2003). In Joy Sys. v. FIN Assocs., 2018 N.J. Super. Unpub. LEXIS 1328, * 8-9 (App. Div. 2018), the Appellate Division cogently addressed and disposed of arguments concerning the discretion and timing of a court to amend pleadings to conform to the record, the quality of "notice" that may be required and the minimum due process protections that should be afforded:

> The Supreme Court has stated the 'broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result.' Kernan v. One Wash. Park Urban Renewal Assocs.,154 N.J. 437, 457 (1998) (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:9-1 (1998)). The opposing party is deemed to be on notice of a claim that has not been formally pled if the issue has been raised in the case prior to trial, even if in a technically deficient manner. See Cuesta v. Classic

[4] While this proposition applies to a "trial court sitting in a non-jury case[,]" it is applicable to the instant Cross-Motion, because the Sixth Cause of Action was withheld from the jury as triers of fact. Seidman, 205 N.J. at 169.

> Wheels, Inc., 358 N.J. Super. 512, 517-18 (App. Div. 2003); see also Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140 (App. Div. 2003). The rule should be followed when a legal theory not advanced in the pleadings was fully aired at trial and in post-trial briefs. 68th Street Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976).

(Id.)

Therefore, under the facts and circumstances of this action, the Court should now credit the trial admissions of Messrs. Ghadrdan and Johnston consistent with the Court's prior observation and evaluation of these witnesses in the sidebar conference discussed in the "Procedural History" above. In sum., the trial included substantial and unequivocal evidence of disassociation by way of voluntary termination that was part of the same record supporting disassociation under subsections (e)(1) and (e)(3). Therefore, notice was adequate. See Gensch v. Hunterdon County Clerk's Office, 2012 N.J. Super. Unpub. LEXIS 1630, * 14-15 (App. Div. 2012) (citing 68th St. Apt. Inc. v. Lauricella, 142 N.J. Super. 546, 561 n.3, 362 A.2d 78 (Law. Div. 1976) (recognizing that a legal theory that is "'fully aired' at trial and in post-trial briefs" is part of the trial record and the pleadings may therefore be conformed by the court), *aff'd o.b.*, 150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977)).

GreenbergFarrow was not deprived of due process, because it had the opportunity to challenge and rehabilitate its fact witnesses' admissions that GreenbergFarrow had both voluntarily terminated all membership in ENGenuity and had expressly notified Plaintiffs on or before October 3, 2016. GreenbergFarrow failed to do so. Thus, GreenbergFarrow should not be heard to now argue a hollow claim of surprise or prejudice, and the Court should affirm GreenbergFarrow's voluntary disassociation from ENGenuity. See Varelli v. White, 2019 N.J. Unpub. LEXIS 1652, 29-30 (App. Div. 2019) ("When an issue has been injected into the case even in a deficient manner, the opposing party will be deemed to have been on notice that the issue is included in the matters to be resolved." Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140-41, 834 A.2d 1037 (App. Div. 2003) (quoting Teilhaber v. Greene, 320 N.J. Super. 453, 466, 727 A.2d 518 (App. Div. 1999) ("[A] 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory.").

The Opposition demonstrates no actual prejudice that would result by allowing amendment to include subsection (a) among the other subsections of member disassociation under the RULLCA that were pled, and it cannot seriously argue that the issue of its voluntary disassociation was not first raised *during the trial* with the testimony of its chief executive officer and chief operating officer. For these additional reasons, the Court should affirm GreenbergFarrow's voluntary membership termination and disassociation on or before October 3, 2016.[5]

[5] The Opposition's post-verdict discussion of whether declaratory relief is even available and its contention that the Cross-Motion is "a second motion for summary judgment" also seem to misstate or misapply the law. (See Opposition, pp. 205. (discussing Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295, 301, 870 A.2d637 (App. Div. 2005), Binkowski v. New Jersey, 322 N.J. Super. 359, 374, 731 A.2d 64 (1999) (quoting N.J. Ass'n for Retarded Citizens, Inc. v. N.J. Dep't of Human Servs., 89 N.J. 234, 241, 445 A.2d 704 (1982)), Adams v. Atlantic City, 26 N.J. Misc. 259, 261, 59 A.2d 825 (1948), Rego Indus., Inc. v. Am. Modern Metals Corp., 91 N.J. Super. 447, 452, 221 A.2d 35 (App. Div. 1966), and In re Quinlan, 137 N.J. Super. 227, 263, 348 A.2d 801 (Ch. Div. 1975). These authorities have nothing to do with the present case in which ENGenuity seeks an order of the Court declaring its statutory rights and status as a single member limited liability company since, at the latest, October 3, 2016. That declaration should result from the disassociation and expulsion of GreenbergFarrow, based on: (i) its voluntary termination; (ii) the substantial evidence of the harm it caused ENGenuity in the past; and (iii) the substantial evidence that it is not reasonably practicable in 2020 for ENGenuity to conduct its business with GreenbergFarrow as a member after it had severed *all* relations, communications and concerns for and with ENGenuity *years* ago. Further, given that the portfolio of work that ENGenuity *presently* services and pursues would be hampered by conflicts relating to GreenbergFarrow and ENGenuity's many, critical credentials could be revoked if GreenbergFarrow was restored to a pre-termination position, it is clear that a justiciable controversy exists and should resolved in favor of ENGenuity consistent with the Court's sidebar trial observations on October 15, 2019. (See Flor Aff. At ¶¶ 10-27; see also Oct. 15, 2019 Tr., at 144:2-12.)

### B. No Facts or Law Support GreenbergFarrow's Demand of An Offsetting Membership Interest Benefit Three Years After Its Voluntary Termination

GreenbergFarrow goes even further afield with its argument that the Court should retroactively restore it to the membership position it would have been in after entering into the contract, based on a convoluted argument sounding in "specific performance," but those arguments border on the absurd. (See Opposition, pp. 5-.7.)

*First*, unlike ENGenuity's request that the Court conform the Sixth Cause of Action to the trial record, including the trial admissions that are directly probative of Section 42:2C-46(a) of the RULLCA, GreenbergFarrow *never* presented or preserved in an answering pleading any theories of "offsetting benefits" or "specific performance", *never* pled same in any counterclaim (in fact, there were *zero* counterclaims interposed in this action and, therefore, no claims or controversies that this Court could adjudicate at the behest of GreenbergFarrow), *never* developed or tested these legal theories in pre-trial discovery and *never* developed any facts at trial.[6] Moreover, contrary to GreenbergFarrow's silly insistence that "Plaintiffs sought to specifically enforce the terms of the Letter and force GreenbergFarrow to make all of the payments contemplated under the letter," the actual trial record does *not* support this.[7]

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[6] ENGenuity respectfully refers the Court to Point VI of Plaintiffs' Brief in Opposition to the Motion for Judgment Notwithstanding the Verdict, For a New Trial, and Remittitur By Defendant GreenbergFarrow Architecture, Inc. ("Defendant's Motion"), at pp. 35-36, where these arguments were first and more fully briefed.

[7] Plaintiffs did not demand, and the jury did not award, "all operating costs" for the initial two years. (See Opposition, p. 1.)

> Q: Okay. Did you ever demand that Greenberg Farrow write a check or wire into Engenuity's bank account $2 million?
> A: No.
> Q: Has that ever been a demand in anything that you've put before Greenberg Farrow?
> A: No.

Consequently, GreenbergFarrow's *novel* argument for an "offsetting benefit" or "specific performance", while colorful, has no factual foundation.

*Second*, GreenbergFarrow cites to no legal authority that recognizes (much less supports) that proposition or result, because none exists.

*Third*, after a multi-week trial, the jury found that GreenbergFarrow had breached the contract pursuant to which it could have purchased its membership and engaged in conduct that violated the covenant of good faith and fair dealing, including, by way of illustration, taking actions that had the effect of destroying or injuring Plaintiffs rights to receive the fruits of the contract. Those determinations supported the unanimous verdicts in favor of Plaintiffs. *This* full trial record also supports GreenbergFarrow's disassociation and expulsion from ENGenuity under Section 46 of the RULLCA – not a reward in the form of an offset to the damages GreenbergFarrow must pay.

**C. The Court Should Affirm GreenbergFarrow's Disassociation and Expulsion**

As set forth in the Cross-Motion, ENGenuity also seeks an order declaring its rights and status as a single member; under RULLCA Sections 42:2C-46(e)(1), *i.e.* "wrongful conduct", and 42:2C-46(e)(3), *i.e.*, "not reasonably practicable to carry on the activities with the person as a member." After seven days of trial, the admission of almost eighty (80) trial exhibits, the taking of trial testimony of multiple witnesses, and unanimous verdicts that GreenbergFarrow

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Oct. 10, 2019 A.M. Tr., at 18:12-22.)

Of course, although the documentary and testimonial evidence would support an award of damages of approximately $2,000,000.00 in agreed and projected operating expenses, the jury awarded significantly less. In any event, the "specific performance-styled" defense was *never* litigated in this action and *cannot* support an argument in opposition to the disassociation and expulsion of GreenbergFarrow.

had breached its contract and the implied covenant of good faith and fair dealing, the Opposition still insists that "Plaintiffs have not shown that GreenbergFarrow engaged in the requisite 'wrongful conduct,' or the necessary certain and concrete harm to Engenuity[.]" (Opposition, p. 13.) According to the Opposition, the Court should not affirm the declaratory relief sought by ENGenuity under subsection (e)(1), because "Plaintiffs have offered no evidence of a . . . identifiable and quantifiable harm that GreenbergFarrow caused to [ENGenuity]." (Opposition p. 16.) This *post*-verdict argument is the lynchpin of GreenbergFarrow's opposition; a pathological refusal to accept that GreenbergFarrow failed to persuade *any* triers of fact that its witnesses' testimony, their credibility and trial exhibits demonstrated that GreenbergFarrow caused no harm to ENGenuity. (See Opposition, pp. 13-16.) The Court observed the *same* witnesses, heard the *same* testimony and *also* assessed their credibility. Consequently, the Court *also* has a complete record upon which to grant the Cross-Motion.

Tellingly, the Opposition does not (because it now cannot) dispute any of the facts set forth in the "Statement of Facts" of the Cross-Motion that chronicled the harm caused by GreenbergFarrow, because those facts are drawn directly from and cited in the trial record that chronicles all of the past harmful acts conducted by GreenbergFarrow. (See Oct. 9, 2019 A.M. Tr., at 104:10-111:19; Oct. 9, 2019 P.M. Tr., at 228:2-5, 232:17-234:10, 235:15-238:25, 252:12-19; Oct. 10, 2019 A.M. Tr., at 156:19-22; Oct. 16, 2019 A.M. Tr., at 8:18-21, 10:12-15, 10:22-11:1, 11:6-13 and P's Exs. 44, 48, 49, 50, 51, 52, 53, 60, 61 and 62, and Flor Aff. at ¶¶ 7, 9 and 10), which was presented to the Court under Argument I (1) in the Cross-Motion.[8] Not only

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[8] The Opposition's reliance on two state cases from Oregon and Utah as the litmus test of what constitutes bona fide "harmful conduct" warrants almost no discussion. These random Left Coast cases are of zero precedential effect, and insofar as IE Test makes clear that every showing of proof is a case-specific inquiry, GreenbergFarrow's authorities are probative of nothing. Still, for completeness, in Sherwood Park Bus. Ctr., LLC v. Taggart, 323 P.3d 551, 561 (Or. Ct. App.

does the Opposition ignore the substantial record evidence cited above and in the Cross-Motion, but it fails to cite *any* trial testimony or exhibits to support its arguments. (See Opposition, pp. 16-20.)

Not surprisingly, the Opposition also ignores the Cross-Motion's discussion as to why it is not reasonably practicable for ENGenuity to conduct its business with GreenbergFarrow restored as a member three-plus years *after* it abandoned ENGenuity.[9] GreenbergFarrow suspended all participation and cooperation with ENGenuity and terminated all relations with it years ago. Previously willing to let ENGenuity die, GreenbergFarrow is now, by any measure, a total stranger to ENGenuity and its business. (See Oct. 9, 2019 P.M. Tr., at 253:20-23; see also Oct. 16, 2019 A.M. Tr., at 8:18-21, 10:12-15, 10:22-11:1, 11:6-13; Flor Aff. at ¶¶ 24-27.) The Opposition also ignores that ENGenuity *cannot* operate financially with GreenbergFarrow as a member without jeopardizing all of the critical credentials, certifications, and additional

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2014), the court agreed that a member's expulsion was appropriate based on the facts that he "had stolen a large amount of money[], had intentionally failed to provide financial information, and had made himself unavailable to carry on the business"). Ironically, as this trial made clear, GreenbergFarrow engaged in some very similar misconduct to Taggart. CCD, L.C. v. Millsap, 116 P.3d 366, 373 (Utah 2005), also wildly misses the mark. In CCD, the court granted a member's expulsion after including he had "misuse[d] . . . company funds . . . in breach of [an] initial and amended operating agreement" which acts deprived the moving party from exercising other rights under the operating agreement. Those facts are inapposite to this action. Succinctly, these cases aggravate – not elevate – the argument presented in the Opposition. (See Opposition, p. 15-16.)

[9] In a particularly obtuse argument, the Opposition believes that "Plaintiffs have not cited to any evidence whatsoever demonstrating that ENGenuity cannot be managed notwithstanding any purported conduct by GreenbergFarrow." (Opposition, p. 18.) Hardly a model of clarity, this contention also misstates the statutory provision. In any event, on substance, it appears that GreenbergFarrow did not read pages 24-25 of the Cross-Motion where such matters *are* discussed. Taken in complete context, those obstacles, plus over three years of harm and disregard, are the clearest and strongest indicators that ENGenuity cannot conduct its present-day business with GreenbergFarrow as a member.

competitive pre-qualifications that ENGenuity has obtained since October 3, 2016 as a single member limited liability company. (See Flor Affidavit at ¶¶ 15-23.)[10]

## CONCLUSION

For all of the foregoing reasons, this Court should grant the Cross-Motion in its entirety and declare GreenbergFarrow Architecture, Incorporated disassociated and expelled from ENGenuity Infrastructure, LLC not later than effective October 3, 2016 and without payment or other consideration for the underlying membership interests that GreenbergFarrow opted to never acquire and for such other and further relief as the Court in its discretion shall deem appropriate.

Dated: February 28, 2020
New York, New York

Respectfully submitted,

SICHENZIA ROSS FERENCE LLP

By: ______________________ DSF

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[10] Although the sum of these credentials were irrelevant to those claims that were presented to the jury, had GreenbergFarrow wishes to simply inquires of ENGenuity's credential when Ms. Flor testified that it had in fact obtained state and federal WBE certification, its attorneys simply could have asked. (See For Affidavit at ¶¶ 15-23.) Not surprisingly, they did not do so.

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| | |
|---|---|
| JACLYN FLOR and ENGENUITY INFRASTRUCTURE, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>GREENBERG FARROW ARCHITECTURE INCORPORATED, ESMAIL GHADRDAN, and KEITH JOHNSTON,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br><br>MONMOUTH COUNTY – LAW DIVISION<br><br>Docket No. MON-L-001021-17<br><br>Civil Action<br><br>**REPLY CERTIFICATION OF**<br>**<u>OWEN A. KLOTER, ESQUIRE</u>** |

I, OWEN A. KLOTER, do hereby certify and state:

1. I am an attorney-at-law and am associated with Sichenzia Ross Ference LLP ("SRF"), attorneys for Plaintiffs Jaclyn Flor ("Flor") and ENGenuity Infrastructure, LLC ("ENGenuity") (collectively "Plaintiffs") in the above-captioned action. I make this Reply Certification in further support of Plaintiffs' Cross-Motion for Declaratory Judgment Expelling or Disassociating Member Defendant GreenbergFarrow Architrecture, Inc. from ENGenuity Infrastructure, LLC.

2. I am fully familiar with the facts set forth herein. My personal knowledge is based on the review of the pleadings and discovery in this action, the Court's docket, the trial, and my representation of Plaintiffs throughout this litigation.

3. Pursuant to N.J. Court Rule 1:36-3, annexed hereto as Exhibit "1" is a true and correct copy of the unpublished decision of the Superior Court of New Jersey, Appellate Division, in Joy Systems, Inc. v. Fin Associates, L.P., 2018 N.J. Super. Unpub. LEXIS 1328 (App. Div. 2018), and I do not know of any contrary unpublished opinions to this case.

4. Pursuant to N.J. Court Rule 1:36-3, annexed hereto as Exhibit "2" is a true and correct copy of the unpublished decision of the Superior Court of New Jersey, Appellate Division, Gensch v. Hunterdon County Clerk's Office, 2012 N.J. Super. Unpub. LEXIS 1630 (App. Div. 2012), and I do not know of any contrary unpublished opinions to this case.

5. Pursuant to N.J. Court Rule 1:36-3, annexed hereto as Exhibit "3" is a true and correct copy of the unpublished decision of the Superior Court of New Jersey, Appellate Division, Varelli v. White, 2019 N.J. Super. Unpub. LEXIS 1652 (App. Div. 2019), and I do not know of any contrary unpublished opinions to this case.

I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

SICHENZIA ROSS FERENCE LLP

By: /s/ Owen A. Kloter
Owen A. Kloter, Esq.

Dated: February 28, 2020

# EXHIBIT 1

LexisNexis®

**User Name:** Jacob Tabman

**Date and Time:** Friday, February 28, 2020 10:15:00 AM EST

**Job Number:** 111259134

## Document (1)

1. *Joy Sys. v. FIN Assocs., 2018 N.J. Super. Unpub. LEXIS 1328*

   **Client/Matter:** Flor

   **Search Terms:** Joy Sys. v. FIN Assocs., 2018 N.J. Super. Unpub. LEXIS 1328

   **Search Type:** Natural Language

   **Narrowed by:**

| **Content Type** | **Narrowed by** |
|---|---|
| Cases | -None- |

# Joy Sys. v. FIN Assocs.

Superior Court of New Jersey, Appellate Division

May 22, 2018, Argued; June 7, 2018, Decided

DOCKET NO. A-5373-15T4

**Reporter**
2018 N.J. Super. Unpub. LEXIS 1328 *

JOY SYSTEMS, INC., Plaintiff-Respondent/ Cross-Appellant, v. FIN ASSOCIATES LIMITED PARTNERSHIP, a New Jersey Limited Partnership, Defendant-Appellant/ Cross-Respondent, and UNITED STATES LAND RESOURCES, LP, a New Jersey Limited Partnership, Defendant.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

**Subsequent History:** Certification denied by *Joy Sys. v. Fin Assocs., 2018 N.J. LEXIS 1439 (N.J., Nov. 7, 2018)*

**Prior History:** **[*1]** On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1565-14.

## Core Terms

security deposit, lease, damages, pleadings, premises, overhead door, unconscionable, dock-levelers, repair, omission, ascertainable loss, counterclaim, obligations, conform, dock, entitled to recover, terms of the lease, consumer fraud, replacement, argues, treble, doors

**Counsel:** Lawrence S. Berger argued the cause for appellant/cross-respondent (Berger & Bornstein, LLC, attorneys; Robert A. Bornstein and Gregory J. Cannon, on the briefs).

Marshall T. Kizner argued the cause for respondent/cross-appellant (Stark & Stark, attorneys; Marshall T. Kizner, of counsel and on the briefs).

**Judges:** Before Judges Yannotti, Mawla, and DeAlmeida.

## Opinion

PER CURIAM

In this commercial landlord-tenant dispute, defendant FIN Associates, LP (FIN) appeals from judgments entered in favor of plaintiff Joy Systems, Inc (Joy) on June 29 and August 19, 2016, following a bench trial. Joy cross-appeals from the judgments. We affirm for the reasons expressed in the thorough and comprehensive opinion of Judge Rosemary E. Ramsay.

The following facts are taken from the record. On May 18, 2006, Joy entered into a lease agreement for an industrial warehouse building located on Finderne Avenue in Bridgewater with defendants FIN and United States Land Resources, LP (USLR). The lease was prepared by defendants. Pursuant to the lease, Joy agreed to pay monthly rent of $31,875, and $82,262 as a security deposit. In April **[*2]** 2009, the parties entered into an amendment extending the lease term for two years to May 31, 2011.

Joy's tenancy lasted from May 18, 2006 to May 31, 2011, during which it paid FIN all of the rents due. Pursuant to the lease terms, Joy agreed to "take good care of the . . . [p]remises . . . and . . . keep and maintain the same in good order and condition subject to normal wear and tear." The lease also provided FIN would "perform the work set forth in [e]xhibit B hereto ('[l]andlord's [w]ork')." Exhibit B enumerated eleven items FIN was required to complete or substantially complete before the commencement of the lease. Pertinent to this dispute, FIN agreed the existing overhead doors and dock levelers would "be put in good working order." FIN also agreed to build a 500 square foot lunch room. Upon termination of the lease, Joy was required to "yield . . . the . . . [p]remises 'broom clean' and in the condition in which [Joy] is required to maintain the same during the term pursuant to the provision of this [l]ease and . . . return the . . . [p]remises to [FIN] in the condition it was in as of the date [FIN] complete[d] [l]andlord's [w]ork[.]"

To fulfill its obligations, Joy employed **[*3]** a full-time maintenance worker to maintain the property in accordance with the terms of the lease. Additionally, Joy contracted with a maintenance services company, which performed general maintenance, including on the overhead doors and dock levelers located on the premises. In total, Joy incurred approximately $280,000 to maintain the premises during the term of the lease. This included regularly maintaining the dock levelers and overhead doors, and replacing a dock leveler that failed during the term of the lease.

On December 13, 2010, Joy provided a letter to FIN advising it was vacating the premises. On August 5, 2011, three months after Joy vacated the premises, FIN advised Joy it "was [Joy's] responsibility to put the dock levelers, etc. back into good condition before [Joy] left the building." FIN represented it would return "whatever remains" of the security deposit after Joy performed the work. Four days later, Joy advised FIN it hired a third party contractor who had returned the doors and dock levelers to good working condition. Joy provided a receipt, which evidenced its payment for completion of the work.

The lease required FIN to return the security deposit at the conclusion **[*4]** of the lease, provided Joy had met its obligations under the lease terms. FIN did not return the security deposit. As a result, Joy filed a six-count complaint against FIN and USLR seeking monetary damages for the failure to return the security deposit. The complaint pled the following counts: breach of contract; unjust enrichment; fraud; promissory estoppel; and equitable estoppel. Monetary damages were sought against USLR based on the theory of piercing the corporate veil.[1]

FIN filed an answer and counterclaim. In the counterclaim, FIN alleged Joy breached the lease by failing to surrender the premises in broom-clean condition, failing to remove its property from the premises, and causing damage to the premises. FIN further alleged it "suffered damages in excess of [Joy's] security deposit, and therefore, was entitled to recover all costs of the aforementioned repairs, replacements, and debris removal that exceed [Joy's] security deposit."

Joy filed an initial summary judgment motion, which was denied. Prior to trial, Joy filed a second summary judgment motion seeking summary judgment on various grounds, including the *New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20*. FIN's opposition did not address **[*5]** Joy's CFA argument. This summary judgment motion was denied as well.

At the start of trial, Joy's counsel argued his client would prove a violation of the CFA. FIN's counsel did not object. During the trial, Joy offered evidence it believed demonstrated FIN's unconscionable commercial practices in violation of the CFA. Following summations, FIN's counsel objected to the assertion of the CFA claim, and moved for a directed verdict to dismiss the CFA claim for lack of notice and evidence supporting the claim. In response, Joy's counsel argued the judge should invoke *Rule 4:9-2* to amend Joy's complaint to conform to the evidence adduced at trial.

Judge Ramsay filed a comprehensive written opinion and entered judgment finding as follows: (1) FIN had breached the lease by failing to return the security deposit; (2) Joy's complaint was amended to conform to the evidence adduced at trial to include a CFA claim; (3) as a result, Joy was entitled to recover damages resulting from the CFA violation in the amount of $52,196.04, plus prejudgment interest on the security deposit from August 15, 2011, to the date of the judgment, in the amount of $9305.90, for a total of $61,501.94; (4) Joy was entitled to **[*6]** treble damages under the CFA totaling $184,505.84. The total amount awarded Joy was $266,767.84. This appeal followed.

I.

"Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice,' and are upheld wherever they are 'supported

[1] The judge dismissed the claims against USLR without prejudice. This aspect of the judgment has not been appealed.

by adequate, substantial and credible evidence."' Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475, 541 A.2d 1063 (1988) (quoting Rova Farms Resort v. Inv'rs Ins. Co., 65 N.J. 474, 483-84, 323 A.2d 495 (1974)). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169, 14 A.3d 36 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12, 713 A.2d 390 (1998)). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378, 658 A.2d 1230 (1995).

"The decision to grant or deny . . . a motion [to amend a pleading] lies within the [trial] court's sound discretion." Balthazar v. Atlantic City Med. Ctr., 358 N.J. Super. 13, 27, 816 A.2d 1059 (App. Div. 2003). "While motions for leave to amend pleadings are to be liberally granted, they nonetheless are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made." Fisher v. Yates, 270 N.J. Super. 458, 467, 637 A.2d 546 (App. Div. 1994).

"The exercise of this discretion **[*7]** will be interfered with by an appellate tribunal only when the action of the trial court constitutes a clear abuse of that discretion." Salitan v. Magnus, 28 N.J. 20, 26, 145 A.2d 10 (1958). A trial court decision will only constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" United States v. Scurry, 193 N.J. 492, 504, 940 A.2d 1164 (2008) (alterations in original) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002)).

On appeal, FIN argues it was deprived of due process when the judge permitted Joy to amend its pleadings pursuant to *Rule 4:9-2*, and adjudicated Joy's CFA claim. FIN asserts the CFA claim was not pled and it had no notice Joy would pursue it. FIN argues there was no opportunity to contest application of the CFA before or after trial. FIN further argues the judge should not have awarded treble damages where Joy suffered no ascertainable losses as defined by the CFA. FIN also asserts the judge's award of interest was error because the lease forbade it. FIN argues the damage award was erroneous because it was calculated utilizing the damages FIN asserted in its counterclaim. We address these arguments in turn.

II.

*Rule 4:9-2* states:

> When issues not raised by the pleadings and pretrial order are tried . . . *without the objection* ***[*8]*** *of the parties, they shall be treated in all respects as if they had been raised in the pleadings* . . . . Such amendment of the pleadings . . . as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at *any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues*. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits.
> [(emphasis added.)]

The Supreme Court has stated the "broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result." Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457, 713 A.2d 411 (1998) (quoting Pressler & Verniero, *Current N.J. Court Rules*, cmt. on *R. 4:9-1* (1998)). The opposing party is deemed to be on notice of a claim that has not been **[*9]** formally pled if the issue has been raised in the case prior to trial, even if in a technically deficient manner. *See* Cuesta v. Classic Wheels, Inc., 358 N.J. Super. 512, 517-18, 818 A.2d 448 (App. Div. 2003); *see also* Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140, 834 A.2d 1037 (App. Div. 2003). The rule should be followed when a legal theory not advanced in the pleadings was fully aired at trial and in post-trial briefs. *68th* Street Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561, 362 A.2d 78 (Law Div. 1976).

Judge Ramsay stated:

> Here, neither party identified the CFA in their pretrial submissions. Nor did either party raise any issue regarding the pleading requirements of the CFA or the absence of a claim under the CFA at the commencement of the trial. Instead, [FIN] waited until the end of the trial to seek dismissal of

> the claim under the CFA for failure to assert the claim in a pleading and/or failure to present evidence demonstrating a consumer fraud.
>
> Although [FIN] objected to the CFA claim, it did not do so in a timely fashion. The objection was raised at the close of the trial, not in advance of the trial. Thus, the issue was tried without objection because [FIN] did not object to the introduction of evidence or testimony bearing on the issue. . . .
>
> [Joy] asserts that [FIN] w[as] not prejudiced because this case had been litigated as a consumer fraud action from its inception. Prior to trial, the parties moved and/or cross **[*10]** moved for summary judgment. The briefs filed in connection with those motions explicitly presented arguments referring to [Joy's] claim as a consumer fraud claim. The judge who decided the motion stated, the claims included a claim under the [CFA.] Although [FIN] denied any basis for [Joy's CFA] claim, [FIN] did not object to [Joy's] pursuit of the claim based on the failure to plead the claim specifically in the complaint. [FIN] simply asserted that the claim had no merit.
>
> Under these circumstances, [FIN] will not be prejudiced as a result of any amendment of the pleadings to conform to the evidence. [FIN] knew that [Joy] purported to seek relief under the [CFA] when the summary judgment motions were filed, if not earlier. [FIN] did not seek dismissal of the claim at that time or identify any prejudice arising from the late identification of the claim. [FIN] determined that [Joy] would be unable to satisfy its burden of proof on a [CFA] claim and defended the claim on the merits. Therefore, [Joy's] motion to amend the pleadings to conform to the evidence is granted.

We agree FIN had adequate notice of the CFA claim. As the judge noted, FIN failed to object to the CFA claim in a timely **[*11]** fashion. Moreover, FIN was not deprived of due process because it could contest the facts Joy adduced to prove its claim before, during, and after the trial. Thus, FIN was not prejudiced as a result of the judge's amendment of the pleadings to conform to the evidence, and the judge did not abuse her discretion under *Rule 4:9-2*.

III.

FIN contends the judge erred in finding a violation of the CFA. Specifically, FIN contends it was an error to conclude the filing of FIN's counterclaim against Joy constituted an unconscionable commercial practice under the CFA.

The CFA prohibits:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [*N.J.S.A. 56:8-2*.]

"The standard of conduct that the term 'unconscionable' implies **[*12]** is lack of 'good faith, honesty in fact and observance of fair dealing.'" *Cox v. Sears Roebuck & Co., 138 N.J. 2, 18, 647 A.2d 454 (1994)* (quoting *Kugler v. Romain, 58 N.J. 522, 544, 279 A.2d 640 (1971))*. Omissions consist of "concealment, suppression, or omission of any material fact . . . ." *Id. at 19* (quoting *N.J.S.A. 56:8-2*). Consumer fraud by omission necessarily includes that a defendant's act must be "knowing." *Ibid.* "[T]he [CFA] is remedial legislation, which 'should be construed liberally in favor of consumers.'" *Allen v. V & A Bros., Inc., 208 N.J. 114, 128, 26 A.3d 430 (2011)* (quoting *Cox, 138 N.J. at 15*).

As Judge Ramsay noted:

> There are three possible bases for responsibility under the [CFA.] The [CFA] itself declares two general categories of conduct as unlawful. The first relates to that part of the Act which states that "any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation" is an unlawful practice. These are considered affirmative acts. The second general category of unlawful conduct is referred to as acts of omission. Such conduct involves the "knowing concealment, suppression or omission of any material fact." The third basis for responsibility under the [CFA] is found in either specific-situation statutes or administrative regulations enacted to interpret the [CFA] itself. Such statutes and regulations define specific conduct that is **[*13]** prohibited by law.

Judge Ramsay concluded:

> Here, [FIN] drafted the [l]ease, which provided the security deposit "shall be returned . . . provided

[Joy] . . . carried out all of the terms, covenants, and conditions, on its part to be performed," including returning the premises "in good order and condition subject to normal wear and tear." [FIN] also expressly agreed to put the existing overhead doors and dock-levelers "in good working order." . . .

[FIN's] subsequent performance or lack thereof relating to its obligations under the [l]ease . . . reflected unconscionable commercial practices. [FIN] failed to respond to [Joy's] request to satisfy [FIN's] obligations to put the existing overhead doors and dock-levelers in good working order. Nonetheless, even though [FIN] did not possess any evidence supporting the position that [it] had satisfied that obligation, i.e., no witnesses possessed first-hand knowledge of the work done on the doors and dock-levelers to satisfy the requirements of [the lease] and no documents were produced to demonstrate the work had been done during [Joy's] occupancy or for its benefit, [FIN] withheld the security deposit at the expiration of the term of the [l]ease. **[*14]**
When [Joy] requested return of the security deposit, [FIN] misrepresented that the reason for the delay related to [FIN's] cash flow issues. When pressed, [FIN] stated the security deposit was not returned because [Joy] allegedly failed to "put the dock-levelers back into good condition." After [Joy] provided documents establishing that Martin Overhead Door had performed work on the doors and dock-levelers, [FIN] still failed to return the security deposit.

At or about the same time, [FIN] leased the premises to Brook, which had insisted on the repair and/or replacement of the existing overhead doors and dock-levelers. Brook referred [FIN] to New Jersey Door Works, which was hired to do the work for Brook's benefit. Although [FIN] knew [it] could not establish the condition of the premises that had been provided to [Joy], [FIN] demanded by way of counterclaim the costs and expenses of the repairs made to satisfy the demands of the subsequent tenant. The demand, however, was not limited to the cost of repair of the overhead doors and dock-levelers. [FIN] also demanded payment of demolition and repair costs to remove the lunch room and offices even though the [l]ease did not impose the **[*15]** obligation for removal of those improvements on [Joy]. [FIN] did not simply breach the terms of the [l]ease. [FIN's] evasive and self-serving conduct relating to their performance under the lease evidenced a complete lack of fair dealing and bad faith.

Given these aggravating circumstances, [Joy] has proven by a preponderance of the evidence that [FIN] engaged in unconscionable commercial practices in violation of the CFA. To recover, however, [Joy] must establish more than the unlawful conduct of [FIN]. [Joy] must also demonstrate an ascertainable loss on the part of [Joy]; and a causal relationship between [FIN'S] unlawful conduct and [Joy's] ascertainable loss. *N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13, 842 A.2d 174 (App. Div. 2003)*.

[Joy's] ascertainable loss includes the amount of the interest on the security deposit from August 15, 2011, through the present. In addition, in *Cox*, the New Jersey Supreme Court concluded that "an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the [CFA], because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the [CFA]." *Cox, 138 N.J. at 23*.

Here, [FIN] asserted an improper debt against [Joy] when [FIN] sought as damages the costs and expenses associated with repairing **[*16]** and/or improving the premises to satisfy [FIN's] obligation to a subsequent tenant. Unlike *Cox*, in this action, these losses occurred after [FIN] had engaged in the conduct that violated the [CFA]. [FIN] already had failed to perform their obligations under the [l]ease with respect to putting the existing overhead doors and dock-levelers in good working order, had failed to communicate effectively the work that [Joy] needed to complete at the expiration of the [l]ease, had agreed to repair and/or replace doors and dock-levelers and demolish the lunch room and offices for the benefit of a subsequent tenant, and had misled [Joy] regarding the reason for not returning the security deposit. When plaintiff refused to succumb to [FIN's] evasive tactics, [FIN] asserted a debt arising out of their unconscionable commercial practices, i.e., the amounts incurred to satisfy [FIN's] obligations to a subsequent tenant.

We agree with Judge Ramsay's determination FIN asserted an improper debt when it pursued its counterclaim, which constituted an unconscionable commercial practice in violation of the CFA. Additionally, we agree with the judge that Joy's ascertainable loss derived from FIN's unconscionable **[*17]** commercial practice of fraudulently retaining the security deposit and asserting a debt against Joy for a sum greater than the security deposit.

IV.

FIN contends the judge's award of interest as part of the judgment violated the lease, which expressly excluded interest payable on the security deposit. Thus, FIN contends there could not have been an ascertainable loss based on interest on the security deposit.

"In general, we review awards of interest and the calculation of those awards under an abuse of discretion standard." *Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 91, 74 A.3d 10 (App. Div. 2013)* (citing *Baker v. Nat'l State Bank, 353 N.J. Super. 145, 177, 801 A.2d 1158 (App. Div. 2002))*. "A reviewing court must not disturb an award of prejudgment interest unless the trial judge's decision represents 'a manifest denial of justice.'" *Id. at 91-92* (quoting *Musto v. Vidas, 333 N.J. Super. 52, 74, 754 A.2d 586 (App. Div. 2000))*.

Judge Ramsay concluded:

> [FIN] asserted that [Joy] owed (1) $36,020.74 for services relating to the repair and replacement of the overhead doors and dock-levelers, and (2) $16,175.30 for the demolition/renovation of the lunch room and offices, for a total of $52,196.04.
>
> Thus, [Joy] is entitled to recover return of the security deposit in the amount of $82,262.00 as damages for [FIN's] breach of the [l]ease. In addition, [Joy] is entitled to recover damages resulting from [FIN's] violation of the [CFA] **[*18]** in the amount of $52,196.04 *plus the interest on the security deposit from August 15, 2011, to the present, i.e., $9,305.90*, for a total of $61,501.94. Although both the breach of contract and [CFA] claim justify recovery of the interest on the security deposit, [Joy] is limited to a single recovery for that loss.
>
> With respect to the losses arising from the violation of the [CFA], *N.J.S.A. 56:8-19* requires that the amount of those losses must be trebled. Thus, damages for the violation of the [CFA] total $184,505.84. In addition, [Joy] is entitled to recover reasonable attorneys' fees. . . .
>
> . . . .
>
> For [FIN's] breach of contract, [Joy] is entitled to recover the security deposit in the amount of $82,262.00; for [FIN's] violation of the [CFA], [Joy] is entitled to recover $184,505.84, for a total judgment in the amount of $266,767.84, subject to [Joy's] application for attorneys' fees and costs.
>
> [(emphasis added).]

As we noted, the lease stated "[t]he [s]ecurity [d]eposit shall be returned to [Joy] without interest, after the time fixed as the expiration of the term herein, . . . provided [Joy] has fully, faithfully and timely carried out all of the terms, covenants and conditions on its part to be performed." **[*19]** This provision of the lease contemplated the return of the security deposit without interest in the normal course at the conclusion of the lease. We do not read this provision as depriving Joy of interest as part of a CFA damage award where the security deposit was wrongfully withheld. For these reasons, it was not an abuse of discretion for the trial judge to award interest on the wrongfully withheld security deposit as an ascertainable loss, and treble the amount pursuant to the CFA.

V.

Finally, in its cross-appeal Joy argues if we reverse the CFA award, we should address Joy's claim for punitive damages, which the judge denied because she determined treble damages under the CFA were a form of punitive damages. We do not reach this argument because we have upheld Judge Ramsay's determination.

Affirmed.

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# EXHIBIT 2

**User Name:** Jacob Tabman

**Date and Time:** Friday, February 28, 2020 10:17:00 AM EST

**Job Number:** 111259365

## Document (1)

1. *Gensch v. Hunterdon County Clerk's Office, 2012 N.J. Super. Unpub. LEXIS 1630*

   **Client/Matter:** Flor

   **Search Terms:** Gensch v. Hunterdon County Clerk's Office, 2012 N.J. Super. Unpub. LEXIS 1630

   **Search Type:** Natural Language

   **Narrowed by:**

| **Content Type** | **Narrowed by** |
|---|---|
| Cases | -None- |

# *Gensch v. Hunterdon County Clerk's Office*

Superior Court of New Jersey, Appellate Division

June 4, 2012, Argued; July 9, 2012, Decided

DOCKET NO. A-3578-10T3, A-1360-11T3, A-1361-11T3

**Reporter**
2012 N.J. Super. Unpub. LEXIS 1630 *; 2012 WL 2683022

JAMES GENSCH, on behalf of himself and all others similarly situated, Plaintiff-Respondent/Cross-Appellant, v. HUNTERDON COUNTY CLERK'S OFFICE, and MARY H. MELFI, in her capacity as the HUNTERDON COUNTY CLERK, and HUNTERDON COUNTY through the HUNTERDON BOARD OF CHOSEN FREEHOLDERS, Defendants-Appellants/Cross-Respondents.DEAN SMITH, on behalf of himself and all others similarly situated, Plaintiff-Appellant/Cross-Respondent, v. HUDSON COUNTY REGISTER and WILLIE J. FLOOD, in his capacity as the HUDSON COUNTY REGISTER and HUDSON COUNTY through the HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS, Defendants-Respondents/Cross-Appellants.ANDREW GARGANO, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. BERGEN COUNTY CLERK'S OFFICE, and KATHLEEN A. DONOVAN, in her capacity as the BERGEN COUNTY CLERK, BERGEN COUNTY, and the BERGEN COUNTY BOARD OF CHOSEN FREEHOLDERS, Defendants-Respondents.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0307-07 (A-3578-10); Hudson County, Docket No. L-5261-07 (A-1360-11); and Bergen County, Docket No. L-8571-06 (A-1361-11).

## Core Terms

cases, fee award, enhancement, lodestar, trial judge, trial court, counsel fees, hourly rate, cross-appealed, appeals, reasons, prevailing, litigated, copying, lawsuits, lawyers, certif, clerk's office, public record, plaintiffs', charges, partner, risks

**Counsel:** Sander D. Friedman and Wesley G. Hanna argued the cause for respondent/cross-appellant James Gensch in A-3578-11; appellant/cross-respondent Dean Smith in A-1360-11; and appellant Andrew Gargano in A-1361-11 (Law Office of Sander D. Friedman, LLC, attorneys; Mr. Friedman, on the briefs).

Shana L. Taylor, Hunterdon County Counsel, argued the cause for appellants/cross-respondents Hunterdon County Clerk's Office, Mary H. Melfi, Hunterdon County, and the Hunterdon County Board of Chosen Freeholders (Ms. Taylor, attorney; Gaetano M. De Sapio, of counsel and on the brief; Michael A. De Sapio, on the brief).

Steven L. Menaker argued the cause for respondents/cross-appellants Hudson County Register, Willie J. Flood and Hudson County (Chasan Leyner & Lamparello, PC, attorneys; Mr. Menaker, of counsel; Kirstin Bohn, on the brief).

John M. Carbone argued the cause for respondents Bergen County Clerk's Office and Kathleen A. Donovan (Carbone and Faasse, attorneys; Mr. Carbone, on the **[*2]** brief).

James X. Sattely, Jr., Bergen County Counsel, attorney for respondent Bergen County, joins in the brief of respondent Bergen County Clerk's Office.

Law Offices of Richard Malagiere, PC, attorneys for respondent Bergen County Board of Chosen Freeholders, join in the brief of respondent Bergen County Clerk's Office.

**Judges:** Before Judges Sabatino, Ashrafi, and Fasciale.

## Opinion

PER CURIAM

The present related appeals and cross-appeals,[1] which were argued back-to-back and which we consolidate solely for purposes of this opinion, concern trial court awards of attorneys' fees to the three respective plaintiffs pursuant to N.J.S.A. 47:1A-6, the fee-shifting provision of the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13. In all three appeals, plaintiffs, who are and have been represented by the same counsel, contend that the trial court's fee awards are inadequate, particularly because none of the awards include a fee enhancement above the "lodestar" amount. In both A-1360-11 (*Smith*) and A-3578-10 (*Gensch*) the governmental defendants not only oppose plaintiffs' claims for enhancement, but further maintain that the fee award in their case should be vacated or reduced.

For the reasons described in this opinion, we affirm the fee awards in all three cases without any lodestar enhancements, although we modify the fee award in A-1360-11 (*Smith*) to correct for certain disallowed attorney time by an associate that was erroneously subtracted by the trial court at a partner's billing rate.

I.

The three lawsuits before us were filed as parallel efforts by the respective plaintiffs to contest the rates that various county governments were then charging citizens for the copying of public records. The general background of these lawsuits, and other similar lawsuits brought by the same counsel on behalf of other plaintiffs against other counties, is detailed in our prior opinions in Smith v. Hudson County Register, 411 N.J. Super. 538, 988 A.2d 114 (App. Div. 2010) ("*Smith I*"), and in Smith v. Hudson County Register, 422 N.J. Super. 387, 29 A.3d 313 (App. Div. 2011) ("*Smith II*"). In each case, the plaintiff contended that the County defendants were overcharging for the reproduction of public records, thereby unduly restricting **[*4]** citizen access to such records.

In *Smith I*, we held that under the then-existing version of OPRA, governmental agencies in our State could not lawfully charge a blanket rate to copy public records if that rate exceeded the "actual cost" of such copying. Smith I, supra, 411 N.J. Super. at 562-70. We denied retrospective relief to the plaintiffs in *Smith I*, but remanded that case along with two companion appeals[2] to address plaintiffs' claims for counsel fees under OPRA's fee-shifting provision. N.J.S.A. 47:1A-6. In the meantime, the Legislature amended OPRA to establish a uniform copying rate of five cents per letter-sized page. *See* N.J.S.A. 47:1A-5(b).

Thereafter, in *Smith II*, we concluded that plaintiff Smith was, in fact, a "prevailing party" entitled to an award of counsel fees under OPRA because he had persuaded this court in *Smith I* to adopt his interpretation of the law predicated on an "actual costs" approach. Smith II, supra, 422 N.J. Super. at 396; **[*5]** *see also* Smith I, supra, 411 N.J. Super. at 570. Smith also prevailed in *Smith I* by persuading us to reject the trial court's ruling that he was not entitled to relief because he had allegedly paid the copying charges "voluntarily." Smith II, supra, 422 N.J. Super. at 395-96; *see also* Smith I, supra, 411 N.J. Super. at 551-54. We therefore remanded the case again to the trial court for a determination of Smith's reasonable counsel fees. Smith II, supra, 422 N.J. Super. at 399.

On remand a second time, the trial court granted Smith a fee award of $40,127.50, utilizing a $350 hourly rate for approved partner time and a $175 hourly rate for approved associate time. Smith has now appealed that

[1] The cases are *James Gensch* ***[*3]*** *v. Hunterdon County Clerk's Office*, (A-3578-10); *Dean Smith v. Hudson County Register*, (A-1360-11); and *Andrew Gargano v. Bergen County Clerk's Office*, (A-1361-11).

[2] The remand of one of those two prior companion appeals, *Gensch v. Hunterdon County Clerk's Office, A-2507-08*, resulted in the fee award that the Hunterdon County defendants are now appealing in A-3578-10, and which plaintiff Gensch is now cross-appealing.

award as insufficient. The Hudson County defendants have cross-appealed, seeking to have the award vacated or reduced.

In addition, the trial judge in Hunterdon County who presided over the remand in *Gensch*, awarded Gensch $93,265.37 in counsel fees, utilizing the same hourly rates as in *Smith*. The Hunterdon County defendants have now appealed that award, seeking to have it set aside or reduced, and Gensch has cross-appealed the award, seeking to have it increased.

A third trial judge in Bergen County **[*6]** who considered the fee application in *Gargano*, awarded that plaintiff $38,299.33, inclusive of costs. The Bergen County judge adopted the same $350/$175 hourly rate structure. Gargano has now appealed that award as insufficient. The Bergen County defendants oppose his appeal, but they have not cross-appealed to seek a reduction of the award.

The record indicates that, on the whole, plaintiffs' law firm filed separate lawsuits against nineteen of the State's twenty-one counties, including the present three cases. We are advised that, in the aggregate, those nineteen cases have generated a fee recovery, either by court award or by settlement, in excess of one million dollars. One of the cases involving another county (Middlesex) resulted in a fee award (without a lodestar enhancement), which was recently sustained by another panel of this court in an unpublished opinion.[3] We were advised at oral argument that the three present cases represent the last of the unresolved fee disputes in the related nineteen cases.

II.

We begin by examining a common issue that Smith, Gensch, and Gargano all raise on appeal: whether the respective trial judges erred in denying them a percentage enhancement of the fee award beyond the so-called "lodestar" amount. For the reasons that follow, we sustain all three judges in their denial of such a lodestar enhancement under the particular circumstances of these coordinated lawsuits. We also affirm the denial of any "incentive award" to the individual plaintiffs.

In general, New Jersey courts abide by the American rule that each party pays its own legal fees. *R. 4:42-9*. The award of a counsel fee, where permissible, is discretionary and normally is reviewed on appeal only for a clear abuse of discretion. *Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444, 771 A.2d 1194 (2001)*; *accord* *City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 123, 966 A.2d 1082 (App. Div.)*, *certif. denied*, *199 N.J. 515, 973 A.2d 383 (2009)*.

An award of counsel fees is calculated by determining the so-called lodestar, i.e., a reasonable hourly charge multiplied by the number of approved hours expended. *Rendine v. Pantzer, 141 N.J. 292, 334-35, 661 A.2d 1202 (1995)*. In determining the lodestar, a court should first compare **[*8]** the hourly rate of the attorney to those of attorneys in the community of "comparable skill, experience, and reputation." *Id. at 337* (quoting *Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990))*. The court must then determine whether the hourly billing rates are "fair, realistic, and accurate." *Ibid.* In the present three appeals, only one of the County defendants contests the respective $350 hourly rate for partners and $175 hourly rate for associates at plaintiffs' former law firm, and we concur with all three trial judges that those rates are reasonable and commensurate with the complexity of the many legal issues raised in this litigation.[4]

Second, the court must determine the hours that were reasonably expended pursuing the statutory objectives. *Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22-23, 860 A.2d 435 (2004)*. Third, the court should reduce the lodestar if the party achieved modest success in relation to the relief sought, although there is no requirement of proportionality between the fee and the damages recovered. *Id. at 23*. Fourth, **[*9]** when the attorney is being paid a contingency fee, the trial court may decide to enhance the fee to reflect the risk of non-payment when the attorney's compensation "entirely or substantially is contingent on a successful outcome." *Rendine, supra, 141 N.J. at 337*.

In *Walker v. Guiffre, 209 N.J. 124, 128-29, 35 A.3d 1177 (2012)*, the Court recently revisited the question of fee enhancements because of questions raised by *Perdue v. Kenny, __ U.S. __, __, 130 S. Ct. 1662, 1674, 176 L. Ed. 2d 494, 507 (2010)* (holding that fee enhancements should only be awarded in exceptional circumstances). *Walker*, however, rejected any new approach to

[3] *Lebbing v. Middlesex Cnty. Clerk's Office, No. A-2738-10, 2012 N.J. Super. Unpub. LEXIS 987 (App. Div. May 4, 2012) (slip op. at 23)*. We were advised at oral argument that no petition for certification has been **[*7]** filed in *Lebbing*.

[4] We are advised that the law firm has since disbanded, although the two attorneys who primarily handled this litigation are still apparently affiliated.

determining fee enhancements and instead reaffirmed *Rendine's* standard. *Walker, supra, 209 N.J. at 129*. The Court explained that the federal reasoning relied on in *Perdue* existed when *Rendine* was decided and, therefore, *Perdue* did not affect New Jersey law. *Id. at 133-41*.

Bearing in mind these general standards, we conclude that the three respective trial judges in *Smith, Gensch*, and *Gargano* reasonably found under the distinct circumstances of these related cases that plaintiffs were not entitled to fee enhancements, nor were they entitled to incentive awards. We acknowledge **[*10]** that each of the plaintiffs, and the lawyers who ably represented them, advanced the interests of the public at large by obtaining a result that ultimately reduced the charges for the copying of public records. *See Walker, supra, 209 N.J. at 139* (noting the Legislature's recognition that one of the purposes of fee-shifting is "attracting counsel to socially beneficial litigation"). As we noted in *Smith I*, the prior law was "murky" as to the appropriate copy charges, *Smith I, supra, 411 N.J. Super. at 570*, largely due to the vague wording of the then-existing OPRA language. We have already held in *Smith II* that "[b]y successfully advocating their construction of the law Smith and the other appellants [in *Smith I*] were a catalyst for change" and were "decidedly prevailing parties." *Smith II, supra, 422 N.J. Super. at 396*.

Even so, it was reasonable for the trial judges to withhold fee enhancements in these and in the other related cases because of the distinctive manner in which the cases were litigated — i.e., in multiple courts in nineteen counties — which lessened the risks involved. Rather than filing a single complaint against all nineteen counties, plaintiffs and their law firm **[*11]** fragmented the litigation effort by suing each county and various individual county defendants in separate forums.

We do not criticize plaintiffs' lawyers for filing separate actions, as they were not obligated to present these statewide over-charging issues in one case. It is conceivable that if a unitary action had been filed, one or more of the county defendants might have moved to sever the cases affecting them and to transfer venue to the trial court in their own county. *See R. 4:3-2(a)(2)* (noting that venue lies "in the county in which the cause of action arose"). *But see R. 4:38-1(a)* (authorizing the consolidation of actions regarding common questions of law or fact arising out of a series of transactions, even where venue lies in multiple counties). We need not resolve here whether such motions to sever and transfer, if they had been brought at all, would or should have been granted. Our point is simply that the cases were litigated in a fragmented, county-by-county manner, a reality that affected the risks involved.

Because the cases were litigated in piecemeal fashion before a host of trial judges, the risks and stakes were lessened. For example, if one of the plaintiffs prevailed **[*12]** before one of the trial courts and obtained a favorable judicial ruling or a court-approved class-wide settlement, that successful outcome undoubtedly would provide some leverage to the counterpart plaintiffs represented by the same lawyers who were litigating and negotiating with defendants in other counties. A potential "domino effect" existed here that is not normally present when public interest litigation is brought in one venue. To be sure, an unfavorable ruling for a plaintiff in one of the trial courts could have had indirect adverse impacts in the other open cases.

Nevertheless, we find that plaintiffs reaped a net strategic advantage by having these cases litigated before multiple trial judges, which spread the risks of failure in a unique manner. We further note that the cases were not filed at the same time, but were instead staggered, a feature that provided plaintiffs with an opportunity to "piggyback" on a favorable outcome in one of the earlier-resolved cases. Plaintiffs also had the chance to contain their risks by refining their legal arguments before successive judges and adversaries.

In sum, the risks of non-payment were sufficiently lessened to justify compensation **[*13]** at the lodestar level, without the necessity for further enhancement. In reaching this decision, we do not lose sight of the fact that the plaintiffs in all of the cases collectively obtained over one million dollars in fee shifting, a sizeable reward indicative of adequate incentive for counsel to represent them in this litigation. Consequently, the denial of a lodestar enhancement in all these cases is affirmed.

III.

We now turn to the discrete arguments raised by the parties in the three respective cases.

*Smith*

In his appeal, Smith, who had sought a lodestar award of $67,835.25, plus $1980 in costs and an enhancement, argues that the trial court unreasonably reduced his lodestar time and also made various calculation errors.

The Hudson County defendants in *Smith*, meanwhile, contend in their cross-appeal that the trial court's $40,127 fee award should be vacated because (1) Smith was not a prevailing party entitled to fees under OPRA because his complaint did not expressly refer to OPRA; (2) Smith's counsel's receipt of fees from other cases bars Smith's right to recover fees; and (3) the fee application was excessive and included duplicative and unreasonable billing entries.

Except for **[*14]** one discrete item of modification respecting the treatment of associate time, we reject the parties' contentions and affirm the fee award in *Smith*. We do so substantially for the reasons set forth in the trial court's written ruling dated October 6, 2011. Only some brief comments are warranted.

All of the arguments presented by the Hudson County defendants seeking to vacate Smith's fee award in its entirety are without merit. The fact that Smith's complaint omitted an explicit OPRA count, a point now belatedly raised by defendants, is of no moment. As defense counsel conceded at oral argument before us, the *Smith* case was litigated as both an OPRA case and a common-law access case, which is consistent with the way the cases were argued and decided on appeal in *Smith I, supra, 411 N.J. Super. at 562-70*, and in *Smith II, supra, 422 N.J. Super. at 396*. Moreover, the complaint in *Smith* implicated OPRA, by alleging a class-wide violation of the holding in *Dugan v. Camden County Clerk, 376 N.J. Super. 271, 279, 870 A.2d 624 (App. Div.)*, *certif. denied*, *184 N.J. 209, 876 A.2d 283 (2005)*, an OPRA-based decision. In any event, the court has discretion under *Rule 4:9-2* to amend the pleadings to conform to the record, and **[*15]** the Hudson County defendants surely had ample notice of plaintiff's arguments under OPRA. *See* *Teilhaber v. Greene, 320 N.J. Super. 453, 466, 727 A.2d 518 (App. Div. 1999)* (holding that "a 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory"); *68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 n.3, 362 A.2d 78 (Law Div. 1976)* (indicating that even when a legal theory was not advanced in the pleadings, it is properly before the court if it was "fully aired" at trial and in post-trial briefs), *aff'd o.b.*, *150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977)*.

The trial court's award of counsel fees to Smith was not barred by the fact that his lawyers were litigating similar cases against other counties for other clients. The Hudson County trial judge sufficiently considered whether the attorney time devoted to *Smith* was duplicative, and she made appropriate reductions for time that was reasonably found to be excessive.

We likewise reject Smith's contention that the trial judge unfairly reduced his lawyers' billable time. Applying, as we must, our limited scope of review, *see* *Packard-Bamberger & Co., supra, 167 N.J. at 444*, we discern no **[*16]** abuse of discretion by the judge, nor any patent unfairness in the award. Although one might quibble about the disallowance of some of the specific time entries in *Smith*, such as, for example, a minor reduction for time spent communicating with the clerk's office and modest time disallowed or reduced for certain legal research, the judge's fee ruling, on the whole, is supported by substantial credible evidence.

The only point warranting a slight adjustment in *Smith* is the trial judge's failure to make a distinction between associate time and partner time when she reduced the lodestar by 61.3 hours and unfortunately applied the $350 hourly partner rate for time that was incurred by both a partner and by an associate. Rather than consume further resources of the parties and the trial court on yet another remand, we exercise our original jurisdiction and increase the fee award in *Smith* to account for the $175 differential in the hourly rates of the partner and the associate. Specifically, we restore approximately half of the deducted amount, i.e., 1/2 x 61.3 hours x $175 rate differential, or $5,363.75, to achieve a rough approximation of the extent of the trial judge's error. Consequently, **[*17]** the trial court shall forthwith issue an amended final order that increases the fee award in the *Smith* case by $5,363.75. No further adjustments are legally or equitably necessary.

*Gensch*

The Hunterdon County defendants argue in *Gensch* that the trial court's $93,265.37 fee award should be set aside because (1) the award is unreasonable and inequitable, in light of the similar lawsuits filed in other counties by the same lawyers who also represented Gensch; (2) Gensch's counsel was allegedly motivated by pecuniary gain, and he improperly provoked Gensch to create an artificial dispute over the County's copying charges; (3) the award should be reduced because of Gensch's lack of success on appeal on certain legal issues; (4) Gensch's fee application was not timely filed in the trial court; and (5) Gensch was not a prevailing party under OPRA because he was given access to the records that he requested.

These arguments are not persuasive. For reasons similar to those already expressed as to Smith, Gensch is not precluded from obtaining a fee award just because his attorneys were pursuing other similar litigation. The Hunterdon County trial judge in *Gensch* adequately took into account considerations **[*18]** of duplicative services and unreasonable attorney time. We also reject the Hunterdon defendants' argument that Gensch's counsel improperly provoked the dispute, inasmuch as Gensch testified at his deposition that he had already been overcharged by the Hunterdon County defendants prior to signing a retainer agreement with counsel in this case. Additionally, the fee award, on the whole, did not include an unreasonable amount of time spent on unsuccessful issues.

Although Gensch did not file his fee motion with the necessary certification of services until more than twenty days after the Hunterdon County defendants had complied with a previous consent order agreeing to reduce the County's copying rate to a level of "actual costs," that short delay did not prejudice defendants. There is ample reason here to relax, pursuant to *Rule 1:1-2*, the twenty-day filing requirement of *Rule 4:49-2*. *Cf.* *Ricci v. Corporate Express of the E., Inc., 344 N.J. Super. 39, 46-47, 779 A.2d 1114 (App. Div. 2001)*, *certif. denied*, *171 N.J. 42, 791 A.2d 220 (2002)*. Lastly, Gensch, like Smith, was a prevailing plaintiff under OPRA, for the reasons set forth in our precedential opinion *Smith II, supra, 422 N.J. Super. at 392-98*.

We similarly **[*19]** reject the arguments made by Gensch in his cross-appeal seeking to increase the fee award. The award, which is the largest of the three before us, is fair and reasonable, and it is supported by substantial evidence in the record.

We thus affirm the fee award in *Gensch*, substantially for the cogent explanations expressed by the Hunterdon trial judge in her March 14, 2011 statement of reasons.

*Gargano*

Gargano contests the sufficiency of the $38,299 in fees that were awarded by the Bergen County trial judge. We reject his contentions. Although the fee award was substantially less than the lodestar sum of about $58,000, the trial judge reasonably discounted that amount because of duplicative work, billings for multiple lawyers for tasks where one was sufficient, travel time, and the like. The judge also appropriately noted that there had been no discovery in the *Gargano* case and that it never went to trial. Here again, applying our limited scope of review on fee determinations, we affirm the trial court's reasonable decision, substantially for the reasons set forth in the Bergen County judge's October 6, 2011 bench opinion.

All other arguments presented by the parties on the appeals and the **[*20]** cross-appeals lack sufficient merit to warrant discussion in this written opinion. *R. 2:11-3(e)(1)(E)*.

IV.

For these reasons, the fee awards in A-3758-10 (*Gensch*) and in A-1361-11 (*Gargano*) are affirmed in all respects. The fee award in A-1360-11 (*Smith*) is affirmed, as modified to reflect an increase of $5,363.75. The stay of collection previously ordered by this court in *Gensch* is dissolved, effective in thirty days.[5]

Affirmed as modified.

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End of Document

[5] Any motion by plaintiffs for counsel fees incurred on the present appeals shall be filed, with the appropriate supporting certification of services, by no later than July 27, 2012, and any opposing papers on such a motion shall be filed by defendants by no later than August 10, 2012.

We do not express, of course, an opinion at this time as to the merits of any such motion for appellate fees and have set forth this motion briefing schedule in the interests of finality and expediency.

# EXHIBIT 3

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## Document (1)

1. *Varelli v. White, 2019 N.J. Super. Unpub. LEXIS 1652*

   **Client/Matter:** Flor

   **Search Terms:** Varelli v. White, 2019 N.J. Super. Unpub. LEXIS 1652

   **Search Type:** Natural Language

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| Content Type | Narrowed by |
|---|---|
| Cases | -None- |

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# *Varelli v. White*

Superior Court of New Jersey, Appellate Division

February 28, 2019, Argued; July 18, 2019, Decided

DOCKET NO. A-4675-16T3

**Reporter**

2019 N.J. Super. Unpub. LEXIS 1652 *; 2019 WL 3229679

DOCK BRENDA LEE VARELLI, KYLE A. BRADFORD, LYLE J. BRADFORD, and ESTATE OF JANET E. BRADFORD, as a nominal plaintiff, Plaintiffs-Respondents/Cross-Appellants, v. JENNIFER WHITE, JACQUELYNE MCGLINCHEY, FIDELITY ESTATE PLANNING, LLC, ADAM BAALS, CEO, and ADAM BAALS, individually, and MELODIE WHITE, Defendants, and DONALD L. KINGETT, ESQ., RABIL, ROPKA, KINGETT & STEWART, LLC, and RABIL, KINGETT & STEWART, LLC, Defendants-Appellants/Cross-Respondents,

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

**Subsequent History:** Certification denied by *Varelli v. White, 2019 N.J. LEXIS 1502 (N.J., Nov. 12, 2019)*

Certification denied by *Varelli v. White, 2019 N.J. LEXIS 1528 (N.J., Nov. 12, 2019)*

**Prior History: [*1]** On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1405-11.

## Core Terms

damages, plaintiffs', defendants', joint enterprise, attorney's fees, the will, non-client, retainer agreement, fiduciary duty, documents, malpractice, percent, standard of care, estate plan, tortfeasor, fiduciary, probate, counsel fees, recovered, unduly, breach of fiduciary duty, drafting, parties, phone, supervise, breached, deviated, summary judgment, estate planning, award fees

**Counsel:** John L. Slimm argued the cause for appellants/cross-respondents (Marshall Dennehey Warner Coleman & Goggin, attorneys; John L. Slimm, on the briefs).

Jeffrey V. Puff argued the cause for respondents/cross-appellants (Puff & Cockerill, LLC, attorneys; Jeffrey V. Puff, on the briefs).

**Judges:** Before Judges Simonelli, Whipple and Firko.

## Opinion

PER CURIAM

Defendants Donald L. Kingett, Esquire, Rabil, Ropka, Kingett and Stewart, LLC, and Rabil, Kingett and Stewart, LLC appeal, and plaintiffs, Brenda Lee Varelli, Kyle A. Bradford, and Lyle J. Bradford cross-appeal from a jury verdict rendered on April 2, 2016 finding Kingett deviated from the standard of care required of an attorney which was a proximate cause of losses sustained by plaintiffs in this estate and negligence case. Defendants also appeal from a May 2, 2016 order denying their motion for a judgment notwithstanding the verdict, and all parties appeal the award of counsel fees to plaintiffs. For the reasons that follow, we reverse and remand for a new jury trial.

I.

On June 23, 2008, plaintiffs filed a verified complaint and order to show cause (OTSC) **[*2]** in the Probate Part in connection with the estate of their mother (decedent) who died on February 6, 2008.[1] She executed Wills in 1996 and 2007. The complaint alleges that in September 2007, decedent had diminished capacity and was unduly influenced to change her estate plan by her granddaughter, Jennifer White, her primary caretaker. The judge entered plaintiffs' OTSC placing restraints on the estate's real and personal assets.

Decedent was diagnosed with Alzheimer's disease and dementia. She had four children: Brenda, Lyle, Kyle, and Melodie, who is Jennifer's mother. The decedent's original 1996 Will provided for a four-way equal distribution of her assets to her children. Because decedent lacked cognitive ability, a previous attorney advised Brenda, Jennifer, and Kyle to file a guardianship action and he declined to prepare a power-of-attorney (POA) as requested by plaintiffs because of decedent's condition. A guardianship action was never pursued.

In March 2007, decedent fell in her home and was transported to Cooper Hospital where she was again diagnosed with dementia and later transferred to ManorCare. After being released on April 12, 2007, she went home and the White family resided **[*3]** with her in conditions described by Brenda as a "pigsty."

After decedent's prescription medication insurance expired in April 2007, Jennifer sent a letter to decedent's insurance company asking for reinstatement of her prescription medication insurance because her grandmother was "slowly slip[ping] away into Alzheimer's." In May 2007, Dr. John Gartland was treating decedent for dementia and Alzheimer's disease. By July 2007, decedent was deteriorating mentally, thought she was a student, could not hold a thirty-second conversation, and became a "shell" of a person according to Brenda.

On July 16, 2007, Jacquelyne McGlinchey a self-employed estate planner affiliated with Fidelity Estate Planning, LLC (FEP), met with decedent at her home. Plaintiffs argue that McGlinchey was a "salesperson" who signed up elderly clients for "estate planning." Ostensibly, decedent expressed to McGlinchey that she wanted Jennifer to inherit her estate because she cared for her and decedent's own children did nothing for her. McGlinchey believed decedent was competent because she freely answered questions. Based upon her observation of decedent, McGlinchey had her execute an estate planning services contract. **[*4]** McGlinchey created a client workbook and recorded information about decedent. At a later time, McGlinchey changed her story and testified that decedent could not understand one hundred percent of what they discussed.

McGlinchey recommended placing decedent's home into a revocable living trust (RLT), naming decedent and Jennifer as co-trustees, and establishing life estates for Woodrow and William, Jennifer's brothers, and Melodie. The RLT was recommended to avoid probate, and Jennifer would be named executrix, POA, and appointed as decedent's health care representative. After the initial meeting, McGlinchey provided attorney Kingett (defendant) with her client workbook. Thereafter, Kingett prepared a retainer agreement that provided his legal services would include "a personal interview, either in [defendant's] office . . . or via telephone to discuss [the client's] estate plan." The retainer specified certain limitations on the scope of legal representation. For example, defendant would not supervise the execution of legal documents unless decedent appeared in his office. The retainer agreement also included information about FEP's services. Decedent paid FEP a total of $1695, $450 **[*5]** was defendant's fee. The remaining $1245 was shared between McGlinchey and Adam Baals, who served as the chief executive officer (CEO) of FEP.

On July 31, 2007, decedent purportedly signed the retainer agreement, but defendant later conceded he did not know whether she personally signed it or if somebody else signed it on her behalf. Defendant never discussed any limitations of his representation with decedent.

On August 1, 2007, decedent purportedly signed an application to purchase an annuity naming Jennifer and Melodie as beneficiaries. Thereafter, McGlinchey invested decedent's assets into annuities with Old Mutual and shared the commissions with Baals. Plaintiffs allege defendant and Baals formed FEP "to sell to unsuspecting clients unnecessary revocable trusts and annuities to generate legal fees and large

[1] Parties who share a last name with other parties are referred to by their first names for the ease of reference. By doing so, we intend no disrespect.

commissions."

Defendant ostensibly spoke to decedent on August 18, 2017, over the telephone for eight minutes about revising her estate plan, but he never met with her in person. He conceded that since he never met her or knew her personally, and he could not confirm he actually spoke to her. According to Jennifer, defendant called decedent on a cellular phone while Jennifer listened **[*6]** in on a speaker phone. He drafted a new Will and RLT naming defendant and Jennifer as trustees, a healthcare directive, and a living Will. Upon decedent's death, the four members of the White family would each receive twenty percent of her estate, and Brenda, Kyle, and Lyle would share the remaining twenty percent.

Defendant claims he asked decedent if she wanted to meet him at his office or if she preferred to have the documents sent to her home. During that brief phone call, defendant claimed that he reviewed with decedent all matters relevant to her estate, including her Will, RLT, POA, and health care directive. Defendant described decedent as sounding like an older female who was clear and concise. After the trial, it was revealed that the person speaking on the phone to defendant was not the decedent but was actually her daughter Melodie.

On September 18, 2007, McGlinchey again went to decedent's home and notarized her testamentary documents purportedly in the presence of two witnesses, a neighbor, and McGlinchey's spouse. In the early stages of the litigation, McGlinchey contended that on that day, decedent was incapable of signing because she was incoherent, and Jennifer signed **[*7]** the documents, as well as the earlier executed retainer agreement. In December 2007, Jennifer informed plaintiffs that decedent's estate plan had changed. Decedent passed away on February 6, 2008. Brenda, Kyle, and Lyle each received a $5000 check from Jennifer.

Plaintiffs amended their complaint on October 23, 2008, adding allegations against Jennifer, McGlinchey, Melodie, FEP, and defendant claiming they participated in a "trust mill." In 2008 and 2009, plaintiffs amended their complaint to add allegations against defendant and his law firm, Rabil, Kingett & Stewart, LLC[2] (collectively, defendants). In April 2010, plaintiffs again amended their complaint to add claims against Baals, in his capacity as CEO of FEP (collectively, with the financial planner and the financial planning company, financial defendants).

On March 24, 2011, the probate judge sua sponte appointed Brenda Lee Eustler, an attorney, as administrator of decedent's estate, and the judge ordered the probate matter be severed from the professional negligence and other claims against defendants and the financial defendants. These claims were transferred to the Law Division. At the summary judgment hearing on July 29, 2011 **[*8]** in the Probate Part, the judge found decedent lacked testamentary capacity to revise her estate plan and Jennifer unduly influenced her with respect to estate documents decedent executed.

At the September 26, 2011 trial, Jennifer and the financial defendants did not appear; the probate court made a final determination that in September 2007, decedent had diminished capacity and was unduly influenced by Jennifer. The probate court nullified the decedent's 2007 estate planning documents and ordered Jennifer to return the assets she confiscated to the estate.[3] The 1996 Will was not probated and the judge distributed the assets in accordance with the intestacy statute, *N.J.S.A. 3B:5-4*, resulting in a $256,298.61 recovery for plaintiffs. The judge awarded plaintiffs $156,073.30 in counsel fees. This determination is not challenged on appeal.

On September 28, 2011, defendants filed for summary judgment in the Law Division. As of June 2012, Baals was still offering estate planning services with defendant providing legal representation to Baal's clients. On June 5, 2012, the judge partially granted defendants' motion, dismissed plaintiffs' consumer fraud claims[4] against defendants, and named the estate as a **[*9]** nominal plaintiff. In so doing, the judge stated:

> [O]nly [Eustler] as the administrator for the estate can decide whether to participate as an active plaintiff prosecuting the claims put forth by [plaintiffs] . . . . [Eustler] is the decision maker and personification of the [e]state; she alone is charged with deciding what litigation to pursue[.]
>
> . . . .
>
> [Eustler] has provided no response or input into the present motions. This court has no idea what her

[2] Formerly known as Rabil, Kingett, Ropka & Stewart, LLC.

[3] The record indicates that Jennifer filed a petition in bankruptcy at some point during these proceedings.

[4] *N.J.S.A. 56:8-1 to -20*.

> position may be . . . . Since she is the decision maker[,] . . . this court must respect her decision to stay in a neutral position.
>
> . . . .
>
> Notwithstanding the above, it is clear that this litigation will directly affect and impact the [e]state.
>
> . . . .
>
> This court finds the estate an indispensable party.
>
> . . . .
>
> Under *[Rule] 4:28-1*, joinder of the [e]state is generally as plaintiff, but if the [e]state refuses, the entity may be joined as a defendant. The court directs [Eustler] within [fifteen] days . . . [to] indicate whether she is refusing to be joined as a nominal plaintiff . . . . If no "refusal" is timely filed[,] then the estate shall be included as a nominal party plaintiff but with the estate not being construed to be adopting the **[*10]** affirmative claims pursued by [plaintiffs].
>
> . . . .
>
> Until [Eustler] indicates on her own application to this court, the [e]state will be a nominal party plaintiff not directly pursuing [plaintiffs'] claims.

In July 2012, plaintiffs amended their complaint to add Baals as a defendant in his individual capacity. On November 18, 2012, the judge ruled that the parties were collaterally estopped from re-litigating matters determined by the probate court. On January 30, 2013, plaintiffs filed a motion seeking to void defendant's limited scope retainer agreement; the judge denied the motion, stating that the validity of the retainer agreement was a fact question for the jury.

On January 30, 2015, McGlinchey signed an affidavit stating that decedent was not competent when the testamentary documents were signed, and that Jennifer unduly influenced her grandmother. Eustler originally determined the value of the estate's assets were as follows:

Go to table1

The sale of the residence yielded only $86,920, the sale of the qualified annuities was $118,378.61, and the sale of the nonqualified **[*11]** annuities amounted to $51,000 instead of the projected $113,653.92 Thus, the total amount Eustler received for the estate was $256,298 and plaintiffs recovered this amount. The loss to the estate was approximately $200,000. In her 2015 certification, Eustler clarified that she chose not to bring an action on behalf of the estate to avoid further depleting the estate's assets, given plaintiffs brought the action and they were authorized to do so.

On February 12, 2015, plaintiffs filed a motion in the Law Division requesting the judge confirm the allocation of damages and counsel fees. The motion was denied because the judge ruled the issue of allocation would have to abide by the jury's verdict. On March 27, 2015, plaintiffs amended their complaint.

On May 6, 2015, the parties stipulated that plaintiffs' compensatory damages were $244,000 and, following the jury verdict, the court would mold the verdict and apportion the percentages of liability for each party. Plaintiffs moved for leave to file and serve a seventh amended complaint, seeking to add a count asserting a joint enterprise, which was granted on June 8, 2015. On September 18, 2015, defendants moved for partial summary judgment **[*12]** seeking to dismiss the joint enterprise count, which was denied on March 3, 2016.[5]

In the interim, defendants made an offer of judgment[6] on November 4, 2016, for $244,000, inclusive of costs and fees, which plaintiffs rejected. Two days later, plaintiffs moved to amend the status of the estate from a nominal to a formal plaintiff. Eustler certified that she authorized plaintiffs to litigate any claim that the estate could have brought. Defendants cross-moved to disqualify plaintiffs' counsel because of a purported conflict of interest in his representing both plaintiffs and the estate, and in response, plaintiffs withdrew their motion to name the estate as a formal plaintiff.

On March 8, 2016, the judge denied plaintiffs' motion for summary judgment on the issue of whether defendant deviated from acceptable standards of legal practice. On March 30, 2016, the judge denied plaintiffs' request to amend their complaint to add a count asserting that an agency relationship existed between defendant and the financial defendants.[7]

In limine, the judge ruled that plaintiffs had a right to rely on defendant to conform with the standard of care in his profession; whether the retainer agreement was **[*13]** enforceable as to plaintiffs, who were not clients, was a fact question for the jury to determine; civil conspiracy

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[5] The order was incorrectly dated 2015.

[6] ***R. 4:58-1 to -6***.

[7] As a result of a settlement, Melodie was dismissed from the case.

could be presented to the jury;[8] and any liability attributable to defendant would also be attributable to his law firm. The judge dismissed plaintiffs' breach of fiduciary duty claim, finding that plaintiffs did not sustain their burden of proof on that issue.

Vincent Micciche, an expert in financial services, testified at trial that there was a fiduciary relationship between the financial defendants and decedent. Micciche also testified that when McGlinchey recognized that decedent lacked testamentary capacity to sign the documents, McGlinchey should have brought the matter to her supervisor.

Plaintiffs' expert on the issue of elder law and estates, Thomas D. Begley, III, Esq., opined at trial that all attorneys are required to demonstrate a reasonable degree of knowledge and skill; but a specialist in a specific area of the law is held to a higher standard, citing *Cellucci v. Bronstein, 277 N.J. Super. 506, 649 A.2d 1333 (App. Div. 1994)*. Here, defendant held himself out as a specialist in estate planning.

Begley cited to the New Jersey Rules of Professional Conduct (RPC) as well as the Model Rules of Professional Conduct (MRPC), which provide **[*14]** objective standards against which attorney conduct can be measured. According to Begley, when an attorney undertakes a duty to one other than his client, he may be liable for damages caused by a breach of that duty, citing *Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (App. Div. 1976)*; lawyers also have a duty to a non-client when the lawyer knows that his or her client intended the lawyer's services to benefit a non-client, citing *Restatement (Third) of The Law Governing Lawyers § 51* (Am. Law Inst. 2000). Defendant's deposition testimony indicated that in his practice, he generally complied with the standard of care applicable to estate attorneys by meeting with his clients without others present, confirming that the estate plan represented the wishes of the testator, explaining documents, and supervising the execution of documents.

Begley opined that defendant deviated from his own general practice with respect to decedent since he could not attest to her competency or conclusively identify that she was the person he spoke to on the phone, he could not screen for the presence of undue influence, had no knowledge as to who was with her during the telephone conversation, he could not have adequately explained everything to her during the short phone call, and he failed to explain or oversee execution **[*15]** of the documents. Begley cited MRPC 1.3 and 1.4, *RPC 1.4*, and *Ziegelheim v. Apollo, 128 N.J. 250, 607 A.2d 1298 (1992)*, which all require a lawyer to keep a client informed and he testified defendant failed to do so here. Also, *RPC 5.3* requires proper supervision of non-lawyers, and Begley opined that defendant failed to supervise McGlinchey. In addition, *RPC 5.4* prohibits an attorney from sharing fees with a non-lawyer, and defendant shared fees with FEP.

According to Begley, *RPC 1.2* permits a limited scope retainer when the client gives informed consent, but defendant's limited scope retainer agreement was improper because it provided that defendant would not explain documents or supervise their execution. And, defendant did not make the relatively simple attempt to ascertain whether decedent had capacity.

Begley relied upon the following facts relevant to his conclusion that defendant had not met the standard of care for an estates attorney: defendant held himself out as an expert on estate matters; the phone call to decedent lasted only eight minutes; defendant could not ascertain that he was speaking with decedent; defendant did not supervise the execution of the documents; defendant ratified McGlinchey's actions by relying on her to obtain information at the initial **[*16]** meeting with decedent; decedent did not provide informed consent for defendant's limited representation; defendant did not determine whether decedent had capacity; and the attorney at the prior law firm understood that decedent needed a guardianship because she had Alzheimer's.

Begley cited cases from other jurisdictions including *Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16, 19 (Cal. 1958)* (holding whether a defendant is liable to third person not in privity involves balancing of various factors, including the extent to which the transaction was intended to affect plaintiff, foreseeability of harm to him, the degree of certainty that plaintiff suffered injury, closeness of connection between the defendant's conduct and injury suffered, moral blame attached to the defendant's conduct, and a policy of preventing future harm), and *Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685, 689 (Cal. 1961)* (where attorney negligently prepared Will, beneficiaries were entitled to recover as third-party beneficiaries). Begley also cited *Rathblott v. Levin, 697 F. Supp. 817, 819 (D.N.J. 1988)* (discussing whether an attorney who drafts a Will could invoke lack of privity as a defense

[8] The civil conspiracy claim was later voluntarily dismissed.

where his negligence caused a beneficiary to spend funds defending a Will contest).

Glenn A. Henkel, Esq., defendants' expert in estate planning and administration, and a former colleague at a law **[*17]** firm where both he and defendant were employed, opined defendant met the standard of care for any attorney with respect to decedent, and defendant owed no duty of care to plaintiffs. Henkel also opined an attorney's violation of an RPC does not constitute malpractice per se, and that McGlinchey properly notarized the document, even if the witnesses did not see decedent sign it. Henkel testified that an attorney does not need to meet a client face-to-face. Henkel testified that defendant could have adequately reviewed with decedent all of the relevant information in an eight-minute phone call.

Following a nine-day trial, the jury returned a verdict in plaintiffs' favor, finding that defendant deviated from accepted standards of professional care, and his negligence proximately resulted in twenty-five percent of plaintiffs' damages. Seventy-five percent of liability was allocated amongst the other defendants. The jury also found Jennifer and the financial defendants breached their fiduciary duties to the estate, committed consumer fraud and common law fraud, and they, along with defendant, participated in a joint enterprise. The judge entered judgment against the financial defendants **[*18]** for consumer fraud, including treble damages and attorney's fees.

Defendants timely moved for a judgment notwithstanding the verdict (JNOV),[9] attorney's fees, and costs. Thereafter, plaintiffs requested fees in the amount of $1,053,137.[10] Defendants filed opposition and argued the sum of $901,929.60 was improperly billed, reducing the amount of fees for consideration to $103,543.65.

On August 31, 2016, the judge granted defendants' motion for a stay pending appeal; and the following day, he denied defendants' motion for JNOV, ruling that the issue of joint enterprise was properly submitted to the jury. In the final judgment order dated March 1, 2017, the judge reconsidered and determined the evidence did not support the jury's finding of joint enterprise and the issue should not have been submitted to the jury. That same day, the judge entered a final judgment against defendants comprised of $61,000 in damages, $534,756 in counsel fees, and against the financial defendants in excess of $1 million each. The judge allocated damages and counsel fees in accordance with the percentages assigned by the jury amongst the defendants.

Plaintiffs filed a motion for reconsideration under *Rule 4:49-2* with respect **[*19]** to the joint enterprise ruling, which was denied on April 13, 2017. In his opinion, the judge stated: "I will note for the record that my decisions with regard to the joint enterprise issue and how I finally handled it and the judgment are inconsistent." On May 22, 2017, the judge denied a motion to vacate the final judgment against Baals. On July 7, 2017, nunc pro tunc to April 20, 2016, the judge denied defendants' motions for involuntary dismissal and for judgment.

On appeal, defendants argue that the judge erred in: finding plaintiffs had an attorney-client relationship with defendant, granting plaintiffs leave to file and serve a seventh amended complaint to assert a theory of joint enterprise, and thereafter, denying defendants' motion for summary judgment seeking to dismiss that claim, and denying defendants' motions for involuntary dismissal and JNOV.

In their cross-appeal, plaintiffs argue the judge erred in: dismissing the estate's claim for breach of fiduciary duty to decedent; dismissing the claim of joint enterprise by acting as a seventh juror; improperly allocating damages and fees; and not declaring the retainer agreement void as a matter of law on summary judgment. The **[*20]** award of attorney's fees is challenged by defendants and plaintiffs.[11]

II.

We first examine the dismissal of the breach of fiduciary claim. Lawyers owe a fiduciary responsibility to their clients. *Cohen v. Radio-Elecs. Officers Union, 146 N.J. 140, 155, 679 A.2d 1188 (1996)*. "The attorney-client relationship is a fiduciary one, involving the highest trust and confidence." *In re Brown, 88 N.J. 443, 448, 443 A.2d 675 (1982)*. An attorney's fiduciary role requires that he or she attend to and look out for the client's best interests. *Estate of Spencer v. Gavin, 400 N.J. Super.*

[9] ***R. 4:40-2***.

[10] Plaintiffs' billing statement exceeded 800 pages and is not included in its entirety in this appendix.

[11] At oral argument, we permitted both counsel to submit post-argument briefs as to the applicability of our recent decision in *Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc., 458 N.J. Super. 194, 203 A.3d 952 (App. Div. 2019)*.

220, 242, 946 A.2d 1051 (App. Div. 2008). Although New Jersey law imposes duties of fairness, good faith, and fidelity upon all fiduciaries, "an attorney is held to an even higher degree of responsibility in these matters than is required of all others." *Ibid.* (quoting In re Honig, 10 N.J. 74, 78, 89 A.2d 411 (1952)).

In F.G. v. MacDonell, 150 N.J. 550, 563, 696 A.2d 697 (1997), a clergy malpractice case, our Supreme Court described a fiduciary relationship as follows:

> The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.

However, "[t]he exact limits of the term 'fiduciary relation' are impossible of statement. Depending upon the circumstances of the particular **[*21]** case or transaction, certain business, public or social relationships may or may not create or involve a fiduciary character." Id. at 564 (alteration in original) (quoting Bogert, *Trusts and Trustees* § 481 (2d ed. 1978)). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship." *Ibid.* (citation omitted).

The Restatement (Second) of Torts § 874 (Am. Law Inst. 1979) provides: "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." A breach of fiduciary duty is a tort. *Ibid.* At common law, certain torts were considered personal, such as invasion of privacy and libel and they did not survive the death of the person who had been damaged by the tortfeasor. Weller v. Home News Pub. Co., 112 N.J. Super. 502, 506-07, 271 A.2d 738 (Law Div. 1970). However, that changed with the passage of the "survival statute," N.J.S.A. 2A:15-3, which provides, in pertinent part, as follows:

> Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and **[*22]** recover their damages as their testator or intestate would have had if he was living.

Further, "[a] personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative." N.J.S.A. 3B:10-20.

Restatement (Third) of Agency § 4.01 (Am. Law Inst. 2006) provides:

> (1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.
> (2) A person ratifies an act by
>> (a) manifesting assent that the act shall affect the person's legal relations, or
>> (b) conduct that justifies a reasonable assumption that the person so consents.

Generally, an attorney is not liable to third parties who are not his or her clients for negligence in the performance of professional duties. Stewart, 142 N.J. Super. at 593. But where an attorney assumes a fiduciary obligation, the attorney has a duty to others who the attorney has or should have reason to believe would be relying on him. *Ibid.* The determination of whether the duty undertaken by an attorney extends to a third party not in privity with the attorney involves a balancing of factors such as: (1) "the extent to which the transaction was intended to affect the plaintiff"; (2) the **[*23]** foreseeability of harm to the plaintiff; (3) "the degree of certainty that the plaintiff suffered injury"; (4) "the closeness of the connection between the defendant's conduct and the injury suffered"; (5) "the moral blame attached to the defendant's conduct"; and (6) "the policy of preventing future harm." *Ibid.* (quoting Biakanja, 320 P.2d at 16).

Applying the Stewart factors here, the following considerations may be drawn by the fact-finder: (1) defendant's drafting of decedent's Will was intended to benefit the beneficiaries of the Will, i.e., plaintiffs; (2) it was foreseeable that drafting a Will for a person that lacked capacity and was unduly influenced would cause harm to plaintiffs; (3) it was a certainty that plaintiffs suffered harm inasmuch as the parties stipulated that the estate lost $244,000 and plaintiffs had to engage in costly, protracted litigation to recover those assets; (4) there was a connection between defendant's drafting of the Will and the loss to the estate, but it is unclear how close the connection was, given that Jennifer, an intentional tortfeasor, depleted the assets of the estate; (5) it is unclear whether moral blame should be attached to defendant's conduct, given that **[*24]** Jennifer was the primary reason why the estate suffered a loss; and (6) it is unclear how this matter would affect the policy of preventing future losses. We conclude it is a fact question for the jury as to whether defendant breached his fiduciary duty here.

Plaintiffs argue that we should exercise original jurisdiction and find that defendant breached his fiduciary duty to the estate and the beneficiaries. We decline to do so because whether defendant breached his fiduciary duty is a fact question for the jury and will be determined on remand.

Plaintiffs further argue that the improper dismissal of their breach of fiduciary duty claim resulted in: defendant not being responsible for the entire amount of the compensatory damages and the reasonable attorney's fees; the jury not assigning a higher percentage of liability to defendant; and a lower award of fees. A finding by the jury that defendant breached his fiduciary duty might affect the jury's allocation of liability and the court's award of fees.

Plaintiffs argue the judge agreed defendant had a fiduciary duty to decedent, but erred in dismissing that claim prior to trial because they were authorized by Eustler to bring claims against **[*25]** defendants on behalf of the estate. We agree. The judge acknowledged that Eustler validly transferred the estate's rights to plaintiffs to pursue claims against defendants, stating:

> [P]laintiffs have stood in the shoes of the estate throughout the litigation. [Eustler], the appointed administrator, . . . could not make clearer . . . that "plaintiffs in this matter have been authorized by [her] to bring all of the claims that the [e]state can make against any and all of the defendants in this litigation."
> [(Third alteration in original).]

The judge found Eustler's authorization was valid with respect to pursuing the legal malpractice claim, but he improvidently analyzed the breach of fiduciary duty claim. Although finding defendant owed a fiduciary duty to decedent, the judge held nothing in the record indicated plaintiffs knew defendant or that they personally placed trust and confidence in him; therefore, the judge concluded plaintiffs could not bring a claim against defendant for breach of fiduciary duty. We disagree.

In *Petrillo v. Bachenberg, 139 N.J. 472, 482-85, 655 A.2d 1354 (1995)*, our Supreme Court held that an attorney owes an independent duty of care to a non-client when the attorney "intended or should have foreseen that the [non-client] **[*26]** would rely on the [attorney's] work" or when the attorney "know[s], or should know, that non-clients will rely on the attorney['s] representations and the non-clients are not too remote from the attorney[] to be entitled to protection." To sustain a malpractice claim, a non-client must show reliance on the attorney's actions or representations was reasonably foreseeable by the attorney, as it is the reasonably foreseeable reliance by the non-client on the attorney's representation that imposes the duty of care. *Id. at 483-84*. As our Supreme Court further clarified in *Banco Popular North America v. Gandi, 184 N.J. 161, 180, 876 A.2d 253 (2005)*:

> If the attorney['s] actions are intended to induce a specific non-client['s] reasonable reliance on his or her representations, then there is a relationship between the attorney and the third party. Contrariwise, if the attorney does absolutely nothing to induce reasonable reliance by a third party, there is no relationship to substitute for the privity requirement.

We "review the trial court's grant of summary judgment de novo under the same standard as the trial court." *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199, 129 A.3d 1069 (2016)*. A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, **[*27]** if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R. 4:46-2(c)*. The evidence must be viewed in "the light most favorable to the non-moving party[.]" *Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524, 46 A.3d 525 (2012)*.

Determining whether there is a genuine issue for trial "does not require a court to turn a blind eye to the weight of the evidence; the 'opponent must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523-24, 859 A.2d 751 (App. Div. 2004)* (quoting *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992))*. Opposition to a motion for summary judgment requires "competent evidential material" beyond mere "speculation" and "fanciful arguments[.]" *Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563, 866 A.2d 189 (App. Div. 2005)*. To survive summary judgment, the opposing party must, with the benefit of all favorable inferences, show a rational factfinder could determine the plaintiff met her burden of proof. *Globe Motor Co. v. Igdalev, 225 N.J. 469, 481, 139 A.3d 57*

(2016).

Thus, even though there was no retainer agreement between plaintiffs and defendant, summary judgment on this issue was properly denied and the issue was appropriately submitted to the jury because Eustler authorized plaintiffs to bring such a claim on behalf of the estate. The judge inexplicably departed from Eustler's assignment of claims that plaintiffs could pursue by **[*28]** dismissing their breach of fiduciary duty claim. The judge erred by concluding the breach of fiduciary claim was not proven because defendant presumably did not actually handle decedent's assets. Therefore, we reverse the judge's ruling and remand for a new trial, and the breach of fiduciary claim shall be submitted to the jury for a determination.

III.

We next address defendants' argument that the judge erred by granting plaintiffs leave to file and serve a seventh amended complaint to assert a theory of joint enterprise, and denying defendants' motion for summary judgment seeking to dismiss that claim.

In June 2015, the judge permitted plaintiffs to file a seventh amended complaint adding an allegation for joint enterprise, and the judge subsequently denied defendants' motion seeking to summarily dismiss the seventh count. The jury ultimately found a joint enterprise existed between defendant, Jennifer and the financial defendants. Initially, the judge denied defendants' motion for JNOV on the joint enterprise issue. But in March 2017, when rendering final judgment, the judge stated that even though he was initially persuaded by the joint enterprise argument, he now concluded that the **[*29]** allocation of responsibility among the defendants should instead be guided by the principles enunciated in *Blazovic v. Andrich, 124 N.J. 90, 106-12, 590 A.2d 222 (1991)*, and *Grubbs v. Knoll, 376 N.J. Super. 420, 431, 870 A.2d 713 (App. Div. 2005)*, i.e., that liability should be imposed in proportion to fault, and not jointly and severally. The judge reasoned that even though defendant might have had some control over McGlinchey, he had no control over Jennifer, "the dominating force in the perfect storm[.]" Thus, the judge determined that defendant should not be held jointly and severally responsible for all damages and attorney's fees, given that Jennifer's undue influence was a significant factor in causing the damages.

A trial court has broad discretion to permit an amendment to pleadings, and such discretion should be liberally construed. *Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456-57, 713 A.2d 411 (1998)*. When an issue has been injected into the case even in a deficient manner, the opposing party will be deemed to have been on notice that the issue is included in the matters to be resolved. *Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140-41, 834 A.2d 1037 (App. Div. 2003)* (quoting *Teilhaber v. Greene, 320 N.J. Super. 453, 466, 727 A.2d 518 (App. Div. 1999)* ("[A] 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory."); *68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 n.3, 362 A.2d 78 (Law Div. 1976)* (noting that even when theory was not advanced in pleadings, it is properly before the court if it was fully aired at trial **[*30]** and in post-trial briefs).

A motion to amend pleadings pursuant to *Rule 4:9-1* should be freely granted by the court so long as no prejudice results to the non-moving party. *Zacharias v. Whatman PLC, 345 N.J. Super. 218, 226, 784 A.2d 741 (App. Div. 2001)*. However, when the motion is filed late and lacks apparent merit, the court generally denies it. *Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476, 483, 658 A.2d 732 (App. Div. 1995)*.

Defendants argue the judge erred in permitting plaintiffs leave to file and serve a seventh amended complaint because the judge had already denied their request that defendants be held jointly and severally liable, and the seventh amended complaint was actually a motion for reconsideration in the guise of a motion to amend the pleadings. We disagree.

Here, defendants have shown no prejudice that resulted from the subject amendment. Moreover, the judge noted that the issue of joint enterprise had already been injected into the case and had been discussed long before the court permitted the amendment to the pleadings. Further, when the judge denied plaintiffs' motion for a ruling on joint and several liability, it noted that its "[d]ecision as to [the] extent of liability, joint [and] several, has to await [the] jury verdict." This holding was not contradicted by the court's subsequent permission for plaintiffs to amend the pleadings **[*31]** to include a count for joint enterprise.

A joint enterprise is an undertaking described in *Restatement of the Law (Second) of Torts § 876* (Am. Law Inst. 1979):

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability

if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or
(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The judge erred here in setting aside the jury finding of a joint enterprise. Whether defendants conspired to revise decedent's estate planning to change her original intent to leave her assets equally to her four children, and whether defendants worked in concert to generate unnecessary fees is a question of fact for the jury. On remand, we direct the judge to allow the seventh amended pleading on the theory of joint enterprise to stand and the issue to be presented to the jury.

IV.

Plaintiffs argue in their cross-appeal that because the court should not have **[*32]** dismissed the breach of fiduciary duty claim, the jury's allocation of liability for damages was incorrect.

The jury found the financial defendants and Jennifer breached their fiduciary duties to decedent, and committed other torts, and determined that those parties were liable for seventy-five percent of the estate's losses. The jury found that defendants had committed legal malpractice and were liable for twenty-five percent of the losses to the estate, but, as noted, did not consider whether defendant had breached his fiduciary duty to decedent.

The *Comparative Negligence Act* requires a fact finder to apportion liability amongst numerous tortfeasors. *N.J.S.A. 2A:15-5.1 to -5.8*. The court should mold the verdict based on the findings of the trier of fact. *N.J.S.A. 2A:15-5.2(d)*. If a tortfeasor is found to be sixty percent responsible for damages, the injured party may recover full damages from that person. *N.J.S.A. 2A:15-5.3*.

In *Blazovic*, the issue before the Supreme Court was the apportionment of liability among a restaurant, plaintiff, and tortfeasors who had attacked plaintiff in the restaurant parking lot, where the lighting was dim because of the restaurant's negligence. *124 N.J. at 106-12 (1991)*. The Supreme Court held that the apportionment of liability should **[*33]** include the proportion of fault among intentional and negligent tortfeasors, *id. at 107*, but recognized that apportionment of fault can be precluded between two tortfeasors "when the duty of one encompassed the obligation to prevent the specific misconduct of the other." *Id. at 111*.

In *Grubbs*, we noted that a negligent attorney was responsible for the reasonable legal expenses and attorney's fees incurred by a former client in prosecuting a legal malpractice action. *376 N.J. Super. at 431*. There was no requirement of proportionality between the damages recovered and the fees awarded. *Id. at 432*. Nevertheless, the amount a plaintiff recovers in damages is a relevant factor in determining whether the fees sought are reasonable. *Ibid.* Also, legal malpractice cases are not an exception to the rule enunciated in *Blazovic* pertaining to the apportionment of fault. *Id. at 442*.

Plaintiffs argue that pursuant to *Blazovic*, there should have been no apportionment of liability because defendant's neglect of his duties was the lynchpin that caused the siphoning of decedent's estate. We disagree. Although defendant deviated from accepted standards of care, Jennifer, an intentional tortfeasor, depleted the estate. Therefore, pursuant to *Blazovic*, apportionment **[*34]** of liability was appropriate.

Plaintiffs further argue that there should have been no apportionment because all the defendants were jointly and severally liable and were involved in a joint enterprise. Alternatively, plaintiffs argue there should be a new trial on allocation. In light of our decision that the claim for breach of fiduciary duty was improperly dismissed, it is impossible to know the allocation of liability that would have been imposed by the jury, had it considered the fiduciary duty claim. Thus, the issue of allocation will be addressed at the retrial.

V.

Defendants argue that the judge erred in denying their motion for involuntary dismissal pursuant to *Rule 4:37-2(b)*, in denying their motion for judgment pursuant to *Rule 4:40-1*, and in denying their motion for JNOV pursuant to *Rule 4:40-2*. On September 1, 2016, the judge denied defendants' motion for JNOV. On July 7, 2017, nunc pro tunc to April 20, 2016, the judge denied defendants' motions for involuntary dismissal and for judgment.

The standard for granting a JNOV under *Rule 4:40-2* and a directed verdict under *Rule 4:40-1* is the same as that governing the determination of a motion for involuntary dismissal under *Rule 4:37-2(b)*, namely that the court must accept as true all the evidence **[*35]** which supports the party defending against the motion and must give all legitimate inferences to that party. We apply the same standard as the trial court. *Boyle v. Ford Motor Co., 399 N.J. Super. 18, 40, 942 A.2d 850 (App. Div. 2008)*.

Defendants argue that the judge should have dismissed the legal malpractice claim because plaintiffs did not represent decedent or the estate, and Eustler never filed a complaint on behalf of the estate, but as we already stated, Eustler authorized plaintiffs to bring the malpractice action on behalf of the estate. Therefore, defendants' argument is devoid of merit. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative. *N.J.S.A. 3B:10-20*. Here, Eustler's assignment of rights was proper and defendants were notified of it. Plaintiffs were authorized to bring the malpractice action on behalf of the estate, and the legal malpractice claim shall stand.

Defendants argue that Begley's opinion went beyond the recognized legal standard in New Jersey, and his opinion was "untenable," as discussed in *Cellucci. 277 N.J. Super. at 506*. In *Cellucci*, the court found the expert's opinion untenable when the expert opined that the lawyer was liable for an exercise of poor judgment, even though **[*36]** the lawyer had not deviated from the standard of care of an attorney. *Id. at 522*. The court held that an error in judgment does not constitute malpractice. *Ibid.*

Here, had defendant met with decedent and judged her to be competent, or not unduly influenced, that would have constituted an error in judgment, but might not have supported a claim for malpractice. Instead, defendant took no steps whatsoever to determine decedent's competency or whether she was unduly influenced. Thus, it is not his judgment that is at issue here, but his failure to comply with the standard of care of an estate attorney.

We disagree with defendants' characterization of Begley's opinion. He cited numerous RPCs that indicated defendant failed to comply with the standard of care, as well as defendant's own testimony that defendant generally complied with this standard, but failed to do so with decedent. Instead, Begley's opinion was that defendant failed to take the basic steps to insure that decedent had capacity, was not unduly influenced, understood the changes to her estate plan and that the documents were properly executed.

Defendants cite *Villanueva v. Brown, 103 F.3d 1128 (3d Cir. 1997)*, for the notion that where a notary is involved, there can be no liability **[*37]** for the attorney. But here, defendant's liability was not solely based upon the fact that he did not supervise the execution of the documents.

VI.

We next address defendant's arguments relative to the plaintiffs' legal malpractice claim. Defendants argue that because they owed no duty to plaintiffs, the judge erred in denying their motion for judgment on this issue. We disagree.

"[A]n attorney is obligated to exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise." *St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 588, 443 A.2d 1052 (1982)*. In representing a client, an attorney impliedly represents that (1) he or she possesses the requisite degree of learning, skill, and ability which others in the profession ordinarily possess; (2) he or she will use his or her best judgment in representing the client; and (3) he or she will exercise reasonable and ordinary care and diligence. *Ibid.*

To present a prima facie legal malpractice claim, a plaintiff must establish the existence of an attorney-client relationship creating a duty of care by the attorney, breach of that duty and proximate causation of damages. *Jerista v. Murray, 185 N.J. 175, 190-91, 883 A.2d 350 (2005)*. Proximate cause is established by showing that the negligent conduct was a "substantial contributing **[*38]** factor" in causing damages. *Lamb v. Barbour, 188 N.J. Super. 6, 12, 455 A.2d 1122 (App. Div. 1982)*.

An attorney owes a duty to a client identified in the retainer agreement. *RPC 1.2*. However, whether a duty exists to a third party depends on a balancing test between the attorney's duty to vigorously represent a client and the duty not to provide misleading information that others may foreseeably rely upon. *Estate of Albanese v. Lolio, 393 N.J. Super. 355, 368, 923 A.2d 325 (App. Div. 2007)*. "To determine if a duty exists, the court conducts an 'inquiry [that] involves weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.'" *Id. at 369* (alteration in original) (quoting *Barner v. Sheldon, 292 N.J. Super. 258, 261, 678 A.2d 767 (Law Div. 1995)*).

"The primary question is one of fairness." *Ibid.* Privity is not necessary between an attorney and a non-client "where the attorney had reason to foresee the specific harm which occurred." Id. at 368-69 (quoting Albright v. Burns, 206 N.J. Super. 625, 633, 503 A.2d 386 (App. Div. 1986)).

"The absence of an attorney-client relationship does not necessarily bar a legal malpractice claim by a non-client where an independent duty is owed." Fitzgerald v. Linnus, 336 N.J. Super. 458, 468, 765 A.2d 251 (App. Div. 2001). For example, a lawyer may have a duty to a beneficiary when a duty has been undertaken, or where egregious circumstances exist. Barner, 292 N.J. Super. at 266. But when "a beneficiary's interest is adversarial to the interest of the estate and contrary to the Will of the testator, then no such duty shall be imposed **[*39]** upon the attorney." *Ibid.*

*Fitzgerald* and *Barner* involved claims that the attorney was remiss in administering an estate by failing to tell the clients to disclaim part of the decedents' estates for tax purposes. Both courts agreed that post-mortem tax planning for the benefit of the executor of the estate was not included in the retainer for drafting the decedent's Will. Fitzgerald, 336 N.J. Super. at 473; Barner, 292 N.J. Super. at 260-61, 266.

Some states preclude a beneficiary of the Will from asserting a malpractice claim against the drafter of the Will based on a lack of privity between the lawyer and the non-client beneficiary. Pivnick v. Beck, 326 N.J. Super. 474, 482, 741 A.2d 655 (App. Div. 1999). Others permit malpractice claims by beneficiaries if the attorney's professional negligence resulted in a frustration of the testamentary intent expressed in the Will, or permit recovery only on negligence or third-party beneficiary theories. Id. at 482-83.

Defendants argue they had no duty to plaintiffs because they never signed a retainer agreement with them and the court should have granted summary judgment. The judge determined that defendant had a duty to plaintiffs, given that they were the beneficiaries of decedent's estate up until the point that defendant aided decedent in changing her estate plan. Giving all favorable inferences **[*40]** to plaintiffs, the judge accepted plaintiffs' argument that defendant had deviated from the standard of care by: failing to properly identify decedent as the person expressing the desire for a change to her estate plan; abrogating his responsibilities to McGlinchey to compile decedent's asset portfolio, to determine the bequests and to distribute assets; failing to review documents with decedent to make sure she understood what she was doing; and failing to evaluate decedent to make sure she was competent and not unduly influenced. The experts disagreed about whether defendant owed a duty to plaintiffs. The jury ultimately found that defendant had a duty to plaintiffs and he deviated from the accepted standards of legal practice.

Even though defendant did not sign a retainer agreement with plaintiffs, the judge properly denied summary judgment on the question of whether he had a duty to plaintiffs. A testator intends his or her attorney to protect the interests of beneficiaries of his or her estate. Restatement (Third) of The Law Governing Lawyers § 51 (Am. Law Inst. 2000). As beneficiaries of the estate, plaintiffs were entitled to rely on defendant to comply with the standards of the profession. The record supports a finding that defendant **[*41]** failed to meet the standards of the legal profession inasmuch as he never met with decedent, did not ascertain that she had capacity to change her estate plan and was not unduly influenced, was not sure that the person he spoke with on the phone was her, and did not supervise the execution of testamentary documents or explain to decedent the nature of the documents.

The test of testamentary capacity is whether a person can comprehend his or her property, the objects of his or her bounty, the meaning of the business that he [or she] is engaged in, and the relationship of these factors to the others and the manner of distribution set forth in the Will. In re Will of Liebl, 260 N.J. Super. 519, 524, 617 A.2d 266 (App. Div. 1992). Capacity should be tested on the date the Will is executed. *Ibid.* Whether an attorney has complied with a standard of care is a fact question for the jury. Cellucci, 277 N.J. Super. at 524.

Defendants cite *Barner* and *Fitzgerald* for the proposition that an attorney who drafts a Will does not owe a duty to beneficiaries of the Will. But, those cases are distinguished because they addressed whether the attorney's obligation extended to post-mortem tax planning. Fitzgerald, 336 N.J. Super. at 473; Barner, 292 N.J. Super. at 260-61, 266. Here, plaintiffs were not requesting post-mortem services, and they expected defendant to comply with the **[*42]** standards of care of an estates attorney by ascertaining that decedent had capacity to change her estate plan, was not unduly influenced and understood the changes she was making.

Defendants cite three unpublished cases to support their argument that they had no duty to plaintiffs. An unpublished opinion does not constitute precedent nor is it binding upon the appellate court. *R. 1:36-3*. "The rule does . . . permit unpublished opinions to be called to" a court's attention as secondary research. Falcon v. Am. Cyanamid, 221 N.J. Super. 252, 261 n.2, 534 A.2d 403 (App. Div. 1987) (quoting *R. 1:36-3*).

Defendants cite Torban v. Obermayer Rebmann Maxwell & Hippel, No. A-3660-05, 2007 N.J. Super. Unpub. LEXIS 2494, *5 (App. Div. June 27, 2007), where the plaintiff was the executor of his parents' Wills and he sued the scrivener for malpractice, claiming that he paid higher estate tax because of the attorney's negligence. The court held that the attorney-client relationship terminated at the point that the decedents executed their Wills, especially given that they had rejected the attorney's advice about tax planning. 2007 N.J. Super. Unpub. LEXIS 2494, at *8. *Torban* is not on point because the claimed malpractice in that case involved liability for additional estate taxes, but the defendants had refused to follow the scrivener's tax advice. *Ibid.* Here, the liability **[*43]** is based upon defendant preparing testamentary documents for a testator without complying with the standard of care for estates attorneys.

Defendants also cite to Holvenstot v. Nusbaum, No. A-2987-08 , 2010 N.J. Super. Unpub. LEXIS 2320, at *9 (App. Div. Sept. 21, 2010), where a court, in a guardianship action, determined the testator was competent to manage her affairs and the testator changed her Will to disinherit her son. After the testator's death, the son sued the attorney scrivener for malpractice. *Ibid.* The court held that the attorney's duty was not as to the potential beneficiary, but to the testator who had been adjudicated competent. 2010 N.J. Super. Unpub. LEXIS 2320, at *9. *Holvenstot* is distinguishable because here, the proofs showed decedent was not competent to change her estate plan when defendant drafted her testamentary documents.

Defendants cite to Taffaro v. Connell, No. A-4928-09, 2011 N.J. Super. Unpub. LEXIS 2512, at *7 (App. Div. Sept. 30, 2011), where shortly after being adjudicated as competent by the court, the testator disinherited her stepson. The court held that the attorney's duty was only to the testator and not the potential beneficiary when he prepared a Will "in accordance with her expressed intention." 2011 N.J. Super. Unpub. LEXIS 2512, at *7-8. Once again, this case can be distinguished because decedent here **[*44]** was not competent to express her intention as to her estate plan.

Defendants argue that their expert, Henkel, relied on *Albanese* to find no duty and that plaintiffs' expert, Begley, could cite no New Jersey case law to support his opinion that defendants owed a duty to plaintiffs. We disagree because Begley cited numerous RPCs and MRPCs and expressed opinions accepted by the jury as to the standard of care applicable to an estate attorney.

> While violations of ethical standards do not per se give rise to tortious claims, the standards set the minimum level of competency which must be displayed by all attorneys. Where an attorney fails to meet the minimum standard of competence governing the profession, such failure can be considered evidence of malpractice.
>
> [Albright, 206 N.J. Super. at 634 (citations omitted).]

Begley also cited *Rothblatt*, a federal case that applied New Jersey law and numerous cases from other jurisdictions that supported the notion that an attorney may be sued for professional malpractice by beneficiaries of an estate who have suffered a loss from the attorney's negligence even though they were not in privity with the attorney. In addition, Begley cited the Restatement (Third) of The Law Governing Lawyers § 51 (Am. Law Inst. 2000), stating that lawyers **[*45]** have a duty to a non-client when the lawyer knows that a client intended the lawyer's services to benefit a non-client. Begley described the importance of an attorney overseeing the execution of documents as evidenced by the American College of Trust and Estate Counsel Foundation (ACTEC), and he noted that it would have been relatively simple for defendant to ascertain that decedent had no capacity, and did not even know the names of her children, but defendant made no attempt to learn this information. Therefore, Begley provided a sufficient basis to support his expert opinion and defendants' argument is devoid of merit.

VII.

Next, we address the issue of counsel fees. In their appeal, defendants argue that the judge erred in not awarding fees to them since plaintiffs did not prevail on all of their claims and they only recovered $61,000 in damages. Plaintiffs argue that the fees awarded were appropriate but they should not have been allocated because defendants should have been responsible for all of the fees. Because we are remanding the matter for a new trial, the counsel fee award is reversed and the judge will consider the issue of counsel fees after the conclusion of the new trial. **[*46]** We add the following comments.

The judge considered the statutory factors and awarded fees in the amount of $534,756.19 to plaintiffs and denied fees to defendants. The judge made the following findings: the time plaintiffs' counsel spent was reasonable; the matter involved extensive discovery, motion practice and knowledge of numerous legal issues; the hourly rates plaintiffs' counsel requested, i.e., $300 per hour, were reasonable; the result obtained was the recovery of $244,000 in damages, but involved the expenditure of approximately $1.7 million in costs and fees; plaintiffs' counsel spent seventy-one percent of their time litigating against defendants who were responsible for only twenty-five percent of the damages, and only twenty-nine percent of their time litigating against Jennifer and the financial defendants; the disparity in the amount recovered relative to the fees and costs expended was the "overriding factor in reducing the fee award sought by plaintiffs." The judge also found Eustler's delegation to plaintiffs the claims of the estate supported fee shifting pursuant to *Saffer v. Willoughby, 143 N.J. 256, 260, 670 A.2d 527 (1996)*; fees should be apportioned pursuant to *Grubbs*; the award of $534,756.19 included twenty-five percent **[*47]** of the total fees and costs expended up until trial, plus one hundred percent of the time devoted to litigating against defendants after trial; plaintiffs were not entitled to a fee enhancement; defendants were not entitled to fees pursuant to the offer of judgment rule; plaintiffs' fees as of April 2016 totaled $1,743,116.

An award of counsel fees is discretionary with the court and will not be reversed absent a demonstration of manifest abuse of discretion. *In re Prob. of Alleged Will of Landsman, 319 N.J. Super. 252, 271, 725 A.2d 90 (App. Div. 1999)*. New Jersey abides by the American Rule that parties are responsible for their own attorney fees, except for specific situations enumerated in *Rule 4:42-9*. For example, an award of attorney's fees is permitted for the following types of actions: family, out of court fund, probate, mortgage foreclosure, tax certificate foreclosure, liability or indemnity policy of insurance, and as expressly provided by rules where attorney's fees are permitted by statute. *R. 4:42-9(a)*.

In *In re Estate of Vayda, 184 N.J. 115, 121, 875 A.2d 925 (2005)*, the Court discussed New Jersey's limited exceptions to the American Rule. For example, *Saffer* permitted a legal malpractice plaintiff to recover, as consequential damages, the attorney's fees incurred in prosecuting the malpractice action against a negligent attorney. *143 N.J. at 271-72*. *Packard—Bamberger & Co. v. Collier, 167 N.J. 427, 443-44, 771 A.2d 1194 (2001)*, **[*48]** extended the exception to include actions for attorney misconduct, such as breach of a fiduciary duty, so long as the attorney's breach arose from the attorney-client relationship. In *In re Estate of Lash, 169 N.J. 20, 26-27, 776 A.2d 765 (2001)*, our Supreme Court held that if a plaintiff was forced because of the wrongful conduct of a tortfeasor to institute litigation against a third party, the plaintiff can recover the fees incurred in that litigation from the tortfeasor. However, the Court specifically limited its holding to cases of attorney breach of fiduciary duty, explaining "that the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship." *Id. at 34*.

In *In re Niles Trust, 176 N.J. 282, 296-99, 823 A.2d 1 (2003)*, our Supreme Court held that when an executor or trustee commits the "pernicious tort" of undue influence, it should result in an award of all reasonable counsel fees and costs. In *DiMisa v. Acquaviva, 198 N.J. 547, 553-54, 969 A.2d 1091 (2009)*, the Court permitted an attorney fee to be recovered by a party required to litigate as a result of a third-party's tort. In *Innes v. Marzano-Lesnevich, 224 N.J. 584, 598, 136 A.3d 108 (2016)*, the court permitted fees to a non-client for an attorney's intentional breach of a fiduciary duty, reaffirming past precedent.

The first step in the analysis of an attorney's **[*49]** fee award is for the court to determine the lodestar, which is the appropriate hourly fee multiplied by the number of hours that were reasonably expended. *Rendine v. Pantzer, 141 N.J. 292, 334-35, 661 A.2d 1202 (1995)*. Hours that are "excessive, redundant, or otherwise unnecessary" should be excluded. *Id. at 335* (quoting *Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990))*. The court may also reduce the lodestar "if the level of success achieved in the litigation is limited as compared to the relief sought." *Id. at 336*. The court is required to make findings on each element of the lodestar fee. *See* *R.M. v. Supreme Court of N.J., 190 N.J. 1, 9-11, 918 A.2d 7 (2007)*.

*RPC 1.5(a)* provides that the following factors pertain to whether an attorney fee is reasonable: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; whether acceptance of the employment precluded other employment by the lawyer; the fee customarily charged in the locality for similar legal services; and the amount involved and the results obtained.

Defendants argue the award of fees is contrary to the holding in *Innes* that a counsel fee may only be awarded to a non-client in a legal malpractice matter upon a finding that the attorney intentionally breached a fiduciary duty to the non-client. *224 N.J. at 597-98*. Defendants claim they had no fiduciary duty to plaintiffs **[*50]** and the court dismissed plaintiffs' breach of fiduciary duty claims, so an attorney fee should not have been awarded.

But the court did not base its award of fees on an intentional breach of fiduciary duty as was discussed in *Innes*. Rather, the judge held that fee-shifting was permitted under *Saffer*, because plaintiffs essentially stepped into the shoes of the estate and the estate delegated its claims to plaintiffs, and as a result, plaintiffs could recover against defendants for their negligent representation of decedent.

We note that the estate never filed a complaint. Nevertheless, Eustler allowed plaintiffs to represent the estate at their sole "risk and expense" and defense counsel never objected to the estate being included as a nominal plaintiff. The judge accepted Eustler's representation that plaintiffs brought the claims on behalf of the estate. As noted, *N.J.S.A. 3B:10-20* provides that a personal representative may ratify and accept acts on behalf of the estate that were done by others. The judge was correct by determining that plaintiffs stepped into the shoes of the estate. According to *Saffer*, a negligent attorney is responsible for reasonable attorney's fees incurred by a former client **[*51]** in prosecuting a legal malpractice action. *143 N.J. at 272*. Thus, had the estate filed a complaint for legal malpractice, defendants might have been liable for fees.

Defendants claim that the judge erred in finding this case similar to *Niles* because there, the executor and the trustee were negligent, but not the attorney, and that case did not include a claim for malpractice, but rather for undue influence. The judge compared this matter to *Niles*, inasmuch as the tortfeasors in that case gained complete control over the estate both before and after the decedent's death, and, here, Jennifer was also able to accomplish this; in *Niles* a former beneficiary of the estate brought the action and that occurred here as well; and in *Niles* as well as here, tort-based damages were sought. The judge duly noted that but for the actions of plaintiffs, no one else would have filed the complaint, because the estate would have been completely depleted if it had filed the complaint. In any event the court relied on *Saffer*, and not *Niles*, in awarding fees.

Defendants distinguish *Lash* because that case involved misappropriation of assets by an estate administrator where the defendant was not an estate administrator. *169 N.J. at 26*. **[*52]** *Lash* stands for the proposition that one, who through the tort of another, is required to litigate to protect his interests, is entitled to recover reasonable attorney's fees from the tortfeasor. *Ibid.*

Defendants take issue with the amount of the court's award, given that the court awarded $534,756, but defendants' responsibility for damages was only $61,000, citing *Szczepanski v. Newcomb Med. Ctr., Inc., 141 N.J. 346, 366, 661 A.2d 1232 (1995)*, for the proposition that when fees are disproportionate to the damages, the court must carefully review the application. Defendants question numerous entries in the billings, such as those from associate Susan Carpenter, who billed at $175 and eventually $225 per hour: she appears to have billed on October 17, 2008, for drafting or researching a "new Will"; researched two cases for 3.5 hours; on three separate days in January 2009, she spent 3.75, 5.75 and 5.40 hours drafting interrogatories and modifying interrogatories responses; she spent an hour sending out interrogatories; she spent 4.25 hours researching insurance and securities issues; and in March 2009, she spent 4.2 and 1.75 hours amending a complaint.

The judge noted that attorney's fees should not be awarded for most of plaintiffs' claims against defendants, **[*53]** including fraud, conspiracy, injunctive relief and punitive damages, because those claims were not intended to make the estate whole. But because of the thousands of billing entries, the judge concluded that it could not separate out the claims where attorney's fees would be permitted. Instead, the court awarded fees pursuant to *Grubbs*, i.e., defendants were responsible for twenty-five percent of the fees expended in preparation for trial, in conformity with defendants' allocation of liability, and one-hundred percent of the fees incurred after trial because the other defendants did not participate in the post-trial litigation.

The judge stated:

> This court has great difficulty questioning the legitimacy of the entries of tasks and time presented by plaintiff[s'] counsel. There is no way this court knows to question whether counsel spent [one] hour or [two] on a particular task. From its review the itemization of tasks appear to be necessary to litigating the multiple and varied claims against defendants. The time, though high,

> appears to be within reason for the task, and the tasks appear to be necessary for the litigation. While it is clear that plaintiff[s'] counsel allowed no stone **[*54]** to be unturned (perhaps two or three times), it is no easy task for this court to take what are literally thousands of entries and second guess their veracity. This court has accepted the entries for purposes of the lodestar review.

Defendants also argue that because plaintiffs only recovered $61,000, the judge should have awarded fees to them pursuant to the offer of judgment rule. Defendants contend that they made an offer of judgment to plaintiffs for $244,000, but plaintiffs refused the offer and the jury ultimately found that defendants were only liable for damages of $61,000. According to defendants, plaintiffs were not successful in recovering from defendants seventy-five percent of their losses, or $195,200. Thus, defendants argue that they were entitled to fees under the offer of judgment rule.

The offer of judgment rule provides that when a party makes an offer to a claimant, and the claimant rejects the offer, and thereafter, the party obtains a favorable monetary judgment, the party is entitled to attorney's fees. *R. 4:58-3*. However, no attorney's fee shall be permitted when: the claimant's claim is dismissed; a no-cause verdict is returned; only nominal damages are awarded; a fee **[*55]** allowance would conflict with a statute or court rule; or an allowance would impose undue hardship. *R. 4:58-3(c)*. A plaintiff asserting multiple defendants are jointly and severally liable is not subject to the financial consequences of *Rule 4:58-3* for rejecting an offer by a single defendant to settle its share of liability. *Schettino v. Roizman Dev., Inc., 158 N.J. 476, 484, 730 A.2d 797 (1999)*.

Here, defendants' offer of judgment for $244,000 included damages, costs and fees, and plaintiffs' fees totaled more than one million dollars, significantly higher than the offer of judgment made by defendants.

In their cross-appeal, plaintiffs argue that fees were appropriate but they should not have been allocated. Plaintiffs argue that the jury found a joint enterprise existed and defendant should therefore have been liable for all of the fees. Plaintiffs also argue that the judge's findings were inadequate because their detailed description of the work performed by each attorney was not considered. Plaintiffs also argue that the judge wrongly labeled their efforts as partially successful, when in fact, they successfully obtained an award pursuant to the New Jersey Consumer Fraud Act against the financial defendants, and recovered assets in the probate proceeding. We note that plaintiffs **[*56]** recovered assets of the estate, but they also pursued claims against defendants that were unsuccessful, such as civil conspiracy and fraud.

Plaintiffs argue that the amount recovered was not disproportionate to the fees requested because the assets brought back into the estate ($256,298), plus the $61,000 (defendants' share of the liability to the estate), plus the attorney's fees award ($534,769), totaled $852,067 ($256,298 plus $61,000 plus $534,769 = $852,067), or one-half of the $1.7 million in attorney's fees requested. The attorney's fees that were already awarded by the probate court in retrieving assets to the estate was approximately $156,000. Following the new trial, the judge shall consider all of these issues anew as well as the issue of allocation of fees, which will abide the proofs and percentages of liability, if any, apportioned by the jury.

Finally, in their cross-appeal, plaintiffs argue that the judge erred when denying their motion for summary judgment with respect to the retainer agreement and argue that the agreement should have been void as a matter of law. We disagree because that is a fact question for the jury.

Plaintiffs argue that *RPC 1.0* requires informed consent **[*57]** after an attorney has explained the risks and alternatives to a proposed course of conduct. Plaintiffs further argue that the retainer agreement was signed before defendant ever spoke with decedent, and therefore, defendant could not have obtained her informed consent, making the retainer agreement null and void because decedent was incapacitated at the time it was signed on July 31, 2007. The judge correctly found that this was a fact question for the jury and the proofs at trial were necessary to make a determination.

We conclude that the remaining arguments—to the extent we have not addressed them—lack sufficient merit to warrant any further discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Reversed and remanded for a new jury trial and further proceedings consistent with this opinion. We do not retain jurisdiction.

**Table1 (*Return to related document text*)**

| | |
|---|---|
| • Decedent's residence | - $169,700 |
| • Individual Retirement Account (IRA) and cash | - $231,530.14 |
| • Life Insurance annuities | - $222,044.58 |

**Table1 (*Return to related document text*)**

End of Document

2020 WL 7134882
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Kamal DASWANI, Plaintiff,
v.
OUTBACK STEAKHOUSE, Defendant-Appellant,
and
Hartz Mountain Industries, Defendant-Respondent,
and
Carlton Group, and Marriot International, Defendants,
and
Hartz Mountain Industries, Inc., Defendant/Third-Party Plaintiff-Respondent,
v.
Outback/Metropolis-I Limited Partnership Defendant/Third-Party Defendant-Appellant
and
Canete Snow Management, Inc., Third-Party Defendant.

DOCKET NO. A-4620-18T2
|
Argued October 1, 2020
|
Decided December 7, 2020

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1876-17.

**Attorneys and Law Firms**

Norman W. Briggs argued the cause for appellant (Briggs Law Office, LLC, attorneys; Norman W. Briggs, on the briefs).

Gerard H. Hanson argued the cause for respondent Hartz Mountain Industries (Hill Wallack LLP, attorneys; Gerard H. Hanson and Todd J. Leon on the brief).

Before Judges Sumners and Mitterhoff.

**Opinion**

PER CURIAM

***1** This appeal arises from a slip-and-fall accident that occurred after plaintiff Kamal Daswani,[1] a patron of appellant Outback Steakhouse (Outback), was seriously injured while exiting the restaurant. Plaintiff fell on black ice on an adjacent sidewalk owned and maintained by Outback's landlord, respondent Hartz Mountain Industries, Inc. (Hartz). Outback appeals the trial court's October 26, 2018 orders that: (1) denied its motion for summary judgment as to liability; and (2) granted Hartz's cross-motion for indemnification.[2] The judge denied Outback's motion for reconsideration. Having reviewed the record and considering the applicable law, we affirm in part and reverse in part.

We discern the following facts from the record. On March 1, 2002, Hartz and Outback entered into a written lease agreement pursuant to which Outback leased a portion of Hartz's property to operate a restaurant in a large commercial complex located in Secaucus.

Section 6.2 of the lease agreement states:

> [Hartz] covenants and agrees to keep and maintain, or cause to be kept and maintained, the exterior of the Building ... the Building Parking Garage, and the Development Common Areas and Building Common Areas, (including but not limited to landscaping, sprinkler systems, pavement and striping of parking areas, and adequate lighting in the Common Area until at least 1:00 a.m.) in good condition and repair, in a neat and clean condition and in compliance with all applicable Legal Requirements. (Aa99; Ab4).

Section 1.1(iii) of the lease agreement defines “Building Common Areas” as:

> All interior and exterior areas in the Building and on the Land, excluding Development Common Areas, that [Hartz] makes available for the common use of all the

> tenants, invitees, and occupants of the Building. The Building Common Areas shall include, without limitation, landscaped areas, sidewalks, and covered and uncovered walkways, if any.

Section 7.1 of the lease agreement establishes Outback's insurance obligations:

> [Outback] shall maintain the following insurance: (a) commercial public liability insurance in respect of the Premises and the conduct and operation of business therein, having limits of not less than $5,000,000.00 combined single limit per occurrence for bodily injury or death to any one person and for bodily injury or death to any number of persons in any one occurrence, and for property damage ... The certificates of insurance to be delivered to [Hartz] by [Outback] shall name [Hartz] as an additional insured ...

Section 7.3 of the lease agreement sets forth mutual indemnification clauses. The first paragraph of section 7.3 states:

> [Outback] shall indemnify and hold harmless [Hartz] ... from and against any and all claims arising from or in connection with ... (b) any act, omission or negligence of [Outback] or ... (c) any accident, injury or damage whatever (unless caused solely by [Hartz's] negligence) occurring in the Premises ...

***2** The second paragraph of section 7.3 states, in part, that:

> [Hartz] shall indemnify and hold harmless [Outback] ... from and against any and all claims arising from or in connection with any willful act or negligence of [Hartz] or its agents in connection with the conduct or management of the Common Areas together with all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brough thereon, including, without limitation, reasonable attorneys' fees and expenses ....

After the parties executed the lease, Outback wished to “self-insure” rather than obtain a standard commercial public liability policy as required under the lease agreement. To resolve this issue, the parties entered into a superseding indemnification agreement on August 10, 2005.

The indemnification agreement states that “the intent of this Agreement [is] to provide [Hartz] the same coverage, as to the Self-Insured Claims, as [Hartz] would have (as an additional insured under [Outback's] Liability Insurance) as to Insured Claims.”[3] The indemnification agreement provides that “[Outback] agrees to indemnify and defend [Hartz] (or provide for the indemnification and defense of [Hartz] ) from and against any Claim which is the subject of any complaint naming both [Hartz] and [Outback] as defendants, to the extent that such Claim is a Self-Insured Claim ...”

On January 24, 2016, plaintiff was staying at the Marriott located in the same plaza as Outback. During plaintiff's stay, there was a “huge storm,” and it “had been snowing the whole weekend.” Nearly twenty-seven inches of snow had accumulated over the weekend. In the early afternoon, plaintiff left his hotel room to eat lunch at Outback. After finishing, plaintiff asked an Outback employee which door was closest to the Marriott. The worker specified the “southern” exit, at which point a different Outback employee opened that door for plaintiff. That employee did not give plaintiff any warnings as he exited the restaurant.

Upon exiting the building, plaintiff slipped and sustained a serious fracture of his right ankle. Plaintiff testified that it "just happened immediately." In plaintiff's answers to interrogatories, he states that he "took one step outside the door and slipped on black ice" which caused him to fall. Plaintiff states in his answers to interrogatories that the "weather was poor outside because of snow but [he] slipped on ice not snow in the immediate area outside of the entrance/exit" of Outback.

Prior to his fall, plaintiff did not observe what caused him to fall and did not "see anything other than a clear pathway with nothing" on it. Although there was no snow on the pathway where plaintiff fell, there was still snow on the ground. There was no observable rock salt or sand on the pathway.

***3** A police officer and EMT were dispatched to the location, and upon arrival, the police officer told plaintiff that "he saw some black ice on the pathway," which he observed was "the same color as the pathway." Plaintiff was transported, by ambulance, to Meadowlands Hospital where he underwent surgery to correct his fractured ankle.

Plaintiff filed a complaint against, among others, Outback and Hartz on May 5, 2017. At the close of discovery, Outback filed a motion for summary judgment on September 14, 2018, which sought to dismiss plaintiff's complaint for plaintiff's failure to identify the cause of his fall. Hartz filed a cross-motion for summary judgment on the same basis. In addition, Hartz sought indemnification from Outback pursuant to the terms of the August 10, 2005 indemnification agreement.

The judge denied Outback's motion for summary judgment, finding Outback owed plaintiff a duty of care because plaintiff was a business invitee and Outback was open to the public. The judge noted that, prior to plaintiff's accident, twenty-seven inches of snow had accumulated. The judge also found that the pathway was clear of snow, but no rock salt was on the surface of the ground where plaintiff fell. The judge determined that "a jury can find that based on prior weather conditions, Outback had constructive notice" of the condition that caused plaintiff's fall. The judge concluded that summary judgment was not appropriate because a reasonable fact finder could "conclude that black ice or at the very least an icy condition caused plaintiff" to slip and fall.

For similar reasons, the motion judge also denied Hartz's cross-motion for summary judgment as to liability. The judge found that the lease agreement required Hartz to maintain the exterior of the building and the building's common areas. The judge again determined that constructive notice existed based on the amount of snowfall that had occurred over the weekend.

The motion judge granted summary judgment requiring Outback to defend and indemnify Hartz against any potential verdict or settlement. The judge noted that the lease agreement was updated in 2005 when the indemnification agreement replaced the insurance provisions. The judge observed that the indemnification agreement required "Outback to indemnify and defend Hartz ... from and against any claim which is subject of any complaint naming both Hartz and Outback as defendant[s], to the extent that such claim is a self-insured claim." Consequently, the judge granted Hartz's request for indemnification and ordered Outback to defend and indemnify Hartz.

On November 15, 2018, Outback filed a motion for reconsideration. The judge found Outback was obligated to indemnify Hartz for Hartz's own negligence because the "agreement makes no mention or exclusion to Hartz's negligence. The parties could have drafted the indemnification agreement differently to exclude claims for Hartz's negligence." Ultimately, the judge denied the motion. The parties subsequently settled the underlying matter with plaintiff, and Outback reserved the right to appeal the judge's October 26, 2018 and January 16, 2019 orders.

On appeal, Outback raises the following arguments for our consideration:

POINT I

PLAINTIFF PRESENTED NO EVIDENCE TO MEET HIS BURDEN OF PROOF OF NEGLIGENCE ON EITHER OUTBACK OR HARTZ.

***4** POINT II

OUTBACK HAD NO DUTY OR RESPONSIBILITY TO MAINTAIN THE SIDEWALK WHERE PLAINTIFF FELL.

POINT III

PURSUANT TO THE 2002 LEASE AGREEMENT AND 2005 INDEMNIFICATION AGREEMENT, HARTZ IS REQUIRED TO DEFEND AND INDEMNIFY OUTBACK FOR HARTZ'S OWN NEGLIGENCE. [4]

POINT IV

THE 2002 LEASE AGREEMENT AND 2005 INDEMNIFICATION AGREEMENT DO NOT REQUIRE OUTBACK TO INDEMNIFY HARTZ FOR HARTZ'S NEGLIGENCE.

POINT V

THE [KIEFFER V. BEST BUY, 205 N.J. 213 (2011)] CASE WHICH HARTZ RELIES HEAVILY IN ITS CROSS-MOTION FOR SUMMARY JUDGMENT IS INAPPLICABLE.

We address these issues in turn.

A.

The standard of review for a grant of summary judgment is de novo. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, "summary judgment will be upheld if there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.' " Ibid (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)); see also R. 4:46-2(c). We "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). If there is no issue of fact, we give no special deference to the trial court's rulings on matters of law. Templo Fuente, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We reject Outback's argument that the motion judge erred in denying its motion for summary judgment on the issue of liability. It is well-settled that common law imposes a duty of care on a commercial tenant for injuries located on an abutting or adjacent sidewalk. See Nielsen v. Wal-Mart Store No. 2171, 429 N.J. Super. 251, 258 (App. Div. 2013) ("we have imposed sidewalk liability on not just commercial owners but also their tenants"); see also Jackson v. K-Mart Corp., 182 N.J. Super. 645, 651 (Law Div. 1981) (where an "operator of a commercial establishment enjoys the benefits of a sidewalk by permitting a substantial number of business invitees to use it as a route to and from his business premises, he must take reasonable measures to keep that sidewalk free of hazards."). [5]

***5** Here, the record reveals that immediately upon leaving the building and stepping onto the adjacent sidewalk, plaintiff slipped and fell on black ice. In plaintiff's answers to interrogatories, he states that "[he] took one step outside the door and slipped on black ice causing [him] to fall." The judge correctly found that Outback had a duty to maintain a safe premises, which included areas of ingress and egress, see Jackson, 182 N.J. Super. at 650-51, and there were issues of fact concerning whether Outback breached its duty that precluded summary judgment.

In that regard, we conclude, as did the motion judge, that there was sufficient evidence from which a reasonable jury could find that Outback had constructive notice of the dangerous condition that caused plaintiff's injuries. "A defendant has constructive notice when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.' " Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016) (quoting Parmenter v. Jarvis Drug Stores, Inc., 48 N.J. Super. 507, 510 (App. Div. 1957)). Viewing the evidence in the light most favorable to plaintiff, see Brill, 142 N.J. at 540, the inclement weather conditions over the weekend; the absence of salt or sand on the sidewalk; the fact that the black ice was observed by the responding police officer; and plaintiff's testimony that the ice was located immediately adjacent to the door through which he exited the restaurant, taken together was sufficient to raise an issue of fact that Outback knew or should have known of the ice, and that it was negligent in failing to take precautions to address the dangerous condition. See Pareja v. Princeton Int'l Props., 463 N.J. Super. 231, 252-54 (App. Div. 2020).

B.

Outback also appeals the trial court's order requiring it to indemnify and defend Hartz in connection with this matter. Outback argues that there is no clear, unequivocal language in the indemnification agreement that requires it to indemnify Hartz for Hartz's negligence. We agree.

  

When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014); see also Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011). "Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally." Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 191 (1986). "The objective in construing a contractual indemnity provision is the same as in construing any other part of a contract – it is to determine the intent of the parties." Kieffer, 205 N.J. at 223 (citing Mantilla v. NC Mall Assocs., 167 N.J. 262, 272 (2001)).

It is well-established that "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." Ramos, 103 N.J. at 191; see also Mantilla, 167 N.J. at 275 ("absent explicit contractual language to the contrary, an indemnitee who has defended against allegations of its own independent fault may not recover the costs of its defense from an indemnitor."). The Court later reaffirmed the Mantilla " 'bright line' rule requiring 'explicit language' that indemnification and defense shall include the indemnitee's own negligence." Azurak v. Corp. Prop. Inv'rs, 175 N.J. 110, 112 (2003) (quoting Azurak v. Corp. Prop. Inv'rs, 347 N.J. Super. 516, 523 (App. Div. 2002)).

***6** We conclude that the trial court erred in requiring Outback to indemnify Hartz because it relied on the fact that "the 2005 indemnification agreement makes no mention or exclusion to Hartz's negligence. The parties could have drafted the indemnification agreement differently to exclude claims for Hartz's negligence." (emphasis added). The Azurak rule, however, is one of inclusion, not exclusion, 175 N.J. at 112. The failure to include or reference Hartz's own negligence as encompassed by the indemnity provision is fatal to Hartz's claim. See Ramos, 103 N.J. at 191; see also McCabe v. Great Pacific Century Corp., 236 N.J. Super. 488, 492-93 (App. Div. 1989).

Even if we look to the indemnity provisions in the 2002 lease as evidence of Hartz's intent when it executed the 2005 indemnification agreement, no other result will follow. Section 7.3 of the lease agreement states:

> [Outback] shall indemnify and hold harmless [Hartz] ... from and against any and all claims arising from or in connection with ... (b) any act, omission or negligence of [Outback] or ... (c) any accident, injury or damage whatever (unless solely caused by [Hartz's] negligence) occurring in the Premises ...
>
> [ (emphasis added) ].

In light of Hartz's non-delegable duty as landlord to maintain the sidewalk where plaintiff was injured, see Vasquez v. Mansol Realty Associates, Inc., 280 N.J. Super. 234, 238 (App. Div. 1995), as well as its contractual obligation to keep and maintain the sidewalk in good condition, it is entirely plausible that a jury may have found Hartz entirely at fault. By settling the claim, and thereby obviating any allocation of fault by the trier of fact, there is simply no basis to require Outback to indemnify Hartz for some unknown percentage of fault.

To the extent we have not addressed any of the remaining arguments raised by the parties, we conclude that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part and reversed in part.

**All Citations**

Not Reported in Atl. Rptr., 2020 WL 7134882

## Footnotes

1 Outback and Hartz have settled plaintiff's claims against them, and plaintiff is not participating in this appeal.

2 By the same order, the trial judge also denied Hartz's cross-motion for summary judgment on the issue of liability. Hartz has not appealed that ruling.

3 The Indemnification Agreement defined "Claim" as "any claim that is covered by [Outback's] Liability Insurance, determined as if there was no Self-Insured Amount." It defined "Self-Insured Claim" as "any Claim to the extent that the Claim falls within the Self-Insured Amount." It defined "Insured Claim" as "any Claim to the extent not a Self-Insured Claim."

4 This argument was not raised below and therefore we do not address it. See Housing Auth. of Newark v. Sagner, 142 **N.J**. **Super**. 332, 337 (App. Div. 1976) ("It is well settled that, absent a compelling reason, appellate courts will decline to consider questions or issues not properly presented at the trial level when an opportunity for such a presentation is available.").

5 Outback's argument that it owed no duty to plaintiff because Hartz covenanted to maintain the common areas is without merit. See Kandrac v. Marrazzo's Mkt., 429 **N.J**. **Super**. 79, 88 (App. Div. 2012) ("[w]e recognize that the covenant in the lease regarding the landlord's obligation to maintain the common areas of the shopping center in good operating condition and repair does not relieve [defendant/tenant] of all duties to its customers regarding ingress and egress"); see also Jackson, 182 **N.J**. **Super**. at 651 ("[i]f the operator is a tenant, his liability is concurrent with that of the property owner.").

**End of Document**

2018 WL 2922988
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

JOY SYSTEMS, INC., Plaintiff–Respondent/Cross–Appellant,
v.
FIN ASSOCIATES LIMITED PARTNERSHIP, a New Jersey Limited Partnership, Defendant–Appellant/Cross–Respondent,
and
United States Land Resources, LP, a New Jersey Limited Partnership, Defendant.

DOCKET NO. A–5373–15T4
|
Argued May 22, 2018
|
Decided June 7, 2018

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L–1565–14.

**Attorneys and Law Firms**

Lawrence S. Berger argued the cause for appellant/cross-respondent (Berger & Bornstein, LLC, attorneys; Robert A. Bornstein and Gregory J. Cannon, on the briefs).

Marshall T. Kizner argued the cause for respondent/cross-appellant (Stark & Stark, attorneys; Marshall T. Kizner, of counsel and on the briefs).

Before Judges Yannotti, Mawla, and DeAlmeida.

**Opinion**

PER CURIAM

***1** In this commercial landlord-tenant dispute, defendant FIN Associates, LP (FIN) appeals from judgments entered in favor of plaintiff Joy Systems, Inc (Joy) on June 29 and August 19, 2016, following a bench trial. Joy cross-appeals from the judgments. We affirm for the reasons expressed in the thorough and comprehensive opinion of Judge Rosemary E. Ramsay.

The following facts are taken from the record. On May 18, 2006, Joy entered into a lease agreement for an industrial warehouse building located on Finderne Avenue in Bridgewater with defendants FIN and United States Land Resources, LP (USLR). The lease was prepared by defendants. Pursuant to the lease, Joy agreed to pay monthly rent of $31,875, and $82,262 as a security deposit. In April 2009, the parties entered into an amendment extending the lease term for two years to May 31, 2011.

Joy's tenancy lasted from May 18, 2006 to May 31, 2011, during which it paid FIN all of the rents due. Pursuant to the lease terms, Joy agreed to "take good care of the ... [p]remises ... and ... keep and maintain the same in good order and condition subject to normal wear and tear." The lease also provided FIN would "perform the work set forth in [e]xhibit B hereto ('[l]andlord's [w]ork')." Exhibit B enumerated eleven items FIN was required to complete or substantially complete before the commencement of the lease. Pertinent to this dispute, FIN agreed the existing overhead doors and dock levelers would "be put in good working order." FIN also agreed to build a 500 square foot lunch room. Upon termination of the lease, Joy was required to "yield ... the ... [p]remises 'broom clean' and in the condition in which [Joy] is required to maintain the same during the term pursuant to the provision of this [l]ease and ... return the ... [p]remises to [FIN] in the condition it was in as of the date [FIN] complete[d] [l]andlord's [w]ork[.]"

To fulfill its obligations, Joy employed a full-time maintenance worker to maintain the property in accordance with the terms of the lease. Additionally, Joy contracted with a maintenance services company, which performed general maintenance, including on the overhead doors and dock levelers located on the premises. In total, Joy incurred approximately $280,000 to maintain the premises during the term of the lease. This included regularly maintaining the dock levelers and overhead doors, and replacing a dock leveler that failed during the term of the lease.

On December 13, 2010, Joy provided a letter to FIN advising it was vacating the premises. On August 5, 2011, three months after Joy vacated the premises, FIN advised Joy it "was [Joy's] responsibility to put the dock levelers, etc. back into good condition before [Joy] left the building." FIN represented it would return "whatever remains" of the security deposit after Joy performed the work. Four days later, Joy advised FIN it hired a third party contractor who had returned the doors and dock levelers to good working condition. Joy provided a receipt, which evidenced its payment for completion of the work.

***2** The lease required FIN to return the security deposit at the conclusion of the lease, provided Joy had met its obligations under the lease terms. FIN did not return the security deposit. As a result, Joy filed a six-count complaint against FIN and USLR seeking monetary damages for the failure to return the security deposit. The complaint pled the following counts: breach of contract; unjust enrichment; fraud; promissory estoppel; and equitable estoppel. Monetary damages were sought against USLR based on the theory of piercing the corporate veil. [1]

FIN filed an answer and counterclaim. In the counterclaim, FIN alleged Joy breached the lease by failing to surrender the premises in broom-clean condition, failing to remove its property from the premises, and causing damage to the premises. FIN further alleged it "suffered damages in excess of [Joy's] security deposit, and therefore, was entitled to recover all costs of the aforementioned repairs, replacements, and debris removal that exceed [Joy's] security deposit."

Joy filed an initial summary judgment motion, which was denied. Prior to trial, Joy filed a second summary judgment motion seeking summary judgment on various grounds, including the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8–1 to –20. FIN's opposition did not address Joy's CFA argument. This summary judgment motion was denied as well.

At the start of trial, Joy's counsel argued his client would prove a violation of the CFA. FIN's counsel did not object. During the trial, Joy offered evidence it believed demonstrated FIN's unconscionable commercial practices in violation of the CFA. Following summations, FIN's counsel objected to the assertion of the CFA claim, and moved for a directed verdict to dismiss the CFA claim for lack of notice and evidence supporting the claim. In response, Joy's counsel argued the judge should invoke Rule 4:9–2 to amend Joy's complaint to conform to the evidence adduced at trial.

Judge Ramsay filed a comprehensive written opinion and entered judgment finding as follows: (1) FIN had breached the lease by failing to return the security deposit; (2) Joy's complaint was amended to conform to the evidence adduced at trial to include a CFA claim; (3) as a result, Joy was entitled to recover damages resulting from the CFA violation in the amount of $52,196.04, plus prejudgment interest on the security deposit from August 15, 2011, to the date of the judgment, in the amount of $9305.90, for a total of $61,501.94; (4) Joy was entitled to treble damages under the CFA totaling $184,505.84. The total amount awarded Joy was $266,767.84. This appeal followed.

I.

"Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice,' and are upheld wherever they are 'supported by adequate, substantial and credible evidence.' " Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (quoting Rova Farms Resort v. Inv'rs Ins. Co., 65 N.J. 474, 483–84 (1974) ). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411–12 (1998) ). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995).

***3** "The decision to grant or deny ... a motion [to amend a pleading] lies within the [trial] court's sound discretion." Balthazar v. Atlantic City Med. Ctr., 358 N.J. Super. 13, 27 (App. Div. 2003). "While motions for leave to amend pleadings are to be liberally granted, they nonetheless are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made." Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994).

"The exercise of this discretion will be interfered with by an appellate tribunal only when the action of the trial court constitutes a clear abuse of that discretion." Salitan v. Magnus, 28 N.J. 20, 26 (1958). A trial court decision will only constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " United States v. Scurry, 193 N.J. 492, 504 (2008) (alterations in original) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) ).

On appeal, FIN argues it was deprived of due process when the judge permitted Joy to amend its pleadings pursuant to Rule 4:9–2, and adjudicated Joy's CFA claim. FIN asserts the CFA claim was not pled and it had no notice Joy would pursue it. FIN argues there was no opportunity to contest application of the CFA before or after trial. FIN further argues the judge should not have awarded treble damages where Joy suffered no ascertainable losses as defined by the CFA. FIN also asserts the judge's award of interest was error because the lease forbade it. FIN argues the damage award was erroneous because it was calculated utilizing the damages FIN asserted in its counterclaim. We address these arguments in turn.

II.

Rule 4:9–2 states:

> When issues not raised by the pleadings and pretrial order are tried ... without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings .... Such amendment of the pleadings ... as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits.
>
> [ (emphasis added.) ]

The Supreme Court has stated the "broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result." Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998) (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:9–1 (1998) ). The opposing party is deemed to be on notice of a claim that has not been formally pled if the issue has been raised in the case prior to trial, even if in a technically deficient manner. See Cuesta v. Classic Wheels, Inc., 358 N.J. Super. 512, 517–18 (App. Div. 2003); see also Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140 (App. Div. 2003). The rule should be followed when a legal theory not advanced in the pleadings was fully aired at trial and in post-trial briefs. 68th Street Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976).

***4** Judge Ramsay stated:

> Here, neither party identified the CFA in their pretrial submissions. Nor did either party raise any issue regarding the pleading requirements of the CFA or the absence of a claim under the CFA at the commencement of the trial. Instead, [FIN] waited until the end of the trial to seek dismissal of the claim under the CFA for failure to assert the claim in a pleading and/or failure to present evidence demonstrating a consumer fraud.
>
> Although [FIN] objected to the CFA claim, it did not do so in a timely fashion. The objection was raised at the close of the trial, not in advance of the trial. Thus, the issue was tried without objection because [FIN] did not object to the introduction of evidence or testimony bearing on the issue....
>
> [Joy] asserts that [FIN] w[as] not prejudiced because this case had been litigated as a consumer fraud action from its inception. Prior to trial, the parties moved and/or cross moved for summary judgment. The briefs filed in connection with those motions explicitly presented arguments referring to [Joy's] claim as a consumer fraud claim. The judge who decided the motion stated, the claims included a claim under the [CFA.] Although [FIN] denied any basis for [Joy's CFA] claim, [FIN] did not object to [Joy's] pursuit of the claim based on the failure to plead the claim specifically in the complaint. [FIN] simply asserted that the claim had no merit.
>
> Under these circumstances, [FIN] will not be prejudiced as a result of any amendment of the pleadings to conform to the evidence. [FIN] knew that [Joy] purported to seek relief under the [CFA] when the summary judgment motions were filed, if not earlier. [FIN] did not seek dismissal of the claim at that time or identify any prejudice arising from the late identification of the claim. [FIN] determined that [Joy] would be unable to satisfy its burden of proof on a [CFA] claim and defended the claim on the merits. Therefore, [Joy's] motion to amend the pleadings to conform to the evidence is granted.

We agree FIN had adequate notice of the CFA claim. As the judge noted, FIN failed to object to the CFA claim in a timely fashion. Moreover, FIN was not deprived of due process because it could contest the facts Joy adduced to prove its claim before, during, and after the trial. Thus, FIN was not prejudiced as a result of the judge's amendment of the pleadings to conform to the evidence, and the judge did not abuse her discretion under Rule 4:9–2.

III.

FIN contends the judge erred in finding a violation of the CFA. Specifically, FIN contends it was an error to conclude the filing of FIN's counterclaim against Joy constituted an unconscionable commercial practice under the CFA.

The CFA prohibits:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> ***5** [N.J.S.A. 56:8–2.]

"The standard of conduct that the term 'unconscionable' implies is lack of 'good faith, honesty in fact and observance of fair dealing.' " Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994) (quoting Kugler v. Romain, 58 N.J. 522, 544 (1971) ). Omissions consist of "concealment, suppression, or omission of any material fact ...." Id. at 19 (quoting N.J.S.A. 56:8–2). Consumer fraud by omission necessarily includes that a defendant's act must be "knowing." Ibid. "[T]he [CFA] is remedial legislation, which 'should be construed liberally in favor of consumers.' " Allen v. V & A Bros., Inc., 208 N.J. 114, 128 (2011) (quoting Cox, 138 N.J. at 15).

As Judge Ramsay noted:

> There are three possible bases for responsibility under the [CFA.] The [CFA] itself declares two general categories of conduct as unlawful. The first relates to that part of the Act which states that "any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation" is an unlawful practice. These are considered affirmative acts. The second general category of unlawful conduct is referred to as acts of omission. Such conduct involves the "knowing concealment, suppression or omission of any material fact." The third basis for responsibility under the [CFA] is found in either specific-situation statutes or administrative regulations enacted to interpret the [CFA] itself. Such statutes and regulations define specific conduct that is prohibited by law.

Judge Ramsay concluded:

> Here, [FIN] drafted the [l]ease, which provided the security deposit "shall be returned ... provided [Joy] ... carried out all of the terms, covenants, and conditions, on its part to be performed," including returning the premises "in good order and condition subject to normal wear and tear." [FIN] also expressly agreed to put the existing overhead doors and dock-levelers "in good working order." ...
>
> [FIN's] subsequent performance or lack thereof relating to its obligations under the [l]ease ... reflected unconscionable commercial practices. [FIN] failed to respond to [Joy's] request to satisfy [FIN's] obligations to put the existing overhead doors and dock-levelers in good working order. Nonetheless, even though [FIN] did not possess any evidence supporting the position that [it] had satisfied that obligation, i.e., no witnesses possessed first-hand knowledge of the work done on the doors and dock-levelers to satisfy the requirements of [the lease] and no documents were produced to demonstrate the work had been done during [Joy's] occupancy or for its benefit, [FIN] withheld the security deposit at the expiration of the term of the [l]ease.
>
> When [Joy] requested return of the security deposit, [FIN] misrepresented that the reason for the delay related to [FIN's] cash flow issues. When pressed, [FIN] stated the security deposit was not returned because [Joy] allegedly failed to "put the dock-levelers back into good condition." After [Joy] provided documents establishing that Martin Overhead Door had performed work on the doors and dock-levelers, [FIN] still failed to return the security deposit.

***6** At or about the same time, [FIN] leased the premises to Brook, which had insisted on the repair and/or replacement of the existing overhead doors and dock-levelers. Brook referred [FIN] to New Jersey Door Works, which was hired to do the work for Brook's benefit. Although [FIN] knew [it] could not establish the condition of the premises that had been provided to [Joy], [FIN] demanded by way of counterclaim the costs and expenses of the repairs made to satisfy the demands of the subsequent tenant. The demand, however, was not limited to the cost of repair of the overhead doors and dock-levelers. [FIN] also demanded payment of demolition and repair costs to remove the lunch room and offices even though the [l]ease did not impose the obligation for removal of those improvements on [Joy]. [FIN] did not simply breach the terms of the [l]ease. [FIN's] evasive and self-serving conduct relating to their performance under the lease evidenced a complete lack of fair dealing and bad faith.

Given these aggravating circumstances, [Joy] has proven by a preponderance of the evidence that [FIN] engaged in unconscionable commercial practices in violation of the CFA. To recover, however, [Joy] must establish more than the unlawful conduct of [FIN]. [Joy] must also demonstrate an ascertainable loss on the part of [Joy]; and a causal relationship between [FIN'S] unlawful conduct and [Joy's] ascertainable loss. N.J. Citizen Action v. Schering–Plough Corp., 367 N.J. Super. 8, 12–13 (App. Div. 2003).

[Joy's] ascertainable loss includes the amount of the interest on the security deposit from August 15, 2011, through the present. In addition, in Cox, the New Jersey Supreme Court concluded that "an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the [CFA], because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the [CFA]." Cox, 138 N.J. at 23.

Here, [FIN] asserted an improper debt against [Joy] when [FIN] sought as damages the costs and expenses associated with repairing and/or improving the premises to satisfy [FIN's] obligation to a subsequent tenant. Unlike Cox, in this action, these losses occurred after [FIN] had engaged in the conduct that violated the [CFA]. [FIN] already had failed to perform their obligations under the [l]ease with respect to putting the existing overhead doors and dock-levelers in good working order, had failed to communicate effectively the work that [Joy] needed to complete at the expiration of the [l]ease, had agreed to repair and/or replace doors and dock-levelers and demolish the lunch room and offices for the benefit of a subsequent tenant, and had misled [Joy] regarding the reason for not returning the security deposit. When plaintiff refused to succumb to [FIN's] evasive tactics, [FIN] asserted a debt arising out of their unconscionable commercial practices, i.e., the amounts incurred to satisfy [FIN's] obligations to a subsequent tenant.

We agree with Judge Ramsay's determination FIN asserted an improper debt when it pursued its counterclaim, which constituted an unconscionable commercial practice in violation of the CFA. Additionally, we agree with the judge that Joy's ascertainable loss derived from FIN's unconscionable commercial practice of fraudulently retaining the security deposit and asserting a debt against Joy for a sum greater than the security deposit.

IV.

FIN contends the judge's award of interest as part of the judgment violated the lease, which expressly excluded interest payable on the security deposit. Thus, FIN contends there could not have been an ascertainable loss based on interest on the security deposit.

"In general, we review awards of interest and the calculation of those awards under an abuse of discretion standard." Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 91 (App. Div. 2013) (citing Baker v. Nat'l State Bank, 353 N.J. Super. 145, 177 (App. Div. 2002) ). "A reviewing court must not disturb an award of prejudgment interest unless the trial judge's decision represents 'a manifest denial of justice.' " Id. at 91–92 (quoting Musto v. Vidas, 333 N.J. Super. 52, 74 (App. Div. 2000) ).

***7** Judge Ramsay concluded:

[FIN] asserted that [Joy] owed (1) $36,020.74 for services relating to the repair and replacement of the overhead doors and dock-levelers, and (2) $16,175.30 for the demolition/ renovation of the lunch room and offices, for a total of $52,196.04.

Thus, [Joy] is entitled to recover return of the security deposit in the amount of $82,262.00 as damages for [FIN's]

> breach of the [l]ease. In addition, [Joy] is entitled to recover damages resulting from [FIN's] violation of the [CFA] in the amount of $52,196.04 plus the interest on the security deposit from August 15, 2011, to the present, i.e., $9,305.90, for a total of $61,501.94. Although both the breach of contract and [CFA] claim justify recovery of the interest on the security deposit, [Joy] is limited to a single recovery for that loss.
>
> With respect to the losses arising from the violation of the [CFA], N.J.S.A. 56:8–19 requires that the amount of those losses must be trebled. Thus, damages for the violation of the [CFA] total $184,505.84. In addition, [Joy] is entitled to recover reasonable attorneys' fees....
>
> ....
>
> For [FIN's] breach of contract, [Joy] is entitled to recover the security deposit in the amount of $82,262.00; for [FIN's] violation of the [CFA], [Joy] is entitled to recover $184,505.84, for a total judgment in the amount of $266,767.84, subject to [Joy's] application for attorneys' fees and costs.
>
> [ (emphasis added).]

As we noted, the lease stated "[t]he [s]ecurity [d]eposit shall be returned to [Joy] without interest, after the time fixed as the expiration of the term herein, ... provided [Joy] has fully, faithfully and timely carried out all of the terms, covenants and conditions on its part to be performed." This provision of the lease contemplated the return of the security deposit without interest in the normal course at the conclusion of the lease. We do not read this provision as depriving Joy of interest as part of a CFA damage award where the security deposit was wrongfully withheld. For these reasons, it was not an abuse of discretion for the trial judge to award interest on the wrongfully withheld security deposit as an ascertainable loss, and treble the amount pursuant to the CFA.

V.

Finally, in its cross-appeal Joy argues if we reverse the CFA award, we should address Joy's claim for punitive damages, which the judge denied because she determined treble damages under the CFA were a form of punitive damages. We do not reach this argument because we have upheld Judge Ramsay's determination.

Affirmed.

**All Citations**

Not Reported in Atl. Rptr., 2018 WL 2922988

## Footnotes

1 The judge dismissed the claims against USLR without prejudice. This aspect of the judgment has not been appealed.

2021 WL 1605989
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Shawna MORGAN, Plaintiff-Respondent,
v.
Willie MAXWELL II, a/k/a "Fetty Wap,"
Fetty Wap Touring Inc., Defendants,
and
Goodfella4
*l*
ife Ent., d/b/a RGF Productions,
Inc.,[1] Defendant-Appellant.

DOCKET NO. A-3157-19
|
Submitted February 24, 2021
|
Decided April 26, 2021

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5834-17.

**Attorneys and Law Firms**

Cariddi & Garcia, attorneys for appellant (Anthony J. Cariddi, on the briefs).

Hillel I. Parness, attorney for respondent.

Before Judges Ostrer, Vernoia, and Enright.

**Opinion**

PER CURIAM

***1** Goodfella4*l*ife Ent., d/b/a RGF Productions, Inc. (RGF) appeals from the February 26, 2020 judgment entered in favor of plaintiff Shawna Morgan in the sum of $1,167,065.63, representing an award of $980,000 for RGF's alleged defamation of plaintiff, breach of contract damages totaling $66,294.42, and pre-judgment interest in the sum of $120,771.21. In the underlying action, defendants Willie Maxwell, II, a/k/a "Fetty Wap," a musical artist, and Fetty Wap Touring, Inc. (FWTI), a touring company, settled with plaintiff prior to trial and are not involved in this appeal.[2] We affirm the jury verdict on liability, vacate the damage award, and remand the matter for a new trial on damages.

We glean the following facts based on evidence produced during the five-day jury trial. In June 2014, plaintiff became an administrative assistant for Fetty Wap, FWTI, and RGF, a record label. Her duties included answering emails and phones, as well as booking tours and shows for Fetty Wap, although plaintiff did not have a written employment agreement and was not a licensed booking agent.

According to Frank Robinson, RGF's co-owner, plaintiff was initially hired to assist him in answering phone calls and emails for RGF. Over time, plaintiff's duties at RGF expanded. She began to handle "all the day-to-day operations for the company," was "a liaison [for the publicists]," and traveled with the team on performance dates. Eventually, Fetty Wap and Robinson referred to plaintiff as the manager.[3]

At times, plaintiff used her personal American Express (Amex) card for business-related travel, accommodations, and other expenses. Robinson agreed to reimburse her for such expenses. According to plaintiff, Robinson also initially agreed to pay her a ten percent commission on any shows she booked for Fetty Wap. After RGF partnered with ICM booking agency, Robinson reduced plaintiff's commission rate to five percent. In October 2016, Robinson informed plaintiff he intended to change plaintiff's pay structure again, so she would receive a flat fee of $2500 per show.

Plaintiff testified that starting in late 2016 and continuing into 2017, her reimbursements and commission payments ceased. She was terminated from RGF in April 2017, and from April to August 2017, she attempted to collect her unreimbursed expenses and unpaid commissions from RGF and Fetty Wap.

On August 6, 2017, Thirty Mile Zone (TMZ), a popular entertainment gossip website, published an article entitled, in part, "Fetty Wap Fires Assistant for Allegedly Stealing $250K." The article stated:

> [s]ources close to Fetty's RGF Productions tell TMZ they fired Shawna Morgan Friday for falsely representing herself as his booking agent and manager. RGF claims Morgan charged additional fees to venues that booked Fetty. They believe

  

> she collected real booking fees on behalf of RGF and then e-mailed on the side pretending to be Fetty's manager. They claim she would request added fees, or as they say in the biz, double-dip. RGF also believes she took off top by lying about fees and pocketing the extra dough.

***2** Two days later, RGF published a press release on www.rapfest.com, reflecting the following statement:

> Shawna Morgan is not a licensed booking agent. Here at RGF Production she was to perform strictly in an administrative capacity as an assistant to the booking team. However, she falsely represented herself as the booking agent and charged outside fees for her services. As a result, she received two fees, one directly from RGF, as well as a fee directly from the clients, an activity known as double-dipping.
>
> Miss Morgan repeatedly undermined the chain of command by withholding information to the decision-makers within the firm, fraudulently misrepresenting herself as upper management. Miss Morgan was able to acquire additional business for personal gain.
>
> As such, we would like to offer our sincerest apologies ... Shawna, Sha Morgan, performing in a capacity that was in direct violation of both law and best business practices, misrepresented her position to our trusted business relationships.

On August 28, 2017, plaintiff sued RGF, Fetty Wap and FWTI. She sought liquidated damages in the sum of $66,294.42, representing compensation for work performed and reimbursement for expenses. Additionally, she requested unspecified damages for defamation. She did not seek punitive damages in her complaint.

On December 2, 2019, the parties appeared for trial. That same day, plaintiff settled with Fetty Wap and FWTI, but RGF, through Robinson, withdrew its settlement offer, discharged its counsel and confirmed it wished to proceed to trial. The trial was rescheduled to February 10, 2020, at which time successor counsel appeared.

During the trial, plaintiff testified about her payment structure at RGF, how Robinson initially instructed her to charge a ten percent commission, or "booking fee on top" of the fee set forth in a performance contract. She also recalled Robinson was aware promoters would pay her commission fee directly into her Wells Fargo account, and confirmed Robinson "was the one that said ... when you're going to book the show, put your fee on top .... Those were his ... words." Additionally, plaintiff affirmed that in other instances, she received a five percent commission on "the total show." Sometime in 2016, another change was made to her pay arrangement, and she testified RGF informed her she would receive a flat fee of $2500 per show.

Further, plaintiff testified there came a point in time when she started "advancing expenses on behalf of others" at RGF because "neither Fetty nor Frank Robinson nor his partner ... had credit of any sort." She specified Robinson asked her to put business-related charges on her Amex card. Further, she explained

> it was easier for this group and the team to move around and be able to do a lot of things, because ... I had my Amex card ... and I was asked to ... put the charges, the travel or whatever the case was, on my card, and I was reassured that I would be reimbursed before ... the bill was due, so I could ... pay my bill.

Fetty Wap's attorney, Navarro Gray, testified he tried to assist plaintiff in recovering business-related expenses arising from her employment with RGF. However, he was informed by Fetty Wap that plaintiff was "overpaid previously." Moreover, Gray testified that following plaintiff's termination, "everybody started looking into things," and they "came up with the conclusion that Ms. Morgan was taking commissions from bookings and then also getting paid a commission from the Fetty Wap Touring account." Asked on direct examination if "anyone ever show[ed him] proof of double dipping at that time," Gray answered, "[a]t that time, no."

***3** In support of her defamation claim, plaintiff introduced the deposition testimony of Fetty Wap and Karen Civil, an entertainment and marketing professional and one of the founders of the Marathon Agency. According to Fetty Wap's deposition testimony, the TMZ article "was posted through

RGF" and to his knowledge, "RGF gave the information to TMZ." When Civil was deposed, she testified that before the TMZ article was published, Marathon Agency wanted "to form a business relationship with" plaintiff. Civil retracted her offer to work with plaintiff after she learned plaintiff "had been publicly accused of theft and other wrongdoing by artist Fetty Wap."

Robinson testified about plaintiff's involvement with RGF and what led to her being fired. Robinson recalled plaintiff negotiated a booking for a show called "Shaggfest." According to his testimony, after plaintiff was terminated from RGF, he learned from FWTI's tour manager that plaintiff told a Shaggfest representative there would be additional fees for Fetty Wap's participation in the show. At that point, Robinson concluded even though plaintiff was on "salary," she had "reach[ed] behind" and had "ask[ed] for a commission after [he] discussed with ... [her] there is no more commissions, ... she's going to salary." On cross-examination, when asked whether Robinson had "any document" to prove plaintiff told Shaggfest, "you cannot put on this show unless I get my commission," he answered "No, I do not have a document saying that."

Robinson also testified that before plaintiff was fired in April 2017, plaintiff and Fetty Wap argued over fees to be charged for another show. Fetty Wap instructed Robinson and his friend, "Big Worm," to tell plaintiff "to put that on the calendar" and the fee for the show would be $30,000. However, Fetty Wap later discovered plaintiff told Big Worm that RGF wanted a fee of $45,000. Robinson testified when Fetty Wap learned of this discrepancy in fees, plaintiff "and Fetty, they got into it, and he said she [is] fired .... So [Robinson] released her."

Regarding the TMZ article released after plaintiff's termination, Robinson denied authorizing anyone at RGF to speak with TMZ about plaintiff, and he stated he did not speak to TMZ before the August 6, 2017 article was published. But on cross-examination, he acknowledged RGF issued the August 8, 2017 press release. Robinson further conceded he had someone else type up the press release while he "stood right there," and then he approved it for dissemination over the internet. Robinson testified, "[a]ll I know is it got sent out and it got ate up by the Internet and it went everywhere."

At the conclusion of the trial, plaintiff's counsel informed jurors during his summation:

> you are allowed to award compensatory damage for emotional suffering. In addition to actual damages, you can award emotional damages as compensation.
>
> ....
>
> You're empowered to award Ms. Morgan damages for emotional suffering and <u>I implore you to think about how you would feel in her position and to be generous in assigning a dollar value to that pain and suffering. If it's easier, think about how you would feel if it happened to someone that you care about. Think about someone that you care about and put them in Ms. Morgan's position and think about what it would take to bring that person back.</u>
>
> ....
>
> Finally, we get to punitive damages .... Punitive damages are awarded ... as the name implies, to punish the wrongdoer for particularly malicious and bad behavior. We have shown such malicious and bad behavior here.
>
> ....
>
> For whatever reason, RGF and Frank Robinson wanted to destroy Shawna Morgan. RGF acted with intense malice and, under the circumstances, you can award punitive damages as you see fit. You have significant discretion and a big responsibility. <u>If you believe that punitive damages are in order, you should think about what dollar figure it would take to deter RGF and people like Mr. Robinson from acting this way in the future.</u>
>
> ***4** It's been our suggestion from the start that some multiple of $250,000, the amount she was accused of stealing, is a very good place to start. <u>I ask you to put yourselves again in Ms. Morgan's shoes and think about what dollar amount would be an appropriate punishment for someone who has done something like this to you or to someone you care about.</u>
>
> [Emphasis added.]

Once plaintiff's counsel finished his summation, defendant's attorney promptly moved for a mistrial. He argued plaintiff's attorney violated the "golden rule doctrine" by asking jurors to "put [them]selves ... in Ms. Morgan's shoes." In response to defendant's application, the court succinctly stated without explanation, "[m]otion is denied."

We note defendant raised no objection to plaintiff's opening or closing remarks insofar as they referenced plaintiff's entitlement to punitive damages. Nevertheless, the judge eliminated all instructions proposed by plaintiff's counsel regarding the various types of damages a jury could award. Additionally, the judge made no mention of punitive damages when he charged the jury. Instead, when he instructed the jury about damages, the judge stated, in part:

> The plaintiff must prove that the damages were the natural and probable consequences of the defendant's breach and/or defamation. Damages may not be based on conjecture or speculation.
>
> I charge you, ladies and gentlemen, that the argument of counsel with references to calculation of damages on a time-unit basis is argument only and is not to be considered by you as evidence. Counsel's statements are a suggestion to you as to how you might determine damages, breach, and/or defamation. You are free to accept or reject this argument as you deem appropriate.
>
> I remind you that you are to make a determination on the amount of damages based on evidence presented and the instructions I have given you on damages.
>
> ....
>
> Your oath as jurors requires you to decide this case fairly and impartially, without sympathy, passion, bias or prejudice. You are to decide this case based solely upon the evidence that you find believable and in accordance with the rules of law that I give you.

After deliberating, the jurors completed a verdict sheet confirming they found: (1) a contract existed between plaintiff and RGF; (2) the contract provided for reimbursement fees and compensation for work performed by the plaintiff; (3) RGF breached the parties' contract; (4) plaintiff was entitled to breach of contract damages in the sum of $66,294.42; (5) defendant defamed plaintiff; (6) plaintiff was entitled to defamation damages of $980,000; and (7) plaintiff was entitled to injunctive relief.

On appeal, defendant raises the following argument for our consideration:

POINT I

> TRIAL COURT ERRED BY FAILING TO GRANT DEFENSE MOTION FOR MISTRIAL BASED UPON PLAINTIFF'S COUNSEL'S COMMENTS [ ] MADE DURING SUMMATION WHICH EXCEEDED THE BOUNDS OF PERMISSIBLE ADVOCACY AND WERE PREJUDICIALLY IMPROPER THEREBY CONSTITUTING A “MISCARRIAGE OF JUSTICE.” R. 2:10-1; R. 4:49-1(a). THIS COURT MUST REMAND FOR BOTH LIABILITY AND DAMAGES. OBJECTION APPEARS ON THE RECORD[.]

Defendant contends that plaintiff's counsel improperly: (1) invoked the golden rule and asked jurors to consider damages “as if they were in the plaintiff's position”; (2) requested punitive damages; and (3) asked the jury to “send a message” in calculating an award for the plaintiff.

***5** Plaintiff urges us not to consider defendant's two latter issues, claiming RGF's “failure to disclose that two out of three issues were not raised below” constitutes a violation of Rule 2:6-2(a)(6). [4]

As a threshold matter, we note that the purpose of an appellate brief is to provide the court “an orderly and considered presentation of the matter on appeal so that the court ‘may have before it such parts of the record and such legal authorities as will be of help in arriving at a proper determination.’ ” Hayling v. Hayling, 197 N.J. Super. 484, 488-89 (App. Div. 1984) (quoting Abel v. Elizabeth Bd. of Works, 63 N.J. Super. 500, 509 (App. Div. 1960)). It is the responsibility of the parties to provide the court with their arguments, the legal authority to support them and then to cite to the portions of the record in support. SeeSpinks v. Twp. of Clinton, 402 N.J. Super. 465, 474 (App. Div. 2008). To the extent defendant failed to comply with Rule 2:6-2(a)(6), we overlook this procedural deficiency, in part, and address the merits of defendant's appeal, because: (1) defendant's argument is framed in general terms to encompass the issues it raises; (2) the issue of punitive damages needs to be addressed by virtue of plaintiff's failure to seek punitive damages in her complaint; and (3) the issue of punitive damages further was implicated when the trial court eliminated any reference to such damages in its jury charge.

Additionally, we conclude we need not discuss at length the issue of whether plaintiff's counsel indirectly asked jurors to “send a message” to defendant, as we are constrained to vacate the damage award on other grounds. Suffice it to say, even if plaintiff's counsel did not expressly implore the jury to “send a message,” the tone of his summation advanced the same message. In that regard, we remind the parties that “the use of the 'sending a message' argument is inappropriate in a civil case where the only issue is compensatory damages." Jackowitz v. Lang, 408 N.J. Super. 495, 509 (App. Div. 2009).

We begin our review of RGF's argument with the understanding counsel has "broad latitude" to make closing arguments to the jury. Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 32 (App. Div. 1998). But it is "improper to construct a summation that appeals to the emotions and sympathy of the jury." State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005). Here, RGF contends plaintiff's counsel attempted to elicit sympathy from the jury by invoking the golden rule during his summation, asking jurors to put themselves in plaintiff's shoes, rather than neutrally assess the issues in the case. We agree.

***6** The golden rule is based on the principle that "you should do unto others as you would wish them to do unto you." Geler v. Akawie, 358 N.J. Super. 437, 464 (App. Div. 2003). It is improper for an attorney to invoke this rule because it tends to encourage "the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Id. at 464-65 (quoting Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), aff'd on other grounds, 465 U.S. 752 (1984)). A golden rule argument suggests to jurors that they should "adopt what they would want as compensation for injury, pain and suffering." Id. at 464.

Governed by these principles, we are satisfied plaintiff's counsel improperly referenced the golden rule during summation. First, he told jurors, "[y]ou're empowered to award Ms. Morgan damages for emotional suffering and I implore you to think about how you would feel in her position and to be generous in assigning a dollar value to that pain and suffering." He added, "[i]f it's easier, think about how you would feel if it happened to someone that you care about. Think about someone that you care about and put them in Ms. Morgan's position and think about what it would take to bring that person back." Moreover, he stated, "I ask you to put yourselves again in Ms. Morgan's shoes and think about what dollar amount would be an appropriate punishment for someone who has done something like this to you or to someone you care about."

RGF's counsel promptly objected to these improper comments at the conclusion of plaintiff's summation. Nonetheless, the trial court not only summarily denied defendant's motion for a mistrial, but failed to give jurors a curative instruction. We are convinced the invocation of the golden rule by plaintiff's counsel warranted the judge providing a clear, cautionary instruction to mitigate the prejudicial effect on the jurors, notwithstanding the failure of defendant's counsel to seek such an instruction. SeePaxton v. Misiuk, 54 N.J. Super. 15, 24 (App. Div. 1959) ("The court is bound to make ... corrective instructions to the jury so clear, explicit, and emphatic as to efface, if possible, any prejudicial or injurious influence likely to have resulted from the misconduct of counsel."). Since the trial judge directed jurors to deliberate free from bias and sympathy but gave no explicit curative instruction to ameliorate counsel's repeated references to the golden rule, we cannot conclude the jury's award of damages did not flow from plaintiff's prejudicial appeal. Thus, we reverse the award and remand for a new trial on damages.

Regarding the issue of punitive damages, we are mindful a punitive damage award is governed by the statutory provisions of the Punitive Damages Act (Act), N.J.S.A. 2A:15-5.9 to -5.17. We also note "punitive or exemplary damages may be awarded in a defamation case," but "all elements of the ... Act must be satisfied in order to sustain a punitive damages award." W.J.A. v. D.A., 210 N.J. 229, 241 (2012). Further, "the Act does not permit counsel to urge the jury to increase a punitive damage award in order to enhance the general deterrence of others." Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 N.J. Super. 557, 569 (App. Div. 2007).

The Act provides, in part:

> a. Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.
>
> ***7** b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

  

(1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;

(2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

(3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the defendant.

[N.J.S.A. 2A:15-5.12.]

Importantly, "[a]n award of punitive damages must be specifically prayed for in the complaint." N.J.S.A. 2A:15-5.11. Here, plaintiff did not seek punitive damages in her complaint. Thus, the jury would not have been authorized to award same, irrespective of whether RGF's counsel objected to his adversary's entreaties for punitive damages during the proceedings. SeeIn re Est. of Stockdale, 196 N.J. 275, 308 (2008); see alsoDepalma v. Building Inspection Underwriters, 350 N.J. Super. 195, 223-24 (2002). However, because the verdict sheet did not specify the type of damages the jury could award to plaintiff, the judge did not instruct the jury to disregard comments made by plaintiff's counsel regarding punitive damages, nor instruct jurors they were prohibited from awarding punitive damages, we have no confidence that repeated requests for punitive damages from plaintiff's counsel had no effect on the jury's decision to award damages. Thus, the award cannot stand.

Finally, RGF argues the trial court erred when denying its motion for a new trial. This argument is not persuasive.

We will not reverse a trial court's decision to deny a motion for a new trial "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. "That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility." Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)); see alsoCarrino v. Novotny, 78 N.J. 355, 360 (1979).

A jury's "verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.' " Hayes v. Delamotte, 231 N.J. 373, 385-86 (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506 (2011)).

"To promote economy in the administration of justice, we ... endeavor to avoid a retrial that would further burden the party most aggrieved .... A more surgically crafted form of relief may ... fairly and efficiently resolv[e] the particular dispute." Goldfarb v. Solimine, 460 N.J. Super. 22, 35-36 (App. Div. 2019), aff'd as modified, 245 N.J. 326 (2021). Governed by these standards, we decline to conclude the trial court erred when denying RGF's request for a mistrial. Moreover, we are satisfied that when canvassing the record, there was sufficient evidence to support the jury's liability verdict.

***8** To establish a claim the terms of a contract were violated, a plaintiff must prove four elements:

first, that the parties entered into a contract containing certain terms; second, that [the] plaintiff did what the contract required [the plaintiff] to do; third, that [the] defendant did not do what the contract required [the defendant] to do, defined as a breach of the contract; and fourth, that [the] defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.

[Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019) (quoting Globe Motor v. Igdalev, 225 N.J. 469, 482 (2016)).]

Additionally, to establish a prima facie case of defamation, a plaintiff must establish the defendant (1) made a defamatory statement (2) concerning the plaintiff, (3) which was false, (4) was publicized to a third party, and (5) caused damages to plaintiff. Govito v. W. Jersey Health Sys., Inc., 332 N.J. Super. 293, 305-06 (App. Div. 2000). A defamatory statement is one that is (1) false and injures another person's reputation, or (2) subjects a person to hatred, contempt or ridicule, or (3) causes others to lose good will or confidence in that person. Romaine v. Kallinger, 109 N.J. 282, 289 (1988).

Here, there was ample competent evidence to support the jury's findings that RGF was liable for its breach of contract and its efforts to defame the plaintiff. Not only did plaintiff's testimony support the liability verdict regarding RGF's breach of contract, but the deposition testimony of Karen Civil and Fetty Wap, as well as Robinson's own testimony, supported the liability verdict for defamation. For example, Civil testified she was planning to work with plaintiff, hoping to pay plaintiff a commission of between ten and twenty percent for her work with two of her agency's clients, but after RGF's August 8, 2017 press release issued, she informed plaintiff they would be unable to work together. Similarly, the deposition testimony of Fetty Wap made clear RGF was the source of the information given to TMZ for its August 6, 2017 article. Accordingly, although the closing remarks of plaintiff's counsel came close to encouraging the jury to decide liability issues for personal reasons, we are not convinced counsel's comments were so prejudicial as to necessitate a mistrial.

To summarize, we affirm the jury's verdict as to liability, vacate the judgment on damages, and remand this matter for a new trial on damages. We do not retain jurisdiction.

### All Citations

Not Reported in Atl. Rptr., 2021 WL 1605989

## Footnotes

1 Sued herein as RGF Productions, Inc. d/b/a Goodfella4*l*ife Ent.

2 Fetty Wap and FWTI collectively agreed to pay $140,000 to settle plaintiff's claims against them.

3 During trial, plaintiff produced an Instagram photo picturing her with Fetty Wap and the caption read: "The best manager I could ask for."

4 Rule 2:6-2(a)(6) states in relevant part:

> (a) ... Except as otherwise provided ... the brief of the appellant shall contain the following material, ... arranged in the following order:
>
> ....
>
> (6) The legal argument for the appellant, which shall be divided, under appropriate point headings, distinctively printed or typed, into as many parts as there are points to be argued. For every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling is located or if the issue was not raised below a statement indicating that the issue was not raised below.

**End of Document**

2019 WL 3229679
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Brenda Lee VARELLI, Kyle A. Bradford, Lyle J. Bradford, and Estate of Janet E. Bradford, as a nominal plaintiff, Plaintiffs-Respondents/ Cross-Appellants,
v.
Jennifer WHITE, Jacquelyne Mcglinchey, Fidelity Estate Planning, LLC, Adam Baals, CEO, and Adam Baals, individually, and Melodie White, Defendants,
and
Donald L. Kingett, Esq., Rabil, Ropka, Kingett & Stewart, LLC, and Rabil, Kingett & Stewart, LLC, Defendants-Appellants/ Cross-Respondents,

DOCKET NO. A-4675-16T3
|
Argued February 28, 2019
|
Decided July 18, 2019

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1405-11.

**Attorneys and Law Firms**

John L. Slimm argued the cause for appellants/cross-respondents (Marshall Dennehey Warner Coleman & Goggin, attorneys; John L. Slimm, on the briefs).

Jeffrey V. Puff argued the cause for respondents/cross-appellants (Puff & Cockerill, LLC, attorneys; Jeffrey V. Puff, on the briefs).

Before Judges Simonelli, Whipple and Firko.

**Opinion**

PER CURIAM

***1** Defendants Donald L. Kingett, Esquire, Rabil, Ropka, Kingett and Stewart, LLC, and Rabil, Kingett and Stewart, LLC appeal, and plaintiffs, Brenda Lee Varelli, Kyle A. Bradford, and Lyle J. Bradford cross-appeal from a jury verdict rendered on April 2, 2016 finding Kingett deviated from the standard of care required of an attorney which was a proximate cause of losses sustained by plaintiffs in this estate and negligence case. Defendants also appeal from a May 2, 2016 order denying their motion for a judgment notwithstanding the verdict, and all parties appeal the award of counsel fees to plaintiffs. For the reasons that follow, we reverse and remand for a new jury trial.

I.

On June 23, 2008, plaintiffs filed a verified complaint and order to show cause (OTSC) in the Probate Part in connection with the estate of their mother (decedent) who died on February 6, 2008. [1] She executed Wills in 1996 and 2007. The complaint alleges that in September 2007, decedent had diminished capacity and was unduly influenced to change her estate plan by her granddaughter, Jennifer White, her primary caretaker. The judge entered plaintiffs' OTSC placing restraints on the estate's real and personal assets.

Decedent was diagnosed with Alzheimer's disease and dementia. She had four children: Brenda, Lyle, Kyle, and Melodie, who is Jennifer's mother. The decedent's original 1996 Will provided for a four-way equal distribution of her assets to her children. Because decedent lacked cognitive ability, a previous attorney advised Brenda, Jennifer, and Kyle to file a guardianship action and he declined to prepare a power-of-attorney (POA) as requested by plaintiffs because of decedent's condition. A guardianship action was never pursued.

In March 2007, decedent fell in her home and was transported to Cooper Hospital where she was again diagnosed with dementia and later transferred to ManorCare. After being released on April 12, 2007, she went home and the White family resided with her in conditions described by Brenda as a "pigsty."

After decedent's prescription medication insurance expired in April 2007, Jennifer sent a letter to decedent's insurance company asking for reinstatement of her prescription medication insurance because her grandmother was "slowly slip[ping] away into Alzheimer's." In May 2007, Dr. John Gartland was treating decedent for dementia and Alzheimer's disease. By July 2007, decedent was deteriorating mentally, thought she was a student, could not hold a thirty-second conversation, and became a "shell" of a person according to Brenda.

On July 16, 2007, Jacquelyne McGlinchey a self-employed estate planner affiliated with Fidelity Estate Planning, LLC (FEP), met with decedent at her home. Plaintiffs argue that McGlinchey was a "salesperson" who signed up elderly clients for "estate planning." Ostensibly, decedent expressed to McGlinchey that she wanted Jennifer to inherit her estate because she cared for her and decedent's own children did nothing for her. McGlinchey believed decedent was competent because she freely answered questions. Based upon her observation of decedent, McGlinchey had her execute an estate planning services contract. McGlinchey created a client workbook and recorded information about decedent. At a later time, McGlinchey changed her story and testified that decedent could not understand one hundred percent of what they discussed.

***2** McGlinchey recommended placing decedent's home into a revocable living trust (RLT), naming decedent and Jennifer as co-trustees, and establishing life estates for Woodrow and William, Jennifer's brothers, and Melodie. The RLT was recommended to avoid probate, and Jennifer would be named executrix, POA, and appointed as decedent's health care representative. After the initial meeting, McGlinchey provided attorney Kingett (defendant) with her client workbook. Thereafter, Kingett prepared a retainer agreement that provided his legal services would include "a personal interview, either in [defendant's] office ... or via telephone to discuss [the client's] estate plan." The retainer specified certain limitations on the scope of legal representation. For example, defendant would not supervise the execution of legal documents unless decedent appeared in his office. The retainer agreement also included information about FEP's services. Decedent paid FEP a total of $1695, $450 was defendant's fee. The remaining $1245 was shared between McGlinchey and Adam Baals, who served as the chief executive officer (CEO) of FEP.

On July 31, 2007, decedent purportedly signed the retainer agreement, but defendant later conceded he did not know whether she personally signed it or if somebody else signed it on her behalf. Defendant never discussed any limitations of his representation with decedent.

On August 1, 2007, decedent purportedly signed an application to purchase an annuity naming Jennifer and Melodie as beneficiaries. Thereafter, McGlinchey invested decedent's assets into annuities with Old Mutual and shared the commissions with Baals. Plaintiffs allege defendant and Baals formed FEP "to sell to unsuspecting clients unnecessary revocable trusts and annuities to generate legal fees and large commissions."

Defendant ostensibly spoke to decedent on August 18, 2017, over the telephone for eight minutes about revising her estate plan, but he never met with her in person. He conceded that since he never met her or knew her personally, and he could not confirm he actually spoke to her. According to Jennifer, defendant called decedent on a cellular phone while Jennifer listened in on a speaker phone. He drafted a new Will and RLT naming defendant and Jennifer as trustees, a healthcare directive, and a living Will. Upon decedent's death, the four members of the White family would each receive twenty percent of her estate, and Brenda, Kyle, and Lyle would share the remaining twenty percent.

Defendant claims he asked decedent if she wanted to meet him at his office or if she preferred to have the documents sent to her home. During that brief phone call, defendant claimed that he reviewed with decedent all matters relevant to her estate, including her Will, RLT, POA, and health care directive. Defendant described decedent as sounding like an older female who was clear and concise. After the trial, it was revealed that the person speaking on the phone to defendant was not the decedent but was actually her daughter Melodie.

On September 18, 2007, McGlinchey again went to decedent's home and notarized her testamentary documents purportedly in the presence of two witnesses, a neighbor, and McGlinchey's spouse. In the early stages of the litigation, McGlinchey contended that on that day, decedent was incapable of signing because she was incoherent, and Jennifer signed the documents, as well as the earlier executed retainer agreement. In December 2007, Jennifer informed plaintiffs that decedent's estate plan had changed. Decedent passed away on February 6, 2008. Brenda, Kyle, and Lyle each received a $5000 check from Jennifer.

Plaintiffs amended their complaint on October 23, 2008, adding allegations against Jennifer, McGlinchey, Melodie, FEP, and defendant claiming they participated in a "trust mill." In 2008 and 2009, plaintiffs amended their complaint to add allegations against defendant and his law firm, Rabil, Kingett & Stewart, LLC [2] (collectively, defendants). In April 2010, plaintiffs again amended their complaint to add claims against Baals, in his capacity as CEO of FEP (collectively, with the financial planner and the financial planning company, financial defendants).

***3** On March 24, 2011, the probate judge sua sponte appointed Brenda Lee Eustler, an attorney, as administrator of decedent's estate, and the judge ordered the probate matter be severed from the professional negligence and other claims against defendants and the financial defendants. These claims were transferred to the Law Division. At the summary judgment hearing on July 29, 2011 in the Probate Part, the judge found decedent lacked testamentary capacity to revise her estate plan and Jennifer unduly influenced her with respect to estate documents decedent executed.

At the September 26, 2011 trial, Jennifer and the financial defendants did not appear; the probate court made a final determination that in September 2007, decedent had diminished capacity and was unduly influenced by Jennifer. The probate court nullified the decedent's 2007 estate planning documents and ordered Jennifer to return the assets she confiscated to the estate.[3] The 1996 Will was not probated and the judge distributed the assets in accordance with the intestacy statute, N.J.S.A. 3B:5-4, resulting in a $256,298.61 recovery for plaintiffs. The judge awarded plaintiffs $156,073.30 in counsel fees. This determination is not challenged on appeal.

On September 28, 2011, defendants filed for summary judgment in the Law Division. As of June 2012, Baals was still offering estate planning services with defendant providing legal representation to Baal's clients. On June 5, 2012, the judge partially granted defendants' motion, dismissed plaintiffs' consumer fraud claims[4] against defendants, and named the estate as a nominal plaintiff. In so doing, the judge stated:

> [O]nly [Eustler] as the administrator for the estate can decide whether to participate as an active plaintiff prosecuting the claims put forth by [plaintiffs] .... [Eustler] is the decision maker and personification of the [e]state; she alone is charged with deciding what litigation to pursue[.]
>
> ....
>
> [Eustler] has provided no response or input into the present motions. This court has no idea what her position may be .... Since she is the decision maker[,] ... this court must respect her decision to stay in a neutral position.
>
> ....
>
> Notwithstanding the above, it is clear that this litigation will directly affect and impact the [e]state.
>
> ....
>
> This court finds the estate an indispensable party.
>
> ....
>
> Under [Rule] 4:28-1, joinder of the [e]state is generally as plaintiff, but if the [e]state refuses, the entity may be joined as a defendant. The court directs [Eustler] within [fifteen] days ... [to] indicate whether she is refusing to be joined as a nominal plaintiff .... If no "refusal" is timely filed[,] then the estate shall be included as a nominal party plaintiff but with the estate not being construed to be adopting the affirmative claims pursued by [plaintiffs].
>
> ....
>
> Until [Eustler] indicates on her own application to this court, the [e]state will be a nominal party plaintiff not directly pursuing [plaintiffs'] claims.

In July 2012, plaintiffs amended their complaint to add Baals as a defendant in his individual capacity. On November 18, 2012, the judge ruled that the parties were collaterally estopped from re-litigating matters determined by the probate court. On January 30, 2013, plaintiffs filed a motion seeking to void defendant's limited scope retainer agreement; the judge denied the motion, stating that the validity of the retainer agreement was a fact question for the jury.

On January 30, 2015, McGlinchey signed an affidavit stating that decedent was not competent when the testamentary documents were signed, and that Jennifer unduly influenced her grandmother. Eustler originally determined the value of the estate's assets were as follows:

| | | |
|---|---|---|
| ***4** • Decedent's residence | - | $169,700 |
| • Individual Retirement Account (IRA) and cash | - | $231,530.14 |
| • Life Insurance annuities | - | $222,044.58 |

The sale of the residence yielded only $86,920, the sale of the qualified annuities was $118,378.61, and the sale of the nonqualified annuities amounted to $51,000 instead of the projected $113,653.92 Thus, the total amount Eustler received for the estate was $256,298 and plaintiffs recovered this amount. The loss to the estate was approximately $200,000. In her 2015 certification, Eustler clarified that she chose not to bring an action on behalf of the estate to avoid further depleting the estate's assets, given plaintiffs brought the action and they were authorized to do so.

On February 12, 2015, plaintiffs filed a motion in the Law Division requesting the judge confirm the allocation of damages and counsel fees. The motion was denied because the judge ruled the issue of allocation would have to abide by the jury's verdict. On March 27, 2015, plaintiffs amended their complaint.

On May 6, 2015, the parties stipulated that plaintiffs' compensatory damages were $244,000 and, following the jury verdict, the court would mold the verdict and apportion the percentages of liability for each party. Plaintiffs moved for leave to file and serve a seventh amended complaint, seeking to add a count asserting a joint enterprise, which was granted on June 8, 2015. On September 18, 2015, defendants moved for partial summary judgment seeking to dismiss the joint enterprise count, which was denied on March 3, 2016. [5]

In the interim, defendants made an offer of judgment [6] on November 4, 2016, for $244,000, inclusive of costs and fees, which plaintiffs rejected. Two days later, plaintiffs moved to amend the status of the estate from a nominal to a formal plaintiff. Eustler certified that she authorized plaintiffs to litigate any claim that the estate could have brought. Defendants cross-moved to disqualify plaintiffs' counsel because of a purported conflict of interest in his representing both plaintiffs and the estate, and in response, plaintiffs withdrew their motion to name the estate as a formal plaintiff.

On March 8, 2016, the judge denied plaintiffs' motion for summary judgment on the issue of whether defendant deviated from acceptable standards of legal practice. On March 30, 2016, the judge denied plaintiffs' request to amend their complaint to add a count asserting that an agency relationship existed between defendant and the financial defendants. [7]

In limine, the judge ruled that plaintiffs had a right to rely on defendant to conform with the standard of care in his profession; whether the retainer agreement was enforceable as to plaintiffs, who were not clients, was a fact question for the jury to determine; civil conspiracy could be presented to the jury; [8] and any liability attributable to defendant would also be attributable to his law firm. The judge dismissed plaintiffs' breach of fiduciary duty claim, finding that plaintiffs did not sustain their burden of proof on that issue.

***5** Vincent Micciche, an expert in financial services, testified at trial that there was a fiduciary relationship between the financial defendants and decedent. Micciche also testified that when McGlinchey recognized that decedent lacked testamentary capacity to sign the documents, McGlinchey should have brought the matter to her supervisor.

Plaintiffs' expert on the issue of elder law and estates, Thomas D. Begley, III, Esq., opined at trial that all attorneys are required to demonstrate a reasonable degree of knowledge and skill; but a specialist in a specific area of the law is held to a higher standard, citing Cellucci v. Bronstein, 277 **N.J**. **Super**. 506, 649 A.2d 1333 (App. Div. 1994). Here, defendant held himself out as a specialist in estate planning.

Begley cited to the New Jersey Rules of Professional Conduct (RPC) as well as the Model Rules of Professional Conduct (MRPC), which provide objective standards against which attorney conduct can be measured. According to Begley, when an attorney undertakes a duty to one other than his client, he may be liable for damages caused by a breach of that duty, citing Stewart v. Sbarro, 142 **N.J**. **Super**. 581, 362 A.2d 581 (App. Div. 1976); lawyers also have a duty to a non-client when the lawyer knows that his or her client intended the lawyer's services to benefit a non-client, citing Restatement (Third) of The Law Governing Lawyers § 51 (Am. Law Inst. 2000). Defendant's deposition testimony indicated that in his practice, he generally complied with the standard of care applicable to estate attorneys by meeting with his clients without others present, confirming that the estate plan represented the wishes of the testator, explaining documents, and supervising the execution of documents.

Begley opined that defendant deviated from his own general practice with respect to decedent since he could not attest to her competency or conclusively identify that she was the person he spoke to on the phone, he could not screen for the presence of undue influence, had no knowledge as to who was with her during the telephone conversation, he could not have adequately explained everything to her during the short phone call, and he failed to explain or oversee execution of the documents. Begley cited MRPC 1.3 and 1.4, RPC 1.4, and Ziegelheim v. Apollo, 128 N.J. 250, 607 A.2d 1298 (1992), which all require a lawyer to keep a client informed and he testified defendant failed to do so here. Also, RPC 5.3 requires proper supervision of non-lawyers, and Begley opined that defendant failed to supervise McGlinchey. In addition, RPC 5.4 prohibits an attorney from sharing fees with a non-lawyer, and defendant shared fees with FEP.

According to Begley, RPC 1.2 permits a limited scope retainer when the client gives informed consent, but defendant's limited scope retainer agreement was improper because it provided that defendant would not explain documents or supervise their execution. And, defendant did not make the relatively simple attempt to ascertain whether decedent had capacity.

Begley relied upon the following facts relevant to his conclusion that defendant had not met the standard of care for an estates attorney: defendant held himself out as an expert on estate matters; the phone call to decedent lasted only eight minutes; defendant could not ascertain that he was speaking with decedent; defendant did not supervise the execution of the documents; defendant ratified McGlinchey's actions by relying on her to obtain information at the initial meeting with decedent; decedent did not provide informed consent for defendant's limited representation; defendant did not determine whether decedent had capacity; and the attorney at the prior law firm understood that decedent needed a guardianship because she had Alzheimer's.

***6** Begley cited cases from other jurisdictions including Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16, 19 (Cal. 1958) (holding whether a defendant is liable to third person not in privity involves balancing of various factors, including the extent to which the transaction was intended to affect plaintiff, foreseeability of harm to him, the degree of certainty that plaintiff suffered injury, closeness of connection between the defendant's conduct and injury suffered, moral blame attached to the defendant's conduct, and a policy of preventing future harm), and Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 689 (Cal. 1961) (where attorney negligently prepared Will, beneficiaries were entitled to recover as third-party beneficiaries). Begley also cited Rathblott v. Levin, 697 F. Supp. 817, 819 (D.N.J. 1988) (discussing whether an attorney who drafts a Will could invoke lack of privity as a defense where his negligence caused a beneficiary to spend funds defending a Will contest).

Glenn A. Henkel, Esq., defendants' expert in estate planning and administration, and a former colleague at a law firm where both he and defendant were employed, opined defendant met the standard of care for any attorney with respect to decedent, and defendant owed no duty of care to plaintiffs. Henkel also opined an attorney's violation of an RPC does not constitute malpractice per se, and that McGlinchey properly notarized the document, even if the witnesses did not see decedent sign it. Henkel testified that an attorney does not need to meet a client face-to-face. Henkel testified that defendant could have adequately reviewed with decedent all of the relevant information in an eight-minute phone call.

Following a nine-day trial, the jury returned a verdict in plaintiffs' favor, finding that defendant deviated from accepted standards of professional care, and his negligence proximately resulted in twenty-five percent of plaintiffs' damages. Seventy-five percent of liability was allocated amongst the other defendants. The jury also found Jennifer and the financial defendants breached their fiduciary duties to the estate, committed consumer fraud and common law fraud, and they, along with defendant, participated in a joint enterprise. The judge entered judgment against the financial defendants for consumer fraud, including treble damages and attorney's fees.

Defendants timely moved for a judgment notwithstanding the verdict (JNOV),[9] attorney's fees, and costs. Thereafter, plaintiffs requested fees in the amount of $1,053,137.[10] Defendants filed opposition and argued the sum of $901,929.60 was improperly billed, reducing the amount of fees for consideration to $103,543.65.

On August 31, 2016, the judge granted defendants' motion for a stay pending appeal; and the following day, he denied defendants' motion for JNOV, ruling that the issue of joint enterprise was properly submitted to the jury. In the final judgment order dated March 1, 2017, the judge reconsidered and determined the evidence did not support the jury's finding of joint enterprise and the issue should not have been submitted to the jury. That same day, the judge entered a final judgment against defendants comprised of $61,000 in damages, $534,756 in counsel fees, and against the financial defendants in excess of $1 million each. The judge allocated damages and counsel fees in accordance with the percentages assigned by the jury amongst the defendants.

Plaintiffs filed a motion for reconsideration under Rule 4:49-2 with respect to the joint enterprise ruling, which was denied on April 13, 2017. In his opinion, the judge stated: "I will note for the record that my decisions with regard to the joint enterprise issue and how I finally handled it and the judgment are inconsistent." On May 22, 2017, the judge denied a motion to vacate the final judgment against Baals. On July 7, 2017, nunc pro tunc to April 20, 2016, the judge denied defendants' motions for involuntary dismissal and for judgment.

***7** On appeal, defendants argue that the judge erred in: finding plaintiffs had an attorney-client relationship with defendant, granting plaintiffs leave to file and serve a seventh amended complaint to assert a theory of joint enterprise, and thereafter, denying defendants' motion for summary judgment seeking to dismiss that claim, and denying defendants' motions for involuntary dismissal and JNOV.

In their cross-appeal, plaintiffs argue the judge erred in: dismissing the estate's claim for breach of fiduciary duty to decedent; dismissing the claim of joint enterprise by acting as a seventh juror; improperly allocating damages and fees; and not declaring the retainer agreement void as a matter of law on summary judgment. The award of attorney's fees is challenged by defendants and plaintiffs. [11]

II.

We first examine the dismissal of the breach of fiduciary claim. Lawyers owe a fiduciary responsibility to their clients. Cohen v. Radio-Elecs. Officers Union, 146 N.J. 140, 155, 679 A.2d 1188 (1996). "The attorney-client relationship is a fiduciary one, involving the highest trust and confidence." In re Brown, 88 N.J. 443, 448, 443 A.2d 675 (1982). An attorney's fiduciary role requires that he or she attend to and look out for the client's best interests. Estate of Spencer v. Gavin, 400 N.J. Super. 220, 242, 946 A.2d 1051 (App. Div. 2008). Although New Jersey law imposes duties of fairness, good faith, and fidelity upon all fiduciaries, "an attorney is held to an even higher degree of responsibility in these matters than is required of all others." Ibid. (quoting In re Honig, 10 N.J. 74, 78, 89 A.2d 411 (1952)).

In F.G. v. MacDonell, 150 N.J. 550, 563, 696 A.2d 697 (1997), a clergy malpractice case, our Supreme Court described a fiduciary relationship as follows:

> The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.

However, "[t]he exact limits of the term 'fiduciary relation' are impossible of statement. Depending upon the circumstances of the particular case or transaction, certain business, public or social relationships may or may not create or involve a fiduciary character." Id. at 564, 696 A.2d 697 (alteration in original) (quoting Bogert, Trusts and Trustees § 481 (2d ed. 1978)). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship." Ibid. (citation omitted).

The Restatement (Second) of Torts § 874 (Am. Law Inst. 1979) provides: "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." A breach of fiduciary duty is a tort. Ibid. At common law, certain torts were considered personal, such as invasion of privacy and libel and they did not survive the death of the person who had been damaged by the tortfeasor. Weller v. Home News Pub. Co., 112 N.J. Super. 502, 506-07, 271 A.2d 738 (Law Div. 1970). However, that changed with the passage of the "survival statute," N.J.S.A. 2A:15-3, which provides, in pertinent part, as follows:

> ***8** Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages

as their testator or intestate would have had if he was living.

Further, "[a] personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative." N.J.S.A. 3B:10-20.

Restatement (Third) of Agency § 4.01 (Am. Law Inst. 2006) provides:

(1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.

(2) A person ratifies an act by

(a) manifesting assent that the act shall affect the person's legal relations, or

(b) conduct that justifies a reasonable assumption that the person so consents.

Generally, an attorney is not liable to third parties who are not his or her clients for negligence in the performance of professional duties. Stewart, 142 N.J. Super. at 593, 362 A.2d 581. But where an attorney assumes a fiduciary obligation, the attorney has a duty to others who the attorney has or should have reason to believe would be relying on him. Ibid. The determination of whether the duty undertaken by an attorney extends to a third party not in privity with the attorney involves a balancing of factors such as: (1) "the extent to which the transaction was intended to affect the plaintiff"; (2) the foreseeability of harm to the plaintiff; (3) "the degree of certainty that the plaintiff suffered injury"; (4) "the closeness of the connection between the defendant's conduct and the injury suffered"; (5) "the moral blame attached to the defendant's conduct"; and (6) "the policy of preventing future harm." Ibid. (quoting Biakanja, 320 P.2d at 16).

Applying the Stewart factors here, the following considerations may be drawn by the fact-finder: (1) defendant's drafting of decedent's Will was intended to benefit the beneficiaries of the Will, i.e., plaintiffs; (2) it was foreseeable that drafting a Will for a person that lacked capacity and was unduly influenced would cause harm to plaintiffs; (3) it was a certainty that plaintiffs suffered harm inasmuch as the parties stipulated that the estate lost $244,000 and plaintiffs had to engage in costly, protracted litigation to recover those assets; (4) there was a connection between defendant's drafting of the Will and the loss to the estate, but it is unclear how close the connection was, given that Jennifer, an intentional tortfeasor, depleted the assets of the estate; (5) it is unclear whether moral blame should be attached to defendant's conduct, given that Jennifer was the primary reason why the estate suffered a loss; and (6) it is unclear how this matter would affect the policy of preventing future losses. We conclude it is a fact question for the jury as to whether defendant breached his fiduciary duty here.

Plaintiffs argue that we should exercise original jurisdiction and find that defendant breached his fiduciary duty to the estate and the beneficiaries. We decline to do so because whether defendant breached his fiduciary duty is a fact question for the jury and will be determined on remand.

Plaintiffs further argue that the improper dismissal of their breach of fiduciary duty claim resulted in: defendant not being responsible for the entire amount of the compensatory damages and the reasonable attorney's fees; the jury not assigning a higher percentage of liability to defendant; and a lower award of fees. A finding by the jury that defendant breached his fiduciary duty might affect the jury's allocation of liability and the court's award of fees.

***9** Plaintiffs argue the judge agreed defendant had a fiduciary duty to decedent, but erred in dismissing that claim prior to trial because they were authorized by Eustler to bring claims against defendants on behalf of the estate. We agree. The judge acknowledged that Eustler validly transferred the estate's rights to plaintiffs to pursue claims against defendants, stating:

[P]laintiffs have stood in the shoes of the estate throughout the litigation. [Eustler], the appointed administrator, ... could not make clearer ... that "plaintiffs in this matter have been authorized by [her] to bring all of the claims that the [e]state can make against any and all of the defendants in this litigation."

[ (Third alteration in original).]

The judge found Eustler's authorization was valid with respect to pursuing the legal malpractice claim, but he improvidently analyzed the breach of fiduciary duty claim. Although finding defendant owed a fiduciary duty to decedent, the judge held nothing in the record indicated plaintiffs knew defendant or that they personally placed trust and confidence in him; therefore, the judge concluded plaintiffs could not bring a claim against defendant for breach of fiduciary duty. We disagree.

In Petrillo v. Bachenberg, 139 **N.J**. 472, 482-85, 655 A.2d 1354 (1995), our Supreme Court held that an attorney owes an independent duty of care to a non-client when the attorney "intended or should have foreseen that the [non-client] would rely on the [attorney's] work" or when the attorney "know[s], or should know, that non-clients will rely on the attorney['s] representations and the non-clients are not too remote from the attorney[ ] to be entitled to protection." To sustain a malpractice claim, a non-client must show reliance on the attorney's actions or representations was reasonably foreseeable by the attorney, as it is the reasonably foreseeable reliance by the non-client on the attorney's representation that imposes the duty of care. Id. at 483-84, 655 A.2d 1354. As our Supreme Court further clarified in Banco Popular North America v. Gandi, 184 **N.J**. 161, 180, 876 A.2d 253 (2005):

> If the attorney['s] actions are intended to induce a specific non-client['s] reasonable reliance on his or her representations, then there is a relationship between the attorney and the third party. Contrariwise, if the attorney does absolutely nothing to induce reasonable reliance by a third party, there is no relationship to substitute for the privity requirement.

We "review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 **N.J**. 189, 199, 129 A.3d 1069 (2016). A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The evidence must be viewed in "the light most favorable to the non-moving party[.]" Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 **N.J**. 512, 524, 46 A.3d 525 (2012).

Determining whether there is a genuine issue for trial "does not require a court to turn a blind eye to the weight of the evidence; the 'opponent must do more than simply show that there is some metaphysical doubt as to the material facts.' " Triffin v. Am. Int'l Grp., Inc., 372 **N.J**. **Super**. 517, 523-24, 859 A.2d 751 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)). Opposition to a motion for summary judgment requires "competent evidential material" beyond mere "speculation" and "fanciful arguments[.]" Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 **N.J**. **Super**. 556, 563, 866 A.2d 189 (App. Div. 2005). To survive summary judgment, the opposing party must, with the benefit of all favorable inferences, show a rational factfinder could determine the plaintiff met her burden of proof. Globe Motor Co. v. Igdalev, 225 **N.J**. 469, 481, 139 A.3d 57 (2016).

***10** Thus, even though there was no retainer agreement between plaintiffs and defendant, summary judgment on this issue was properly denied and the issue was appropriately submitted to the jury because Eustler authorized plaintiffs to bring such a claim on behalf of the estate. The judge inexplicably departed from Eustler's assignment of claims that plaintiffs could pursue by dismissing their breach of fiduciary duty claim. The judge erred by concluding the breach of fiduciary claim was not proven because defendant presumably did not actually handle decedent's assets. Therefore, we reverse the judge's ruling and remand for a new trial, and the breach of fiduciary claim shall be submitted to the jury for a determination.

III.

We next address defendants' argument that the judge erred by granting plaintiffs leave to file and serve a seventh amended complaint to assert a theory of joint enterprise, and denying defendants' motion for summary judgment seeking to dismiss that claim.

In June 2015, the judge permitted plaintiffs to file a seventh amended complaint adding an allegation for joint enterprise, and the judge subsequently denied defendants' motion seeking to summarily dismiss the seventh count. The jury ultimately found a joint enterprise existed between defendant, Jennifer and the financial defendants. Initially, the judge denied defendants' motion for JNOV on the joint enterprise issue. But in March 2017, when rendering final judgment, the judge stated that even though he was initially persuaded by the joint enterprise argument, he now concluded that the allocation of responsibility among the defendants should instead be guided by the principles enunciated in Blazovic v. Andrich, 124 N.J. 90, 106-12, 590 A.2d 222 (1991), and Grubbs v. Knoll, 376 N.J. Super. 420, 431, 870 A.2d 713 (App. Div. 2005), i.e., that liability should be imposed in proportion to fault, and not jointly and severally. The judge reasoned that even though defendant might have had some control over McGlinchey, he had no control over Jennifer, "the dominating force in the perfect storm[.]" Thus, the judge determined that defendant should not be held jointly and severally responsible for all damages and attorney's fees, given that Jennifer's undue influence was a significant factor in causing the damages.

A trial court has broad discretion to permit an amendment to pleadings, and such discretion should be liberally construed. Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456-57, 713 A.2d 411 (1998). When an issue has been injected into the case even in a deficient manner, the opposing party will be deemed to have been on notice that the issue is included in the matters to be resolved. Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 140-41, 834 A.2d 1037 (App. Div. 2003) (quoting Teilhaber v. Greene, 320 N.J. Super. 453, 466, 727 A.2d 518 (App. Div. 1999) ("[A] 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory."); 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 n.3, 362 A.2d 78 (Law Div. 1976) (noting that even when theory was not advanced in pleadings, it is properly before the court if it was fully aired at trial and in post-trial briefs).

A motion to amend pleadings pursuant to Rule 4:9-1 should be freely granted by the court so long as no prejudice results to the non-moving party. Zacharias v. Whatman PLC, 345 N.J. Super. 218, 226, 784 A.2d 741 (App. Div. 2001). However, when the motion is filed late and lacks apparent merit, the court generally denies it. Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476, 483, 658 A.2d 732 (App. Div. 1995).

Defendants argue the judge erred in permitting plaintiffs leave to file and serve a seventh amended complaint because the judge had already denied their request that defendants be held jointly and severally liable, and the seventh amended complaint was actually a motion for reconsideration in the guise of a motion to amend the pleadings. We disagree.

***11** Here, defendants have shown no prejudice that resulted from the subject amendment. Moreover, the judge noted that the issue of joint enterprise had already been injected into the case and had been discussed long before the court permitted the amendment to the pleadings. Further, when the judge denied plaintiffs' motion for a ruling on joint and several liability, it noted that its "[d]ecision as to [the] extent of liability, joint [and] several, has to await [the] jury verdict." This holding was not contradicted by the court's subsequent permission for plaintiffs to amend the pleadings to include a count for joint enterprise.

A joint enterprise is an undertaking described in Restatement of the Law (Second) of Torts § 876 (Am. Law Inst. 1979):

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The judge erred here in setting aside the jury finding of a joint enterprise. Whether defendants conspired to revise decedent's estate planning to change her original intent to leave her assets equally to her four children, and whether defendants worked in concert to generate unnecessary fees is a question of fact for the jury. On remand, we direct the judge to allow the seventh amended pleading on the theory of joint enterprise to stand and the issue to be presented to the jury.

IV.

Plaintiffs argue in their cross-appeal that because the court should not have dismissed the breach of fiduciary duty claim, the jury's allocation of liability for damages was incorrect.

The jury found the financial defendants and Jennifer breached their fiduciary duties to decedent, and committed other torts, and determined that those parties were liable for seventy-five percent of the estate's losses. The jury found that defendants had committed legal malpractice and were liable for twenty-five percent of the losses to the estate, but, as noted, did not consider whether defendant had breached his fiduciary duty to decedent.

The Comparative Negligence Act requires a fact finder to apportion liability amongst numerous tortfeasors. N.J.S.A. 2A:15-5.1 to -5.8. The court should mold the verdict based on the findings of the trier of fact. N.J.S.A. 2A:15-5.2(d). If a tortfeasor is found to be sixty percent responsible for damages, the injured party may recover full damages from that person. N.J.S.A. 2A:15-5.3.

In Blazovic, the issue before the Supreme Court was the apportionment of liability among a restaurant, plaintiff, and tortfeasors who had attacked plaintiff in the restaurant parking lot, where the lighting was dim because of the restaurant's negligence. 124 **N.J**. at 106-12, 590 A.2d 222 (1991). The Supreme Court held that the apportionment of liability should include the proportion of fault among intentional and negligent tortfeasors, id. at 107, 590 A.2d 222, but recognized that apportionment of fault can be precluded between two tortfeasors "when the duty of one encompassed the obligation to prevent the specific misconduct of the other." Id. at 111, 590 A.2d 222.

In Grubbs, we noted that a negligent attorney was responsible for the reasonable legal expenses and attorney's fees incurred by a former client in prosecuting a legal malpractice action. 376 **N.J**. **Super**. at 431, 870 A.2d 713. There was no requirement of proportionality between the damages recovered and the fees awarded. Id. at 432, 870 A.2d 713. Nevertheless, the amount a plaintiff recovers in damages is a relevant factor in determining whether the fees sought are reasonable. Ibid. Also, legal malpractice cases are not an exception to the rule enunciated in Blazovic pertaining to the apportionment of fault. Id. at 442, 870 A.2d 713.

***12** Plaintiffs argue that pursuant to Blazovic, there should have been no apportionment of liability because defendant's neglect of his duties was the lynchpin that caused the siphoning of decedent's estate. We disagree. Although defendant deviated from accepted standards of care, Jennifer, an intentional tortfeasor, depleted the estate. Therefore, pursuant to Blazovic, apportionment of liability was appropriate.

Plaintiffs further argue that there should have been no apportionment because all the defendants were jointly and severally liable and were involved in a joint enterprise. Alternatively, plaintiffs argue there should be a new trial on allocation. In light of our decision that the claim for breach of fiduciary duty was improperly dismissed, it is impossible to know the allocation of liability that would have been imposed by the jury, had it considered the fiduciary duty claim. Thus, the issue of allocation will be addressed at the retrial.

V.

Defendants argue that the judge erred in denying their motion for involuntary dismissal pursuant to Rule 4:37-2(b), in denying their motion for judgment pursuant to Rule 4:40-1, and in denying their motion for JNOV pursuant to Rule 4:40-2. On September 1, 2016, the judge denied defendants' motion for JNOV. On July 7, 2017, nunc pro tunc to April 20, 2016, the judge denied defendants' motions for involuntary dismissal and for judgment.

The standard for granting a JNOV under Rule 4:40-2 and a directed verdict under Rule 4:40-1 is the same as that governing the determination of a motion for involuntary dismissal under Rule 4:37-2(b), namely that the court must accept as true all the evidence which supports the party defending against the motion and must give all legitimate inferences to that party. We apply the same standard as the trial court. Boyle v. Ford Motor Co., 399 **N.J**. **Super**. 18, 40, 942 A.2d 850 (App. Div. 2008).

Defendants argue that the judge should have dismissed the legal malpractice claim because plaintiffs did not represent decedent or the estate, and Eustler never filed a complaint on behalf of the estate, but as we already stated, Eustler authorized plaintiffs to bring the malpractice action on behalf of the estate. Therefore, defendants' argument is devoid of merit. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative. N.J.S.A. 3B:10-20. Here, Eustler's assignment of rights was proper and defendants were notified of it. Plaintiffs were authorized to bring the malpractice action on behalf of the estate, and the legal malpractice claim shall stand.

  

Defendants argue that Begley's opinion went beyond the recognized legal standard in New Jersey, and his opinion was "untenable," as discussed in Cellucci, 277 N.J. Super. at 506, 649 A.2d 1333. In Cellucci, the court found the expert's opinion untenable when the expert opined that the lawyer was liable for an exercise of poor judgment, even though the lawyer had not deviated from the standard of care of an attorney. Id. at 522, 649 A.2d 1333. The court held that an error in judgment does not constitute malpractice. Ibid.

Here, had defendant met with decedent and judged her to be competent, or not unduly influenced, that would have constituted an error in judgment, but might not have supported a claim for malpractice. Instead, defendant took no steps whatsoever to determine decedent's competency or whether she was unduly influenced. Thus, it is not his judgment that is at issue here, but his failure to comply with the standard of care of an estate attorney.

***13** We disagree with defendants' characterization of Begley's opinion. He cited numerous RPCs that indicated defendant failed to comply with the standard of care, as well as defendant's own testimony that defendant generally complied with this standard, but failed to do so with decedent. Instead, Begley's opinion was that defendant failed to take the basic steps to insure that decedent had capacity, was not unduly influenced, understood the changes to her estate plan and that the documents were properly executed.

Defendants cite Villanueva v. Brown, 103 F.3d 1128 (3d Cir. 1997), for the notion that where a notary is involved, there can be no liability for the attorney. But here, defendant's liability was not solely based upon the fact that he did not supervise the execution of the documents.

VI.

We next address defendant's arguments relative to the plaintiffs' legal malpractice claim. Defendants argue that because they owed no duty to plaintiffs, the judge erred in denying their motion for judgment on this issue. We disagree.

"[A]n attorney is obligated to exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise." St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 588, 443 A.2d 1052 (1982). In representing a client, an attorney impliedly represents that (1) he or she possesses the requisite degree of learning, skill, and ability which others in the profession ordinarily possess; (2) he or she will use his or her best judgment in representing the client; and (3) he or she will exercise reasonable and ordinary care and diligence. Ibid.

To present a prima facie legal malpractice claim, a plaintiff must establish the existence of an attorney-client relationship creating a duty of care by the attorney, breach of that duty and proximate causation of damages. Jerista v. Murray, 185 N.J. 175, 190-91, 883 A.2d 350 (2005). Proximate cause is established by showing that the negligent conduct was a "substantial contributing factor" in causing damages. Lamb v. Barbour, 188 N.J. Super. 6, 12, 455 A.2d 1122 (App. Div. 1982).

An attorney owes a duty to a client identified in the retainer agreement. RPC 1.2. However, whether a duty exists to a third party depends on a balancing test between the attorney's duty to vigorously represent a client and the duty not to provide misleading information that others may foreseeably rely upon. Estate of Albanese v. Lolio, 393 N.J. Super. 355, 368, 923 A.2d 325 (App. Div. 2007). "To determine if a duty exists, the court conducts an 'inquiry [that] involves weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.' " Id. at 369, 923 A.2d 325 (alteration in original) (quoting Barner v. Sheldon, 292 N.J. Super. 258, 261, 678 A.2d 767 (Law Div. 1995)). "The primary question is one of fairness." Ibid. Privity is not necessary between an attorney and a non-client "where the attorney had reason to foresee the specific harm which occurred." Id. at 368-69, 923 A.2d 325 (quoting Albright v. Burns, 206 N.J. Super. 625, 633, 503 A.2d 386 (App. Div. 1986)).

"The absence of an attorney-client relationship does not necessarily bar a legal malpractice claim by a non-client where an independent duty is owed." Fitzgerald v. Linnus, 336 N.J. Super. 458, 468, 765 A.2d 251 (App. Div. 2001). For example, a lawyer may have a duty to a beneficiary when a duty has been undertaken, or where egregious circumstances exist. Barner, 292 N.J. Super. at 266, 678 A.2d 767. But when "a beneficiary's interest is adversarial to the interest of the estate and contrary to the Will of the testator, then no such duty shall be imposed upon the attorney." Ibid.

  

***14** Fitzgerald and Barner involved claims that the attorney was remiss in administering an estate by failing to tell the clients to disclaim part of the decedents' estates for tax purposes. Both courts agreed that post-mortem tax planning for the benefit of the executor of the estate was not included in the retainer for drafting the decedent's Will. Fitzgerald, 336 N.J. Super. at 473, 765 A.2d 251; Barner, 292 N.J. Super. at 260-61, 266, 678 A.2d 767.

Some states preclude a beneficiary of the Will from asserting a malpractice claim against the drafter of the Will based on a lack of privity between the lawyer and the non-client beneficiary. Pivnick v. Beck, 326 N.J. Super. 474, 482, 741 A.2d 655 (App. Div. 1999). Others permit malpractice claims by beneficiaries if the attorney's professional negligence resulted in a frustration of the testamentary intent expressed in the Will, or permit recovery only on negligence or third-party beneficiary theories. Id. at 482-83, 741 A.2d 655.

Defendants argue they had no duty to plaintiffs because they never signed a retainer agreement with them and the court should have granted summary judgment. The judge determined that defendant had a duty to plaintiffs, given that they were the beneficiaries of decedent's estate up until the point that defendant aided decedent in changing her estate plan. Giving all favorable inferences to plaintiffs, the judge accepted plaintiffs' argument that defendant had deviated from the standard of care by: failing to properly identify decedent as the person expressing the desire for a change to her estate plan; abrogating his responsibilities to McGlinchey to compile decedent's asset portfolio, to determine the bequests and to distribute assets; failing to review documents with decedent to make sure she understood what she was doing; and failing to evaluate decedent to make sure she was competent and not unduly influenced. The experts disagreed about whether defendant owed a duty to plaintiffs. The jury ultimately found that defendant had a duty to plaintiffs and he deviated from the accepted standards of legal practice.

Even though defendant did not sign a retainer agreement with plaintiffs, the judge properly denied summary judgment on the question of whether he had a duty to plaintiffs. A testator intends his or her attorney to protect the interests of beneficiaries of his or her estate. Restatement (Third) of The Law Governing Lawyers § 51 (Am. Law Inst. 2000). As beneficiaries of the estate, plaintiffs were entitled to rely on defendant to comply with the standards of the profession. The record supports a finding that defendant failed to meet the standards of the legal profession inasmuch as he never met with decedent, did not ascertain that she had capacity to change her estate plan and was not unduly influenced, was not sure that the person he spoke with on the phone was her, and did not supervise the execution of testamentary documents or explain to decedent the nature of the documents.

The test of testamentary capacity is whether a person can comprehend his or her property, the objects of his or her bounty, the meaning of the business that he [or she] is engaged in, and the relationship of these factors to the others and the manner of distribution set forth in the Will. In re Will of Liebl, 260 N.J. Super. 519, 524, 617 A.2d 266 (App. Div. 1992). Capacity should be tested on the date the Will is executed. Ibid. Whether an attorney has complied with a standard of care is a fact question for the jury. Cellucci, 277 N.J. Super. at 524, 649 A.2d 1333.

***15** Defendants cite Barner and Fitzgerald for the proposition that an attorney who drafts a Will does not owe a duty to beneficiaries of the Will. But, those cases are distinguished because they addressed whether the attorney's obligation extended to post-mortem tax planning. Fitzgerald, 336 N.J. Super. at 473, 765 A.2d 251; Barner, 292 N.J. Super. at 260-61, 266, 678 A.2d 767. Here, plaintiffs were not requesting post-mortem services, and they expected defendant to comply with the standards of care of an estates attorney by ascertaining that decedent had capacity to change her estate plan, was not unduly influenced and understood the changes she was making.

Defendants cite three unpublished cases to support their argument that they had no duty to plaintiffs. An unpublished opinion does not constitute precedent nor is it binding upon the appellate court. R. 1:36-3. "The rule does ... permit unpublished opinions to be called to" a court's attention as secondary research. Falcon v. Am. Cyanamid, 221 N.J. Super. 252, 261 n.2, 534 A.2d 403 (App. Div. 1987) (quoting R. 1:36-3).

Defendants cite Torban v. Obermayer Rebmann Maxwell & Hippel, No. A-3660-05, 2007 WL 1827283 (App. Div. June 27, 2007) (slip op. at 3-5), where the plaintiff was the executor of his parents' Wills and he sued the scrivener for malpractice, claiming that he paid higher estate tax because of the attorney's negligence. The court held that the attorney-client relationship terminated at the point that the decedents executed their Wills, especially given that they had rejected the attorney's advice about tax planning. Id. at 6-7. Torban is not on point because the claimed malpractice in that case involved liability for additional estate taxes, but the defendants had refused to follow the scrivener's tax advice. Ibid. Here, the liability is based upon defendant preparing testamentary documents for a testator without complying with the standard of care for estates attorneys.

Defendants also cite to Holvenstot v. Nusbaum, No. A-2987-08, 2010 WL 3834866 (App. Div. Sept. 21, 2010) (slip op. at 2-6), where a court, in a guardianship action, determined the testator was competent to manage her affairs and the testator changed her Will to disinherit her son. After the testator's death, the son sued the attorney scrivener for malpractice. Ibid. The court held that the attorney's duty was not as to the potential beneficiary, but to the testator who had been adjudicated competent. Id. at 6-10. Holvenstot is distinguishable because here, the proofs showed decedent was not competent to change her estate plan when defendant drafted her testamentary documents.

Defendants cite to Taffaro v. Connell, No. A-4928-09, 2011 WL 4502077 (App. Div. Sept. 30, 2011) (slip op. at 3-5), where shortly after being adjudicated as competent by the court, the testator disinherited her stepson. The court held that the attorney's duty was only to the testator and not the potential beneficiary when he prepared a Will "in accordance with her expressed intention." Id. at 7-8. Once again, this case can be distinguished because decedent here was not competent to express her intention as to her estate plan.

Defendants argue that their expert, Henkel, relied on Albanese to find no duty and that plaintiffs' expert, Begley, could cite no New Jersey case law to support his opinion that defendants owed a duty to plaintiffs. We disagree because Begley cited numerous RPCs and MRPCs and expressed opinions accepted by the jury as to the standard of care applicable to an estate attorney.

> While violations of ethical standards do not per se give rise to tortious claims, the standards set the minimum level of competency which must be displayed by all attorneys. Where an attorney fails to meet the minimum standard of competence governing the profession, such failure can be considered evidence of malpractice.
>
> ***16** [Albright, 206 N.J. Super. at 634, 503 A.2d 386 (citations omitted).]

Begley also cited Rothblatt, a federal case that applied New Jersey law and numerous cases from other jurisdictions that supported the notion that an attorney may be sued for professional malpractice by beneficiaries of an estate who have suffered a loss from the attorney's negligence even though they were not in privity with the attorney. In addition, Begley cited the Restatement (Third) of The Law Governing Lawyers § 51 (Am. Law Inst. 2000), stating that lawyers have a duty to a non-client when the lawyer knows that a client intended the lawyer's services to benefit a non-client. Begley described the importance of an attorney overseeing the execution of documents as evidenced by the American College of Trust and Estate Counsel Foundation (ACTEC), and he noted that it would have been relatively simple for defendant to ascertain that decedent had no capacity, and did not even know the names of her children, but defendant made no attempt to learn this information. Therefore, Begley provided a sufficient basis to support his expert opinion and defendants' argument is devoid of merit.

VII.

Next, we address the issue of counsel fees. In their appeal, defendants argue that the judge erred in not awarding fees to them since plaintiffs did not prevail on all of their claims and they only recovered $61,000 in damages. Plaintiffs argue that the fees awarded were appropriate but they should not have been allocated because defendants should have been responsible for all of the fees. Because we are remanding the matter for a new trial, the counsel fee award is reversed and the judge will consider the issue of counsel fees after the conclusion of the new trial. We add the following comments.

The judge considered the statutory factors and awarded fees in the amount of $534,756.19 to plaintiffs and denied fees to defendants. The judge made the following findings: the time plaintiffs' counsel spent was reasonable; the matter involved extensive discovery, motion practice and knowledge of numerous legal issues; the hourly rates plaintiffs' counsel requested, i.e., $300 per hour, were reasonable; the result obtained was the recovery of $244,000 in damages, but involved the expenditure of approximately $1.7 million in costs and fees; plaintiffs' counsel spent seventy-one percent of their time litigating against defendants who were responsible for only twenty-five percent of the damages, and only twenty-nine percent of their time litigating against Jennifer and the financial defendants; the disparity in the amount recovered relative to the fees and costs expended was the "overriding factor in reducing the fee award sought by plaintiffs." The judge also found Eustler's delegation to plaintiffs the claims of the estate supported fee shifting pursuant to Saffer v. Willoughby, 143 N.J. 256, 260, 670 A.2d 527 (1996); fees should be apportioned pursuant to Grubbs; the award of $534,756.19 included twenty-five percent of the total fees and costs expended up until trial, plus one hundred percent of the time devoted to litigating against defendants after trial; plaintiffs were not entitled to a fee enhancement; defendants were not entitled to fees pursuant to the offer of judgment rule; plaintiffs' fees as of April 2016 totaled $1,743,116.

***17** An award of counsel fees is discretionary with the court and will not be reversed absent a demonstration of manifest abuse of discretion. In re Prob. of Alleged Will of Landsman, 319 N.J. Super. 252, 271, 725 A.2d 90 (App. Div. 1999). New Jersey abides by the American Rule that parties are responsible for their own attorney fees, except for specific situations enumerated in Rule 4:42-9. For example, an award of attorney's fees is permitted for the following types of actions: family, out of court fund, probate, mortgage foreclosure, tax certificate foreclosure, liability or indemnity policy of insurance, and as expressly provided by rules where attorney's fees are permitted by statute. R. 4:42-9(a).

In In re Estate of Vayda, 184 N.J. 115, 121, 875 A.2d 925 (2005), the Court discussed New Jersey's limited exceptions to the American Rule. For example, Saffer permitted a legal malpractice plaintiff to recover, as consequential damages, the attorney's fees incurred in prosecuting the malpractice action against a negligent attorney. 143 N.J. at 271-72, 670 A.2d 527. Packard–Bamberger & Co. v. Collier, 167 N.J. 427, 443-44, 771 A.2d 1194 (2001), extended the exception to include actions for attorney misconduct, such as breach of a fiduciary duty, so long as the attorney's breach arose from the attorney-client relationship. In In re Estate of Lash, 169 N.J. 20, 26-27, 776 A.2d 765 (2001), our Supreme Court held that if a plaintiff was forced because of the wrongful conduct of a tortfeasor to institute litigation against a third party, the plaintiff can recover the fees incurred in that litigation from the tortfeasor. However, the Court specifically limited its holding to cases of attorney breach of fiduciary duty, explaining "that the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship." Id. at 34, 776 A.2d 765.

In In re Niles Trust, 176 N.J. 282, 296-99, 823 A.2d 1 (2003), our Supreme Court held that when an executor or trustee commits the "pernicious tort" of undue influence, it should result in an award of all reasonable counsel fees and costs. In DiMisa v. Acquaviva, 198 N.J. 547, 553-54, 969 A.2d 1091 (2009), the Court permitted an attorney fee to be recovered by a party required to litigate as a result of a third-party's tort. In Innes v. Marzano-Lesnevich, 224 N.J. 584, 598, 136 A.3d 108 (2016), the court permitted fees to a non-client for an attorney's intentional breach of a fiduciary duty, reaffirming past precedent.

The first step in the analysis of an attorney's fee award is for the court to determine the lodestar, which is the appropriate hourly fee multiplied by the number of hours that were reasonably expended. Rendine v. Pantzer, 141 N.J. 292, 334-35, 661 A.2d 1202 (1995). Hours that are "excessive, redundant, or otherwise unnecessary" should be excluded. Id. at 335, 661 A.2d 1202 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). The court may also reduce the lodestar "if the level of success achieved in the litigation is limited as compared to the relief sought." Id. at 336, 661 A.2d 1202. The court is required to make findings on each element of the lodestar fee. See R.M. v. Supreme Court of N.J., 190 N.J. 1, 9-11, 918 A.2d 7 (2007).

RPC 1.5(a) provides that the following factors pertain to whether an attorney fee is reasonable: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; whether acceptance of the employment precluded other employment by the lawyer; the fee customarily charged in the locality for similar legal services; and the amount involved and the results obtained.

Defendants argue the award of fees is contrary to the holding in Innes that a counsel fee may only be awarded to a non-client in a legal malpractice matter upon a finding that the attorney intentionally breached a fiduciary duty to the non-client. 224 N.J. at 597-98, 136 A.3d 108. Defendants claim they had no fiduciary duty to plaintiffs and the court dismissed plaintiffs' breach of fiduciary duty claims, so an attorney fee should not have been awarded.

***18** But the court did not base its award of fees on an intentional breach of fiduciary duty as was discussed in Innes. Rather, the judge held that fee-shifting was permitted under Saffer, because plaintiffs essentially stepped into the shoes of the estate and the estate delegated its claims to plaintiffs, and as a result, plaintiffs could recover against defendants for their negligent representation of decedent.

We note that the estate never filed a complaint. Nevertheless, Eustler allowed plaintiffs to represent the estate at their sole "risk and expense" and defense counsel never objected to the estate being included as a nominal plaintiff. The judge accepted Eustler's representation that plaintiffs brought the claims on behalf of the estate. As noted, N.J.S.A. 3B:10-20 provides that a personal representative may ratify and accept acts on behalf of the estate that were done by others. The judge was correct by determining that plaintiffs stepped into the shoes of the estate. According to Saffer, a negligent attorney is responsible for reasonable attorney's fees incurred by a former client in prosecuting a legal malpractice action. 143 **N.J**. at 272, 670 A.2d 527. Thus, had the estate filed a complaint for legal malpractice, defendants might have been liable for fees.

Defendants claim that the judge erred in finding this case similar to Niles because there, the executor and the trustee were negligent, but not the attorney, and that case did not include a claim for malpractice, but rather for undue influence. The judge compared this matter to Niles, inasmuch as the tortfeasors in that case gained complete control over the estate both before and after the decedent's death, and, here, Jennifer was also able to accomplish this; in Niles a former beneficiary of the estate brought the action and that occurred here as well; and in Niles as well as here, tort-based damages were sought. The judge duly noted that but for the actions of plaintiffs, no one else would have filed the complaint, because the estate would have been completely depleted if it had filed the complaint. In any event the court relied on Saffer, and not Niles, in awarding fees.

Defendants distinguish Lash because that case involved misappropriation of assets by an estate administrator where the defendant was not an estate administrator. 169 **N.J**. at 26, 776 A.2d 765. Lash stands for the proposition that one, who through the tort of another, is required to litigate to protect his interests, is entitled to recover reasonable attorney's fees from the tortfeasor. Ibid.

Defendants take issue with the amount of the court's award, given that the court awarded $534,756, but defendants' responsibility for damages was only $61,000, citing Szczepanski v. Newcomb Med. Ctr., Inc., 141 **N.J**. 346, 366, 661 A.2d 1232 (1995), for the proposition that when fees are disproportionate to the damages, the court must carefully review the application. Defendants question numerous entries in the billings, such as those from associate Susan Carpenter, who billed at $175 and eventually $225 per hour: she appears to have billed on October 17, 2008, for drafting or researching a "new Will"; researched two cases for 3.5 hours; on three separate days in January 2009, she spent 3.75, 5.75 and 5.40 hours drafting interrogatories and modifying interrogatories responses; she spent an hour sending out interrogatories; she spent 4.25 hours researching insurance and securities issues; and in March 2009, she spent 4.2 and 1.75 hours amending a complaint.

***19** The judge noted that attorney's fees should not be awarded for most of plaintiffs' claims against defendants, including fraud, conspiracy, injunctive relief and punitive damages, because those claims were not intended to make the estate whole. But because of the thousands of billing entries, the judge concluded that it could not separate out the claims where attorney's fees would be permitted. Instead, the court awarded fees pursuant to Grubbs, i.e., defendants were responsible for twenty-five percent of the fees expended in preparation for trial, in conformity with defendants' allocation of liability, and one-hundred percent of the fees incurred after trial because the other defendants did not participate in the post-trial litigation.

The judge stated:

> This court has great difficulty questioning the legitimacy of the entries of tasks and time presented by plaintiff[s'] counsel. There is no way this court knows to question whether counsel spent [one] hour or [two] on a particular task. From its review the itemization of tasks appear to be necessary to litigating the multiple and varied claims against defendants. The time, though high, appears to

> be within reason for the task, and the tasks appear to be necessary for the litigation. While it is clear that plaintiff[s'] counsel allowed no stone to be unturned (perhaps two or three times), it is no easy task for this court to take what are literally thousands of entries and second guess their veracity. This court has accepted the entries for purposes of the lodestar review.

Defendants also argue that because plaintiffs only recovered $61,000, the judge should have awarded fees to them pursuant to the offer of judgment rule. Defendants contend that they made an offer of judgment to plaintiffs for $244,000, but plaintiffs refused the offer and the jury ultimately found that defendants were only liable for damages of $61,000. According to defendants, plaintiffs were not successful in recovering from defendants seventy-five percent of their losses, or $195,200. Thus, defendants argue that they were entitled to fees under the offer of judgment rule.

The offer of judgment rule provides that when a party makes an offer to a claimant, and the claimant rejects the offer, and thereafter, the party obtains a favorable monetary judgment, the party is entitled to attorney's fees. R. 4:58-3. However, no attorney's fee shall be permitted when: the claimant's claim is dismissed; a no-cause verdict is returned; only nominal damages are awarded; a fee allowance would conflict with a statute or court rule; or an allowance would impose undue hardship. R. 4:58-3(c). A plaintiff asserting multiple defendants are jointly and severally liable is not subject to the financial consequences of Rule 4:58-3 for rejecting an offer by a single defendant to settle its share of liability. Schettino v. Roizman Dev., Inc., 158 N.J. 476, 484, 730 A.2d 797 (1999).

Here, defendants' offer of judgment for $244,000 included damages, costs and fees, and plaintiffs' fees totaled more than one million dollars, significantly higher than the offer of judgment made by defendants.

In their cross-appeal, plaintiffs argue that fees were appropriate but they should not have been allocated. Plaintiffs argue that the jury found a joint enterprise existed and defendant should therefore have been liable for all of the fees. Plaintiffs also argue that the judge's findings were inadequate because their detailed description of the work performed by each attorney was not considered. Plaintiffs also argue that the judge wrongly labeled their efforts as partially successful, when in fact, they successfully obtained an award pursuant to the New Jersey Consumer Fraud Act against the financial defendants, and recovered assets in the probate proceeding. We note that plaintiffs recovered assets of the estate, but they also pursued claims against defendants that were unsuccessful, such as civil conspiracy and fraud.

***20** Plaintiffs argue that the amount recovered was not disproportionate to the fees requested because the assets brought back into the estate ($256,298), plus the $61,000 (defendants' share of the liability to the estate), plus the attorney's fees award ($534,769), totaled $852,067 ($256,298 plus $61,000 plus $534,769 = $852,067), or one-half of the $1.7 million in attorney's fees requested. The attorney's fees that were already awarded by the probate court in retrieving assets to the estate was approximately $156,000. Following the new trial, the judge shall consider all of these issues anew as well as the issue of allocation of fees, which will abide the proofs and percentages of liability, if any, apportioned by the jury.

Finally, in their cross-appeal, plaintiffs argue that the judge erred when denying their motion for summary judgment with respect to the retainer agreement and argue that the agreement should have been void as a matter of law. We disagree because that is a fact question for the jury.

Plaintiffs argue that RPC 1.0 requires informed consent after an attorney has explained the risks and alternatives to a proposed course of conduct. Plaintiffs further argue that the retainer agreement was signed before defendant ever spoke with decedent, and therefore, defendant could not have obtained her informed consent, making the retainer agreement null and void because decedent was incapacitated at the time it was signed on July 31, 2007. The judge correctly found that this was a fact question for the jury and the proofs at trial were necessary to make a determination.

We conclude that the remaining arguments—to the extent we have not addressed them—lack sufficient merit to warrant any further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded for a new jury trial and further proceedings consistent with this opinion. We do not retain jurisdiction.

  

**All Citations**

Not Reported in Atl. Rptr., 2019 WL 3229679

## Footnotes

1 Parties who share a last name with other parties are referred to by their first names for the ease of reference. By doing so, we intend no disrespect.

2 Formerly known as Rabil, Kingett, Ropka & Stewart, LLC.

3 The record indicates that Jennifer filed a petition in bankruptcy at some point during these proceedings.

4 N.J.S.A. 56:8-1 to -20.

5 The order was incorrectly dated 2015.

6 R. 4:58-1 to -6.

7 As a result of a settlement, Melodie was dismissed from the case.

8 The civil conspiracy claim was later voluntarily dismissed.

9 R. 4:40-2.

10 Plaintiffs' billing statement exceeded 800 pages and is not included in its entirety in this appendix.

11 At oral argument, we permitted both counsel to submit post-argument briefs as to the applicability of our recent decision in Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc., 458 **N.J**. **Super**. 194, 203 A.3d 952 (App. Div. **2019**).