NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5883-08T1

STEPHEN J. HOPKINS
and STEPHEN HOPKINS
ASSOCIATES, INC.,

Plaintiffs-Appellants/
Cross-Respondents,

v.

DENNIS J. DUCKETT,
MICHAEL R. D'APPOLONIA,
KEVIN I. DOWD, HOWARD S.
HOFFMANN and NIGHTINGALE
& ASSOCIATES, L.L.C.,

Defendants-Respondents/
Cross-Appellants.

Argued October 4, 2011 - Decided January 17, 2012

Before Judges Payne, Simonelli and Hayden.

On appeal from Superior Court of New Jersey,
Chancery Division and Law Division, Bergen
County, Docket Nos. C-449-06 and L-7575-07.

Eric D. McCullough argued the cause for
appellants/cross-respondents (Waters,
McPherson, McNeill, P.C. and Michael J.
Breslin, Jr., L.L.C., attorneys; Mr.
Breslin, Jr. and Donald J. Fay, of counsel;
Mr. Breslin and Mr. McCullough, on the
briefs).

Marc J. Gross argued the cause for

respondents/cross-appellants (Greenbaum, Rowe, Smith & Davis L.L.P., attorneys; Mr. Gross, of counsel and on the brief; David T. Shivas, on the brief).

PER CURIAM

Plaintiffs, Stephen Hopkins, and his firm, Stephen Hopkins Associates, Inc. (SHA), appeal various rulings that resulted in their failure to obtain recovery in their action against defendants Nightingale & Associates, L.L.C. (N&A), a Delaware entity, and those of its members named as defendants, Dennis J. Duckett, Michael R. D'Appolonia, Kevin I. Dowd, and Howard S. Hoffmann. Defendants cross-appeal. We affirm.

I.

The facts and procedural history of this matter are lengthy.

Prior to 1997, N&A was known as Nightingale & Associates, Inc., a company founded in 1975 as a turnaround management consulting firm providing advice and assistance to financially troubled businesses, their creditors, insurance companies, and to financially troubled debtors. Hopkins was, for a period of time commencing in 1993, its president. He also served as the company's managing member until December 31, 2001. In 1995, Hopkins held an eighty percent ownership share in the corporation. In 1997, Nightingale & Associates, Inc. became Nightingale & Associates, L.L.C., a Delaware limited liability

company, with its principal place of business located in Stamford, Connecticut. Pursuant to N&A's February 21, 1997 operating agreement, the interest held by Hopkins in the business was reduced from eighty to twenty-five percent, with the remaining members each holding a fifteen-percent ownership interest. The operating agreement for N&A established Delaware law as governing disputes. Additionally, the operating agreement provided that individual members of N&A would not be personally liable for any act done on behalf of the company unless the act constituted fraud, bad faith, gross negligence, or willful misconduct. All members of N&A shared in the profits and losses of the company in proportion to their ownership interests. Major management decisions required more than a seventy-five percent vote that Hopkins could block as the result of his retained ownership interest.

In addition to his ownership interest in N&A, Hopkins performed services as an independent contractor for it through a services agreement between N&A and Hopkins's Delaware corporation, SHA. During part of the period that the services agreement was in effect, Hopkins was a New Jersey resident, and he did some work out of his home in New Jersey. He later moved to Indiana. The services agreement between N&A and SHA provided that disputes arising from it would be governed by Connecticut

law. It did not contain a "non-compete" clause. Similarly, services agreements between N&A and its other members did not contain such a clause.

Plaintiffs' suit arose from the fact that, in 2000, internal disputes commenced in N&A regarding Hopkins's leadership. In particular, intense acrimony developed between Hopkins and members D'Appolonia and Dowd. In July 2000, Hopkins announced that he intended to step down as managing member at the end of the year, and to retire at the end of 2002.

In response, the members of N&A commenced discussion of amendments to the operating agreement, which failed to provide retirement benefits or a means for removing a member.

On August 16, 2000, the principals of N&A sent a written proposal for retirement benefits to Hopkins, independent of the operating agreement, that offered percentage of earnings pay-outs in the two years following retirement. The proposal listed as Hopkins's retirement date, "[o]n or before 12/31/02." Hopkins responded to the proposal in a letter dated September 17, 2000, in which he agreed to the payment terms, and to relinquishing his position as managing member on December 31, 2000, but he rejected the fixed retirement date. Hopkins stated:

> Although it may not have been intended, the terms of the proposal require that I <u>must</u>

> retire by 12/31/02 to be eligible for <u>any</u> payments. I am offended by this and reject it. I have expressed an expectation that I will retire within this time frame, but see no reason that this must be a condition of your proposal to me.

In response, the August 16 letter was revised to state: "You have expressed a desire to continue working full time until 12/31/02. This firm is flexible regarding this date, both earlier and later."

On January 26, 2001, the members met to determine who should become the next managing member, eventually designating Hoffmann. They designated D'Appolonia as president, with direct responsibility for the company's marketing efforts.

Hopkins claims that at a February 26, 2001 members meeting, the company's members offered him project work to supplement his income following retirement. Additionally, he claims that he was promised a role in defining the duties and responsibilities of the managing member and president, in allocating personnel resources, in maintaining the quality of the firm's work, in the hiring and training of new employees, and in the company's marketing activities, including new business campaigns. In the present suit, Hopkins alleges that none of these promises was kept.

On May 14, 2001, the members memorialized Hopkins's retirement agreement. Additionally, on that date, they

unanimously adopted an amended and restated operating agreement. Pursuant to that agreement, each member, including Hopkins, was given a fifteen-percent interest in the company, with ten percent of the ownership interest reserved for new members. The agreement also reduced the percentage of votes needed for an amendment to the agreement from more than seventy-five percent to sixty percent. In connection with the amended agreement, Hopkins thus gave up his blocking vote, stating in later trial testimony that he did so in reliance upon the other members' promises regarding his retirement and his post-retirement participation in company business.

Paragraph 3.5 of the amended operating agreement provided that the members could remove a fellow member without cause upon six months' notice and with cause upon fourteen days' notice. In either case, the removed member's shares would be repurchased by the company. However, the provisions for compensation of members dismissed with and without cause differed. The amended agreement preserved the provisions conditionally absolving individual members of personal liability and designating Delaware law for choice of law purposes.

In October 2002, the company planned a major marketing event in Sea Island, Georgia, culminating in a black-tie dinner. A proposal was circulated to utilize the dinner as an

opportunity to honor Hopkins and his retirement. However, when Hoffmann mentioned the proposal to Hopkins in August 2002, Hopkins announced that he had changed his mind, and that he was not retiring. Among other things, Hopkins was reported by Hoffmann as stating that the retirement benefits offered to him by separate agreement were less than those offered by the amended operating agreement to persons removed without cause. Hoffmann was concerned by Hopkins's revised plans, fearing that the acrimony that had existed in 2000 would be rekindled to the detriment of the company.

According to the allegations of the complaint later filed by Hopkins in this matter,

> [d]uring the above-referenced August 2, 2002 conversation, in response to my question to the Defendant Hoffmann as to why I should be forced out (on December 31, 2002), he stated to me that turnaround management was a young man's business and that there was an image to uphold. I responded to the Defendant Howard D. Hoffmann that that explains why Michael R. D'Appolonia, who was now President, with primary responsibility for marketing, won't use me for new business presentations and meetings. In response to my statement, the Defendant Mr. Hoffmann admitted: "Yes."

At the time, Hopkins was sixty-seven years of age.

By letter dated September 2, 2002, Hopkins formally informed the other company members that he did not intend to retire on December 31, 2002, and he listed in detail his reasons

for that decision, including his dissatisfaction with the retirement benefits offered to him. On September 25, 2002, Hoffmann circulated a proposed revision to the operating agreement that reduced the payout for a person removed without cause to the level that Hopkins was to receive as the result of his retirement agreement. The amended agreement also shortened the notice period for removal without cause to thirty days. Hopkins testified at trial that he thought this latter provision was targeted at him.

On September 30, 2002, at a members meeting in Connecticut, Hopkins formally announced that he was not retiring. In response, the members demanded that, within one week, Hopkins provide his retirement plans in writing. Additionally, the members, with the exception of Hopkins and his son Douglas, voted to accept the second amended operating agreement.

On October 6, 2002, Hopkins informed the members in writing that he had "no intention of retiring until some later date." By notice dated November 1, 2002, a meeting was scheduled for November 15, 2002 to consider "whether a Requisite Voting Interest (as defined in the Operating Agreement) of the Members desires to give notice to Stephen J. Hopkins of their intention to vote on the removal of Mr. Hopkins as a member pursuant to the terms of the Operating Agreement, and any matters related

thereto." On the day of the November 15 meeting, D'Appolonia and Hoffmann met with Hopkins in an attempt to resolve matters without the necessity for a vote on removal. Hopkins offered to retire by December 31, 2003. However, the offer was rejected because Hopkins could give no assurance that his undertaking would not again be rescinded.

At the meeting held on November 15, the requisite voting interest determined to provide notice of their intent to vote on Hopkins's removal, listing the principal reasons for the proposed removal as follows:

> - You have a fundamentally different view of the objectives of the Company (operationally and strategically) than do a Requisite Voting Interest of the Members.
>
> - The Requisite Voting Interest of the Members has lost confidence in your ability to conduct Company business in a way that is in the best interest of the Company.
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> - Relations between you and the Requisite Voting Interest of the Members is strained and you have acknowledged that your continued presence causes destructive disruption within the Company.
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> - The disruption caused by the relations between you and the Requisite Voting Interest of the Members is impairing the ability of the Company to conduct its business in a normal manner.

A vote was scheduled for December 16, 2002.

The members met to vote on removal in January 2003, but the required number of votes for removal was not be obtained. However, on September 29, 2003, the members again met, and at that time, they voted in favor of Hopkins's removal, effective October 31, 2003, with the only dissenting votes being cast by Hopkins and his son. He was removed as a member effective November 1, 2003. By letter dated November 14, 2003 from Hoffmann, Hopkins's "change of [his] relationship with Nightingale & Associates, LLC" was confirmed, and his June 1, 1995 services agreement with the company was terminated. In that letter, N&A offered Hopkins an opportunity to remain associated with it and to continue in the role of an independent contractor. However, Hopkins declined the terms offered to him. By letter dated November 24, 2003, Hopkins informed Hoffmann of his intent to approach his three current clients, Xpectra, Brown Schools and Zeta, to determine whether they wished to retain him individually to complete ongoing projects or to have Nightingale assign another principal to take over the work. Eventually, Hopkins offered to complete the three projects at no charge, and the offer was accepted.

In December 2003, N&A placed amounts allegedly due to Hopkins and SHA[1] in an escrow account. N&A asserted that the funds consisted of Hopkins's retirement proceeds, as well as other funds that were owed to him. However, Hopkins contended that a major portion of those funds were amounts that he was due under his normal distributions, plus the receivables that he had not been paid when he left. He asserted that N&A had issued 1099 tax forms to SHA for the years 2003 and 2004 that stated that SHA had received over $275,000 more in compensation in 2003 than N&A had actually paid to it, and that SHA received $185,188.25 in 2004, when no compensation had been paid. In that regard, the members of N&A claimed that Hopkins was not yet entitled to the compensation, because the clients' bills had not been paid in full, as required by N&A policies.

In the meantime, on November 22, 2002, Hopkins, individually, had filed suit in the United States District Court for the District of New Jersey against Duckett, D'Appolonia, Dowd, Hoffmann, and N&A. The complaint, as subsequently amended, alleged claims under the New Jersey Oppressed Minority Shareholder statute, N.J.S.A. 14A:12-7(1) to -(10), claims under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A.

[1] It was later certified that $606,492.91 was being held in the account.

10:5-12, various breach of contract claims, fraud, retaliation, conversion, breach of fiduciary duty, and an ERISA claim pursuant to 29 U.S.C.A. § 1001 to 1461. Defendants counterclaimed, alleging Hopkins's interference with N&A's business operations and his diversion of funds to himself and SHA.

Through an order to show cause filed prior to the initial vote on his removal, Hopkins sought preliminary restraints against any vote on his removal and the appointment of a custodian to manage the affairs of N&A. However, the application was denied by the court by order dated December 19, 2002. Thereafter, in January 2004, Hopkins moved to supplement his complaint to allege actions occurring since January 2002 and, as an oppressed minority shareholder, to have the court appoint a custodian to manage N&A's affairs as they related to Hopkins. In connection with the latter relief, Hopkins alleged that N&A was withholding money consisting of the value of his ownership interest in the company, performance fees and the earned income being held in the escrow account established by N&A. However, although Hopkins was permitted to amend his complaint, his motion to appoint a custodian was denied by the federal magistrate hearing the matter, who concluded that

Hopkins had failed to meet the stringent requirements for appointing a custodian under either New Jersey or Delaware law.

Hopkins appealed the decision not to appoint a custodian, which was affirmed in the District Court. Hopkins v. Duckett, 2005 U.S. Dist. LEXIS 47039, at *9-*11 (D.N.J. May 27, 2005) (Duckett I). In reaching its decision, the court agreed with the tentative decision of the magistrate that Delaware law was applicable to the matter, relying in this regard both on the parties' choice of law and on its finding that Delaware had a greater interest than New Jersey in the affairs of N&A. Id. at *10-*12. Further, the court recognized that Delaware law does not expressly provide for appointment of a custodian to relieve minority shareholder oppression, but instead authorizes such an appointment only when stockholder or director deadlock scenarios occur or when the managers of the corporation are guilty of fraud or gross mismanagement or of creating such extreme circumstances that an imminent danger of great loss that cannot otherwise be prevented occurs. Id. at *12. Such extreme conditions, the court found, had not been demonstrated in this case. Id. at *12-*13. Additionally, the court determined that invocation of Delaware law would not violate public policy. Id. at *13. Although N.J.S.A. 14A:12-7(c) provided for the discretionary appointment of a custodian on proof that officers

or directors had acted oppressively or unfairly toward a minority shareholder, the court recognized that appointment of a custodian had long been regarded as an extraordinary remedy. Ibid. (citing Neff v. Progress Bldg. Materials Co., 139 N.J. Eq. 356, 357 (Ch. Div. 1947)). The court held: "Custodianship is unnecessary here where Plaintiff's interest in the disputed funds is amply protected by virtue of the escrow account, an accounting of those funds has been provided, and appointment of a custodian would likely hinder Defendants' ability to conduct their business and serve their clients." Id. at *13-*14.

At a later point, defendants moved for summary judgment on Hopkins's ERISA claim and for dismissal of his remaining claims. Their motion was granted. In a written opinion dated November 21, 2006, the court held that Hopkins was not a "participant" in an ERISA plan offered by N&A, because he was not an "employee" as defined in 29 U.S.C.A. § 1002(6) and as further construed by the Supreme Court in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 1348-49, 117 L. Ed. 2d 581, 589-90 (1992), but rather, an independent contractor. Hopkins v. Duckett, 2006 U.S. Dist. LEXIS 84559, at *8-*16 (D.N.J. November 21, 2006) (Duckett II). As a consequence, the court dismissed Hopkins's federal ERISA claim and, finding that subject-matter jurisdiction was lacking over the remaining state

law claims, the court dismissed those claims without prejudice. Id. at *17-*25.

On December 21, 2006, the present action was filed in the Superior Court, Chancery Division, as a verified complaint and order to show cause alleging violations of the Oppressed Minority Shareholder statute, violations of the Law Against Discrimination, breach of contract, violation of the covenant of good faith and fair dealing, fraud, retaliation, tortious interference with contract, and breach of fiduciary duty. As relief, Hopkins sought payment of all money in the escrow account; a detailed accounting and payment of his capital account, distributions, performance fees and invoice collections for the years 2002 through 2004; payment of additional money that would have been payable to him as a former member of N&A under the terms of the May 14, 2002 operating agreement; payment of additional money owed as a continuing member of N&A up to the present, because there had never been a closing to purchase his ownership interest; an order directing sale of his shares in N&A; and compensatory damages. Defendants filed an answer and counterclaim, asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, negligent and intentional

misrepresentation, tortious interference with contract, and unjust enrichment.

On the return date of the order to show cause, Hopkins sought, as an oppressed minority shareholder, the immediate release of the escrowed funds pursuant to N.J.S.A. 14A:12-7. In a written opinion dated February 20, 2007, the court denied relief. The court held that Hopkins was collaterally estopped from challenging the retention of escrowed funds by the interlocutory decisions of the federal magistrate and district court in the federal litigation, which held that N.J.S.A. 14A:12-7 did not apply to Hopkins's application. It, instead, was governed by Delaware law that did not provide grounds for the requested relief. Additionally, the court found that Hopkins had failed to meet the standards for injunctive relief set forth in Crowe v. De Gioia, 90 N.J. 126 (1982), since he was unable to demonstrate irreparable harm.

On March 29, 2007, defendants moved to dismiss plaintiffs' claims of minority shareholder oppression and violation of the Law Against Discrimination, and plaintiffs cross-moved for release of the escrowed funds. In a written opinion dated May 25, 2007, the court granted both motions.

In reaching a decision to dismiss the oppressed minority shareholder claim, the court considered the choice of law issue

anew, determining that effect should be given to the parties' choice of Delaware law, that Delaware had a substantial relationship to the operating agreement that formed the basis for the present dispute, and that enforcement of the forum selection clause would not be contrary to New Jersey public policy. The court concluded that the claim could not be sustained because Delaware did not have a minority oppression statute; in cases such as Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993), Delaware courts had refused to apply remedies for alleged oppression; and plaintiff had not demonstrated any common law remedy for minority shareholder oppression that had been recognized in Delaware.

Turning to the NJLAD claim, the court analyzed whether Hopkins was an "employee" for purposes of that statute under the six-factor standard articulated in Clackamas v. Gastroenterology Associates v. Wells, 538 U.S. 440, 449-50, 123 S. Ct. 1673, 1680, 155 L. Ed. 2d 615, 626 (2003),[2] as adopted by the New

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[2] The factors, utilized by the Equal Employment Opportunity Commission in considering who is an "employee" and when partners, officers, members of boards of directors, and major shareholders qualify as employees under federal anti-discrimination laws, are:

> [1.] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

(continued)

Jersey Supreme Court in the context of a Conscientious Employee Protection Act (CEPA)[3] claim in Feldman v. Hunterdon Radiological Associates, 187 N.J. 228, 246-47 (2006). Finding, as in Feldman, supra, 187 N.J. at 245-48, the "question of control and influence [to be] critical," the court held that because Hopkins was a shareholder who participated in the management and control of N&A with an equal vote and voice in all matters, no

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(continued)

> [2.] Whether, and if so, to what extent the organization supervises the individual's work;
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> [3.] Whether the individual reports to someone higher in the organization;
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> [4.] Whether, and if so, to what extent the individual is able to influence the organization;
>
> [5.] Whether the parties intended the individual to be an employee, as expressed in written agreements or contracts; and
>
> [6.] Whether the individual shares in the profits, losses, and liabilities of the organization.
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> [Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 244 (2006) (quoting Clackamas, supra, 538 U.S. at 449-50, 123 S. Ct. at 1680, 155 L. Ed. 2d at 626 (citing 2 Equal Employment Opportunity Commission, Compliance Manual § 605:0008-605:00010 (2000)).]

[3] N.J.S.A. 34:19-1 to -8.

reasonable factfinder could conclude that he was an employee. Thus, Hopkins's NJLAD claims were dismissed.

Return of the escrowed funds was ordered on the ground that they represented monies earned while Hopkins was performing services for N&A, and that the escrow constituted a prejudgment attachment that was not authorized pursuant to N.J.S.A. 2A:26-2.

Plaintiffs moved for leave to appeal from the dismissal of the NJLAD claim, but we denied the motion by order dated August 16, 2007. Thereafter, plaintiffs moved for reconsideration in the chancery court, raising the issue of whether Hopkins's status as an independent contractor barred his action for age discrimination under the NJLAD. In opposing the motion, defendants argued that, by virtue of the choice of law provision in the services agreement between N&A and SHA and the conduct of the parties, Connecticut, not New Jersey, law should apply to the age discrimination claim. The court agreed, determining in an oral opinion rendered on September 20, 2007 that the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. 46a-51 to -104, was applicable in the circumstances presented, and that the court's decision recognizing the applicability of Connecticut law provided an additional reason for dismissal of the claim brought pursuant to the NJLAD. However, the court found that plaintiffs should either be granted a Rule 4:30A

exemption to allow them to proceed in Connecticut on the age discrimination claim or be afforded the opportunity to amend their complaint in the New Jersey action to assert a claim under the Connecticut Act. The court granted plaintiffs' motion to reinstate the jury demand, determining that concepts of fundamental fairness dictated that course, and to transfer the matter to the Law Division. A further motion for reconsideration was denied, as was plaintiffs' additional motion for leave to appeal the denial of reconsideration.

Following transfer of the action to the Law Division, on January 9, 2009, defendants moved to dismiss plaintiffs' remaining claims. Plaintiffs cross-moved for summary judgment dismissing defendants' counterclaims. Defendants' motion was partially successful, because on March 10, 2009, the court dismissed plaintiffs' claims that defendants tortiously interfered with the September 2000 retirement agreement (Count VIII) and with the May 2001 operating agreement (Count IX). The court held that, because defendants were parties to both agreements, under existing precedent, they could not have tortiously interfered with their own contracts. Additionally, the court dismissed Count X, alleging breach of fiduciary duty by defendants, determining that there was no fiduciary relationship between the parties following Hopkins's involuntary

removal from membership. The court denied plaintiffs' motion for summary judgment on the counterclaims, determining that material issues of fact existed with respect to all counts. A motion to bar the testimony of plaintiffs' expert was also denied. The court declined to grant a motion by defendants for reconsideration of the judge's determination that defendants were parties to the retirement agreement.

Trial of the matter occurred between April 1 and 16, 2009. On April 13, 2009, at the conclusion of plaintiffs' proofs, the court involuntarily dismissed all claims against the individual defendants pursuant to Rule 4:37-2(b), determining that they were acting in their corporate capacities in connection with the actions at issue in the litigation, and that there was no evidence of an individual guarantee or obligation. Additionally, the court dismissed plaintiffs' claims of fraud, resulting from the failure of N&A to extend Hopkins's retirement date beyond December 31, 2002, holding that any promise to extend that date was a promise to perform a future act that, upon breach, was cognizable as a breach of contract but not as fraud. The court held:

> Here, plaintiff has not presented any proof that, at the time of the contract, the defendants had no intention of actually carrying the promise out. Mere proof of non-performance does not prove a lack of intent to perform. . . .

> Here, we had indefinite language about being flexible from an exact written retirement date as the basis for breach and nothing more to show a present intention at the time to violate the nebulous provision . . . other than a subsequent failure to go beyond that written date.

Additionally, the court dismissed plaintiffs' claim for conversion, holding that the money due to SHA and Hopkins was placed by defendants in an escrow account and later paid in full to plaintiffs, and that the money was never wrongfully converted to N&A's use. It denied defendants' motion to dismiss plaintiffs' claims for breach of contract.

Thereafter, the court dismissed defendants' counterclaims for breach of fiduciary obligation, fraud and negligent misrepresentation. However, it sustained defendants' claim of tortious interference with N&A's existing contractual relationships by plaintiffs while dismissing their claim of tortious interference with prospective economic advantage.

On April 16, 2009, the jury returned a verdict in which it determined that neither plaintiffs nor defendants breached their contracts with the other, and that Hopkins and SHA did not tortiously interfere with defendants' existing contractual relationships. A motion by defendants for attorney's fees was denied.

Plaintiffs have appealed, and defendants have cross-appealed.

II.

On appeal, plaintiffs contend that the chancery court erred in dismissing Hopkins's claim for age discrimination pursuant to the NJLAD, which was premised on Hoffman's statements to Hopkins that the business was a "younger man's business" and that N&A had an "image to uphold." As previously noted, the court initially found that Hopkins was not an "employee" after applying the factors set forth in Clackamas, supra, 538 U.S. at 449-50, 123 S. Ct. at 1680, 155 L. Ed. 2d at 626, as adopted by the New Jersey Supreme Court in the context of a CEPA claim in Feldman, supra, 187 N.J. at 246-47.[4] Upon reconsideration, the court accepted defendants' additional arguments that, as the result of the choice of law provision contained in the services agreement between N&A and SHA and the conduct of the parties, which had its locus in Connecticut, that state's law should apply. We concur with the court's analysis.

New Jersey honors choice of law provisions in contracts unless "'(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable

[4] New Jersey courts often utilize reasoning derived from analysis of CEPA claims when analyzing claims brought under the LAD. Feldman, supra, 187 N.J. at 242.

basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which * * * would be the state of the applicable law in the absence of an effective choice of law by the parties." Instructional Sys. v. Computer Curriculum Corp., 130 N.J. 324, 341-42 (1992) (quoting Restatement (Second) of Conflicts of Laws § 187 (1969)).

Plaintiffs contend that the court did not properly analyze New Jersey's relationship to the litigation, noting that Hopkins was a resident of New Jersey during part of the time that he was a member of N&A, moving to Indiana only after he filed his federal complaint; some of the negotiations regarding Hopkins's retirement took place in New Jersey; and Hopkins received faxes as well as drafts of the second amended agreement at his New Jersey address. Additionally, plaintiffs note that neither SHA nor N&A was formed under the laws of Connecticut.

While plaintiffs are correct that ties to New Jersey exist, we agree with the chancery court that Connecticut has more substantial ties to the litigation. N&A's corporate headquarters is located in Connecticut; Hopkins has admitted that, while the managing member, his practice was to be in the Stamford, Connecticut office of N&A "attending to firm

administrative matters every day" that he was not traveling;[5] and all meetings to discuss amendments to the operating agreement and Hopkins's removal were conducted at the Stamford headquarters. As a consequence, it cannot be said that Connecticut has no substantial relationship to the parties or the transaction at issue. Instructional Sys., supra, 130 N.J. at 341. Indeed, we find relevant relationships with Connecticut predominate over any relationship with New Jersey.

Plaintiffs also claim that Connecticut law conflicts with New Jersey's strong public policy directed at the eradication of workplace discrimination. We disagree. While we acknowledge New Jersey's strong policy in that regard, Ellison v. Creative Learning Ctr., 383 N.J. Super. 581, 588 (App. Div. 2006), we note that a similarly strong policy has been articulated by the courts of Connecticut. See, e.g., Thibodeau v. Design Group One Architects, L.L.C., 802 A.2d 731, 745 (Conn. 2002) ("there can be no doubt that the elimination of invidious discrimination in employment is the overarching goal of the [Fair Employment Practices A]ct."); see also Conn. Gen. Stat. § 46a-60(a)(1) (declaring age discrimination by an employer to be a prohibited employment practice).

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[5] See letter from Hopkins to the remaining firm members, dated September 17, 2000.

Plaintiffs argue that, under New Jersey law, independent contractors can sue for age discrimination, see Rubin v. Chilton, 359 N.J. Super. 105, 110 (App. Div. 2003), whereas independent contractors are not entitled to such protection under the Connecticut Fair Employment Practices Act, the antidiscrimination protections of which cover employees, only. See DeSouza v. EGL Eagle Global Logistics L.P., 596 F. Supp. 2d 456, 463-67 (D. Conn. 2009). Thus, they claim application of Connecticut law would be contrary to New Jersey public policy. However, public policy concerns arise only when the state whose law has not been contractually designated as controlling has a materially greater interest in the controversy than the chosen state. Such is not the case here.

Moreover, we find Rubin nonprecedential in the circumstances presented. The chancery court did not find the NJLAD inapplicable to Hopkins because his company, SHA, contracted with N&A, but rather because Hopkins participated in the management and control of N&A, and for that reason, was not an employee. Rubin does not address that circumstance. Further, our decision in Rubin, which concerned the termination of employment contracts between a hospital and two pathologists, was premised upon a different provision of the NJLAD than that asserted here, N.J.S.A. 10:5-12*l*, a provision prohibiting

discriminatory refusals to contract. Rubin, supra, 359 N.J. Super. at 109-11. That statutory provision is inapplicable in the present case. DeSouza, which focuses on the distinction between employees and independent contractors in construing Conn. Gen Stat. § 46a-60(a)(1) in a manner similar to our construction of N.J.S.A. 10:5-12a, see Rubin, supra, 359 N.J. Super. at 108-09, is similarly inapposite.

Plaintiffs have cited no precedent holding, under New Jersey law, that Hopkins as a member of N&A would be deemed an employee of that entity. Indeed, as the chancery court held, application of the six-prong test enunciated in Feldman, supra, 187 N.J. at 244, to the facts of this case compels a contrary result. Such application leads to the conclusion that (1) Hopkins had a high degree of independence in how he performed his duties; (2) N&A did not provide supervision over Hopkins's work, as he was highly experienced and was hired as a consultant by different companies; (3) there was no evidence that Hopkins reported to anyone in the organization; (4) as a member, Hopkins had significant influence over the company and had an equal voice with other members in controlling the operation of the business; (5) the parties never intended for Hopkins to be considered an employee; and (6) Hopkins shared equally with the other members in the profits, losses, and liabilities of the

organization. The fact that he might have provided services, through SHA, to N&A as an independent contractor did not nullify his status as a shareholder/director of N&A. As a result, there is no basis to conclude that New Jersey extends broader protections under the NJLAD than does Connecticut law, and as a consequence, New Jersey law should be applied in this case. Even if New Jersey law were applicable, as the foregoing analysis demonstrates, plaintiffs would be unable to prevail on the claim asserted under the NJLAD.

III.

Plaintiffs argue additionally that the chancery court erred in applying Delaware law to dismiss their oppressed minority shareholder claim.

The chancery court addressed the issue of the proper choice of law on two occasions: first, when Hopkins sought, as an allegedly oppressed minority shareholder, the immediate release of escrowed funds by N&A. The court denied relief, declaring that Hopkins was collaterally estopped from challenging the retention of those funds by the interlocutory decisions of the federal magistrate and the district court in the federal litigation, which applied federal law. Additionally, the court held that Hopkins had failed to meet the standards for injunctive relief set forth in Crowe, supra, 90 N.J. at 132-34.

The court revisited the issue in its opinion granting defendants' motion to dismiss plaintiffs' claims of minority shareholder oppression and, at that time, gave effect to the choice of law provision contained in the operating agreements, determining that neither exception to a recognition of the parties' choice of law was applicable. It found that New Jersey had no more significant relationship to the transaction or parties than did Delaware, and that application of Delaware law would not violate the public policy of a state with a materially greater interest in the issues in dispute. In support of its position, the court relied on Kalman Floors Co., Inc. v. Jos. L. Muscarelle, Inc., 196 N.J. Super. 16, 21 (App. Div. 1984), aff'd, 98 N.J. 266 (1985) (adopting the position of the Restatement (Second) of Conflicts of Laws, supra, § 187). The court held:

> Nightingale was formed under Delaware law and its members unanimously chose to have their relationship governed by that law.
> . . .
>
> The members of Nightingale were sophisticated businessmen, represented by counsel, making copious sums of money. It would be anomalous and unfounded to reject the agreement freely entered into by the members of the LLC, to provide plaintiffs the benefit they seek.

Additionally, the court again found that the federal choice of law determinations on this issue should be granted preclusive effect.

We reject the court's conclusion that the federal rulings were binding in the state court proceeding and accept plaintiffs' position that, when a federal court has determined that it has no subject matter jurisdiction over an issue, its prior rulings with respect to that issue become a nullity. Zacharias v. Whatman, P.L.C., 345 N.J. Super. 218, 226-27 (App. Div. 2001) (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 18, 71 S. Ct. 534, 542, 95 L. Ed. 702, 710-11 (1951) and Brown v. Francis, 75 F.3d 860, 864 (3d Cir. 1996)), certif. denied, 171 N.J. 444 (2002). Nonetheless, we find no error in the chancery court's determination to apply Delaware law.

In reaching that conclusion, we concur with the chancery court's observation that the parties freely entered into an operating agreement that they explicitly provided was to be governed by Delaware law. Further, it is apparent that the disputes at issue arose out of that agreement, as amended to permit the removal of a member without cause and to establish the procedures for doing so. That some communications by N&A in that connection were received by Hopkins in New Jersey and responses were sent by him from this State does not alter our

conclusion that plaintiffs' dispute concerns the management and governance of N&A – subjects that the parties unanimously agreed would be governed by Delaware law.

Moreover, we are satisfied that, if New Jersey law were to be applied to this dispute, the result would not differ from that obtained by application of Delaware law. In this regard, we note that, at the time that plaintiffs' dispute with N&A arose, N&A was a limited liability company to which N.J.S.A. 14A:12-7, the oppressed minority shareholder statute, is inapplicable. Denike v. Cupo, 394 N.J. Super. 357, 378 (App. Div. 2007), rev'd on other grounds, 196 N.J. 502 (2008).

New Jersey's Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70 (LLCA), was enacted to enable members of such companies "'to take advantage of both the limited liability afforded to shareholders and directors of corporations and the pass through tax advantages available to partnerships.'" Kuhn v. Tumminelli, 366 N.J. Super. 431, 439 (App. Div.) (quoting Senate Commerce Committee Statement, S. Doc. No. 890, at 1 (June 14, 1993)), certif. denied, 180 N.J. 354 (2004). "The LLCA gives members of such companies great discretion to establish structure and procedures, with the statute controlling in the absence of a contrary operating agreement." Denike, supra, 394 N.J. Super. at 378 (citing Kuhn, supra, 366 N.J. Super. at 439).

Here, the second amended operating agreement, adopted by the members of N&A on September 30, 2002, sets forth in a provision entitled "Distributions to Former Members" the rights of a member who is removed without cause. The agreement does not address the rights of a minority member who claims oppression. But then, neither does the LLCA, which has no provision that relates to oppressed minority shareholder-type claims. As a consequence, no relief is available to plaintiffs pursuant to New Jersey law.

IV.

As previously stated, before trial of the matter, the Law Division court dismissed plaintiffs' claims that the individual defendants tortiously interfered with the September 2000 retirement agreement (Count VIII) and with the May 14, 2001 operating agreement (Count IX). The court held that the defendants were parties to both agreements, and under established precedent, they could not interfere with their own agreements. During trial, the court also dismissed claims that the individual defendants breached contracts with plaintiffs, namely, the same September 2000 retirement and the May 2001 operating agreements that had figured in plaintiffs' claims of tortious interference, holding that in signing those agreements,

defendants were acting in their corporate capacity, and that there was no evidence of an individual guarantee or obligation.

On appeal, plaintiffs claim that the two rulings are inconsistent, and that the reasoning underlying the court's ruling dismissing plaintiffs' tortious interference claims[6] compels the conclusion that plaintiffs' claims against the individual defendants for breach of contract should not have been involuntarily dismissed pursuant to Rule 4:37-2(b). Alternatively, plaintiffs argue that if the breach of contract claims were properly dismissed, then they should have been permitted to proceed with their claims of tortious interference with contract. In either event, plaintiffs claim, the court committed harmful error.

We agree with plaintiffs that the individual members of N&A were parties to the operating agreements governing that entity. See N.J.S.A. 42:2B-2 (defining operating agreement to be "a written agreement among the members"). However, we do not regard that fact as compelling the further conclusion that defendants can be held individually liable for breach of that

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[6] Plaintiffs concede that if defendants were parties to the contracts at issue, they cannot be found liable for tortiously interfering with them. See Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 80 (App. Div. 2004), certif. denied, 183 N.J. 213 (2005).

agreement. As previously noted, paragraph 12.1.1 of the May 2001 operating agreement provided:

> No Member or Manager shall be personally liable to the Company or other Members in acting on behalf of the Company or in his or her capacity as a Member or Manager, except as otherwise required by applicable law, provided that his or her actions or omissions did not constitute fraud, bad faith, gross negligence or willful misconduct.

Further, N.J.S.A. 42:2B-23 provides:

> Except as otherwise provided by this act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company, or for any debt, obligation or liability of any other member, manager, employee or agent of the limited liability company, by reason of being a member, or acting as a manger, employee or agent of the limited liability company.

As the result of these contractual and statutory provisions, we find that the defendant members of N&A are immune from liability as the result of plaintiffs' claims of breach of the May 2001 operating agreement.

We concur with the Law Division court's conclusion that the individual defendant members of N&A were not parties to the retirement agreement – an agreement separate from the operating

agreement. As Hopkins conceded in his deposition, if N&A had dissolved before his retirement, he would not have been able to collect any retirement proceeds from any of the individual defendants. Nonetheless, this conclusion does not compel resurrection of plaintiffs' claim of tortious interference by defendants with the retirement agreement between Hopkins and N&A, because the immunities conferred by the operating agreement and statute remain operative. Moreover, we note that, if such a claim were recognized, it would nonetheless fail, as the trial court recognized, as the result of plaintiffs' failure to proffer evidence of malice – an essential element in a claim of tortious interference with contract. See Raymond v. Cregar, 38 N.J. 472, 480 (1962) (requiring malice, which the Court defined as "the intentional doing of a wrongful act without justification or excuse").

We recognize the exception to the immunities conferred by the operating agreement that applies if defendants committed fraud. However, as discussed more fully in the next section of this opinion, we are satisfied that plaintiffs failed to produce evidence of such actionable conduct.

V.

In their final argument, plaintiffs claim that the trial court improperly granted defendants' motion for an involuntary

dismissal of plaintiffs' claims of fraud. In that regard, plaintiffs state that their fraud count

> was based on misrepresentations and statements made by the Defendants to Hopkins to induce him to give up his blocking vote in Nightingale LLC through adoption of the Amended LLC Operating Agreement. The evidence presented in Plaintiffs' case showed that the Defendants made promises upon which Hopkins relied concerning the flexibility of his retirement date with no intention of honoring them, simply to get Hopkins to relinquish his blocking vote. Hopkins suffered damages through lost income as the result of Defendant's conduct.

Plaintiffs concede that "statements as to future events, expectations or intended acts, do not constitute misrepresentations despite their falsity, if the statements were not made with the intent to deceive." Notch View Assocs. v. Smith, 260 N.J. Super. 190, 202 (Law Div. 1992) (citing Middlesex Cnty. Sewer Auth. v. Borough of Middlesex, 74 N.J. Super. 591, 605 (Law Div. 1962), aff'd, 79 N.J. Super. 24 (App. Div.), certif. denied, 40 N.J. 501 (1963)). Plaintiffs concede as well that "[m]ere nonperformance is insufficient to show that the promisor had no intention of performing." Id. at 203 (citing Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 382 (App. Div. 1980)). Nonetheless, plaintiffs contend that if defendants had no intention to perform at the time that the promise of future action was made, their conduct

can be recognized as fraudulent. Id. at 202-03 (citing Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1264 (D.N.J. 1982)).

In support of their position, plaintiffs rely on the testimony of Douglas Hopkins, the son of Stephen Hopkins, who was also a member of N&A at the time of the negotiations for Stephen's retirement and when he was eventually removed. Douglas Hopkins testified at trial that, at a meeting held on September 30, 2002, after Stephen had announced that he had rescinded his plan to retire, the members met to discuss an amendment to the operating agreement to conform the compensation offered to a member who was removed without cause to that offered to Stephen in the retirement agreement. Douglas opposed the amendment, arguing that the operating agreement should not be utilized to compel Stephen to retire upon a date certain, when he had specifically negotiated for flexibility in that regard. At this point, according to Douglas,

> Mike D'Appolonia erupted indicating that that wasn't the deal, that Steve had to leave. Kevin Dowd erupted saying that wasn't the deal, that Steve had to leave. Both Mike D'Appolonia and Kevin Dowd insisted that this was the first time they had heard that Steve didn't intend to leave.

Nonetheless, the amendment to the operating agreement equalizing compensation was adopted over the objection of Stephen and Douglas Hopkins.

Stephen was then asked to leave the room. While he was absent, Douglas was "attacked" by Kevin Dowd, who claimed that the company had been "betrayed" by Stephen as the result of his change of position regarding retirement, and Dowd asked if Stephen had consulted with counsel regarding litigation over the proper construction of the retirement agreement. At this point, according to Douglas,

> Howard [Hoffmann] said that he simply gave the changed language to Steve in order to allow him to save face, but he never had any intention of allowing Steve to stay past 12/31/02.
>
> * * *
>
> He – he said, Steve has to retire on time. That this was not a negotiable issue.

When Douglas asked Hoffmann what "flexible" meant, Hoffmann allegedly responded that "he was not intending to be flexible. That he got to interpret flexible. . . . He could decide what it meant." Stephen Hopkins was then permitted to return to the room, and he was informed that he had seven days to confirm that he was going to retire.

In our view, this exchange does not offer evidence that a jury could determine constituted clear and convincing proof of

fraud on the part of defendants. At the time the retirement agreement was negotiated in August and September 2000, Hopkins was suffering from medical problems that were curtailing his ability to travel. Hopkins's retirement plans were, in large measure, a response to his medical condition at the time. While he sought flexibility with respect to his retirement date, a fair reading of the documents exchanged at the time suggests that the parties envisioned providing some leeway of weeks or months regarding Hopkins's actual retirement date. There is no evidence in the record to suggest that, when the retirement agreement was executed, defendants envisioned that bargained-for "flexibility" included rescission of the agreement to retire upon an improvement in Hopkins's medical condition. While Hopkins may have construed the agreement to include such an eventuality, no evidence was presented of a meeting of the minds on this point. Thus, from the members' perspective, Hopkins's statement in June 2002 that he did not intend to retire at any specific date was wholly contrary to the members' reasonable expectations.

It was in this context that the statements of the defendant members, as alleged by Douglas Hopkins in his trial testimony, were made. As such, they do not provide any evidence with respect to the members' intent in connection with the

implementation of the retirement agreement as it was initially negotiated. Indeed, the record is silent as to whether the members would, knowing of Hopkins's intent to retire, have afforded him some period of time beyond December 31, 2002 in which to order his affairs. We thus concur with the trial court's determination to dismiss plaintiffs' fraud claims.

VI.

We turn next to defendants' cross-appeal. Defendants argue first that the court erred by reinstating plaintiffs' jury demand when the matter was transferred from the Chancery Division to the Law Division. We consider this issue on appeal since the jury rendered a verdict not only on the breach of contract claim asserted by plaintiffs, but also on the counterclaim for breach of contract and tortious interference with existing contracts, asserted by defendants. Thus, the issue has not been mooted by our affirmance with respect to plaintiffs' appeal.

In the verified complaint filed by plaintiffs in the Chancery Division, plaintiffs included a demand for "trial by jury on all issues so triable." In pursuing their action, plaintiffs initially sought injunctive relief on an oppressed minority shareholder theory pursuant to N.J.S.A. 14A:12-7 — equitable relief as to which a trial by jury was unavailable.

Thereafter, the court dismissed plaintiffs' claims of minority shareholder oppression and violation of the NJLAD as a matter of law, and exercised its discretion pursuant to Rule 4:3-1(b) to transfer the remaining claims, which were legal in nature, for trial in the Law Division and granted plaintiffs' motion for "reinstatement of Plaintiffs' waived jury demand" on grounds of fundamental fairness pursuant to Rule 1:1-2. The court held:

> The plaintiff[s'] counsel agreed to waive the jury demand in consideration of maintaining the entire action in the Chancery Division. It would be inequitable and unfair to the plaintiffs to require that position be maintained if the matter is transferred to the Law Division.
>
> Would it have been preferable to indicate waiver only if the matter retains or remains in the Chancery Division? Certainly, but it would be unduly punitive and prejudicial to the plaintiffs to have that oversight preclude their fundamental right to a jury trial.

The record on appeal does not set forth the circumstances in which jury waiver occurred in this matter. We therefore accept the court's statement that plaintiffs waived a jury with the understanding that the entire matter would be resolved by the chancery court. We recognize that, after rulings by the court disposed of all equitable issues, as well as plaintiffs' NJLAD claim, it was plaintiffs who sought transfer to the Law Division and, in that connection, reinstatement of their jury

demand. However, it remained within the chancery court's discretion whether to grant that motion, which it determined to do primarily as the result of the press of a heavy caseload in the Chancery Division.

In the circumstances presented, we do not find an abuse of discretion on the part of the chancery court in reinstating plaintiffs' jury demand upon transfer of the matter to the Law Division for trial. That the court had such discretion pursuant to Rule 1:1-2 was recognized by the Supreme Court in Carolyn Schnurer, Inc. v. Stein, 29 N.J. 498, 502-04 (1959), which held that a request to reinstate a jury demand need not be automatically granted, but that relief could be afforded pursuant to a precursor to Rule 1:1-2 when a rational basis for it is demonstrated. Id. at 503. Here, the nature of plaintiffs' claims was changed by the elimination of those seeking equitable remedies. We find that such legal action provided sufficient cause to permit the court's exercise of its discretion.

VII.

In light of the jury's verdict rejecting plaintiffs' claims, we decline to consider defendants' protective appeal from the court's denial of their motion to bar the testimony of plaintiffs' economic expert and turn to their appeal from the

court's involuntary dismissal of their counterclaims for breach of fiduciary duty, tortious interference with prospective economic advantage, and negligent and intentional misrepresentation.

The court dismissed defendants' breach of fiduciary duty claims on the ground that, following Hopkins's removal from membership in November 2003 and the termination of the services agreement between N&A and SHA at that time, plaintiffs owed no fiduciary duty to N&A. We concur with that legal conclusion.

Defendants claim on appeal that, because Hopkins testified that he regarded himself to be a member of N&A after his termination, a breach of fiduciary duty could be found to exist. We reject that argument, determining as a matter of law that the business relationship between plaintiffs and defendants ended when defendants exercised their right of removal without cause pursuant to N&A's amended operating agreement.

Defendants claim additionally that Hopkins breached his fiduciary duty to the company during his tenure as a member by plotting with his son, Douglas, against D'Appolonia and Dowd to starve them of resources and, additionally, to start a new firm in the Nightingale name with Hoffmann and Duckett and without D'Appolonia and Dowd. However, neither Hoffmann nor Duckett agreed to the proposals.

Defendants claim that in November 2001, Hopkins unilaterally promoted and raised the billing rate of an associate named Chip Weismiller. However, when Hoffmann learned of the promotion, and after consultation with D'Appolonia, the promotion was rescinded.

Defendants also claim that in May 2002, after stepping down as managing member, upon learning that a portion of the assignment responsibilities had been transferred to an investment banking firm, Hopkins unilaterally withdrew Nightingale from a consulting assignment for Farmland Industries, despite the fact that there was still significant work that N&A could have done. Thereafter, N&A was not successful in regaining that work, which was performed by another turnaround consulting firm. However, defendants do not quantify the amount of damages suffered by the company as a result.

In July 2002, according to defendants, an attorney approached N&A, through Hopkins, concerning a project for a large nationwide propane distributor. According to defendants, Hopkins unilaterally declined the assignment on the ground that the company lacked propane experience. However, Hopkins's communication was intercepted, and N&A was successful in obtaining the assignment.

Our review of the record regarding these claims by defendants of breach of fiduciary duty by Hopkins during his tenure as a member of N&A satisfy us that either the steps taken by Hopkins were ineffectual, they were rescinded, or damages flowing from them were not proven. As a consequence, involuntary dismissal was properly entered.

Defendants also contest the dismissal of their claims for negligent and intentional misrepresentation by Hopkins. Defendants correctly argue that negligent misrepresentation constitutes a recognized cause of action in New Jersey. See Karu v. Feldman, 119 N.J. 135, 146 (1990) (recognizing a cause of action when a party negligently provides false information upon which a reasonably foreseeable recipient relies, resulting in damages); H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334 (1983) (defining negligent misrepresentation as "[a]n incorrect statement, negligently made and justifiably relied upon," resulting in damages). However, the statement upon which defendants' cause of action is premised is Hopkins's undertaking to retire at the end of 2002. While that undertaking was later rescinded, there is no evidence in the record that Hopkins's statement of his future intent was incorrect at the time it was uttered. Thus, the record does not support defendants' claim of misrepresentation, whether negligent or intentional.

As a final matter, defendants challenge the claimed dismissal of their causes of action for tortious interference with existing contracts and prospective economic advantage. In that regard, the court explicitly preserved defendants' claim for tortious interference with existing contracts, and that claim was submitted to the jury, which rendered a verdict against defendants. The court dismissed the claim for interference with prospective economic advantage on the ground that the services agreement between N&A and SHA did not contain a non-competition clause, and as a result, Hopkins was free to compete with N&A for business following his involuntary removal as a member of the company. We agree. In the circumstances, whether N&A sustained damages, and whether those damages were quantified at trial, is not relevant to the legal analysis. Contrary to defendants' arguments, we find nothing misleading in Hopkins's statements to clients that he had been involuntarily retired by N&A, that the contract between SHA and N&A had been cancelled, and that his authority to act independently in providing advice and counsel to clients as a representative of the firm had been revoked.

VIII.

In a final legal argument, defendants contend that Hopkins's continued prosecution of his minority shareholder

oppression claim was frivolous, entitling defendants to attorneys' fees and costs pursuant to the frivolous litigation statute, N.J.S.A. 2A:15-59.1, and the offer of judgment rule, Rule 4:58-3.[7] In this connection with their frivolous litigation claim, defendants argue that, following the dismissal of his oppressed minority shareholder claim in June 2007, Hopkins continued to seek the "fair value" of his share in N&A, relief that defendants contend was available only as the result of the successful prosecution of an oppression claim. Accordingly, defendants claim entitlement to fees in the amount of $103,688.61, and they contend that the court erred in declining to award that amount. Additionally, defendants claim that Hopkins asserted frivolous claims against the individual defendants, contending that, as the result of the retirement agreement, they were obligated to provide continued project work to him after his retirement. In connection with their defense of that claim, defendants seek $120,725.85 in fees and costs.

The court denied the relief in a written opinion of June 1, 2009. In that opinion, it denied relief pursuant to the offer of judgment rule because plaintiffs had not recovered a monetary award. Rather, plaintiffs' claims were either dismissed on

[7] Defendants offered judgment to plaintiffs in the sum of $315,000 on November 20, 2007. The offer was not accepted.

summary judgment or dismissed following the jury's no-cause verdict. In those circumstances, an award of attorneys' fees was unavailable.[8]

The court also denied attorneys' fees pursuant to the frivolous litigation statute, noting that in Toll Brothers, Inc. v. Township of West Windsor, 190 N.J. 61, 72 (2007), the Supreme Court had held that a party seeking statutory fees must comply with the procedural requirements of Rule 1:4-8, the frivolous litigation rule. See also R. 1:4-8(f) (requiring "[t]o the extent practicable" the procedures prescribed by the rule shall apply to an application pursuant to N.J.S.A. 2A:15-59.1). The court continued by stating that Rule 1:4-8(b)(1) requires that, before seeking sanctions for frivolous litigation, the party must send a detailed letter to the allegedly offending party indicating why the pleading or other submission was frivolous, and demanding its retraction within twenty-eight days in order to avoid sanctions. However, in the present matter, defendants failed to send the safe harbor letter that the rule requires, and offered no excuse for their failure to do so. Additionally, the court held that plaintiffs' complaint was made in good

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[8] Rule 4:58-3(c) provides in relevant part:

> No allowances shall be granted if (1) the claimant's claim is dismissed, [or] (2) a no-cause verdict is returned[.]

faith, and that in ordering dismissal of various counts, no finding was ever made that the claims were frivolous. The court continued:

> As long as there is litigation of "marginal merit," a court should not reward attorneys' fees and costs to a party. See Belfer v. Merling, 322 N.J. Super. 123, 144 (App. Div. 1999); Venner v. Allstate, 306 N.J. Super. 106 (App. Div. 1997). Here, nothing indicates that the Complaint was commenced or used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury. Moreover, nothing indicates that Plaintiff[s] knew or should have known that the Complaint was without any reasonable basis in law or equity and could not be supported with a good faith argument.

Accordingly, defendants' attorneys' fee claim was denied.

Although defendants challenge the court's decision on appeal, we affirm it for the reasons stated by the Law Division court. We add only that, even if we were to accept defendants' explanation for their failure to serve a safe harbor letter as valid, we would still conclude that plaintiffs' claims were not frivolous, and thus sanctions were not warranted.

The decisions from which the appeal and cross-appeal are taken are affirmed.

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

CLERK OF THE APPELLATE DIVISION