KDN, INC. AND NICHOLAS ANTIPIN, INDIVIDUALLY,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-00204-24T2
Plaintiff/Appellant(s),	:	Civil Action
v.	:	On appeal from:
YOURY ANTIPIN,	:	Superior Court of New Jersey Law Division - Monmouth County
Defendant/Respondent(s).	:	Docket No.:MON-L-3682-21
	:	Sat below: Hon. Lisa P. Thornton, J.S.C. Hon. Gregory L. Acquaviva, J.S.C. Hon. Andrea Marshall, J.S.C. Hon. David F. Bauman, J.S.C.

BRIEF OF PLAINTIFF- APPELLANTS KDN, INC. & NICHOLAS ANTIPIN

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PRELIMINARY STATEMENT

This matter arises out of a dispute over the dissolution of a business relationship between Plaintiff-Appellants KDN, Inc. and Nicholas Antipin (hereinafter referred to "KDN" and "Nicholas", respectively, and "KDN", collectively) and Nicholas' brother, Defendant-Respondent Youry Antipin (hereinafter referred to as "Youry"[2]). In particular, the central dispute involved the valuation of 111 10th Avenue, Belmar, New Jersey (hereinafter the "subject property" or the "subject", interchangeably) for purposes of determining the buyout of Youry after the relationship between the former partners had soured.

About a month before a peremptory trial, Youry moved to reopen discovery to obtain a new appraiser and attorney. Youry's reason for seeking a new appraisal was that he had filed an ethics complaint against his expert, who allegedly would not respond to his communications. The trial court granted the motion without issuing a statement of reasons or formal findings of fact. However, the motion judge's comments suggested that she found Youry's dilemma to be self-inflicted, and that no valid reason existed to extend discovery. The motion court awarded costs of the motion and appraisal to KDN but failed to address the prejudice caused by

[2] Nicholas and Youry are referred to by their first names for clarity and ease of reference. No disrespect to the parties is intended.

appreciation in market values between the time of the first and second trials. The first round of appraisals valued the property between approximately $680,000 and $1,400,000; the appraisals used at trial valued the property between $1,400,000 and $2.500,000, nearly doubling the averaged appraised value to be presented at trial.

Additionally, during the trial, the trial court allowed Youry's expert to critique KDN's expert's appraisal on a detailed basis, even though no rebuttal report was produced. This negatively affected KDN in the ultimate determination; the result of Youry's expert's rebuttal on just one of these issues increased the final determination of value by over $300,000.

To remedy the prejudice KDN suffered, the matter must be remanded for the limited purpose of redetermining the value of the subject property as of the filing of the verified complaint or, at the latest, the time of the preparation of the parties' first round of appraisals.

PROCEDURAL HISTORY

On November 2, 2021, KDN initiated suit against Youry by way of verified complaint and order to show cause. (Pa9, Pa46). On December 1, 2021, Youry filed an answer and counterclaim. (Pa50). On September 21, 2022, KDN filed a First Amended Complaint, which Youry answered on or about September 26, 2022. (Pa102).

On November 3, 2022, discovery issues between the parties resulted in cross motions to compel discovery and to extend the discovery end date. (Pa3). Youry filed a discovery motion on January 11, 2023. (Pa4). On February 3, 2023, contemporaneous with granting the discovery motion in part, the trial court entered an order setting June 12, 2023 as a firm trial date. (Pa4; Pa113). This order stated that,

> [T]he trial date in the above matter shall not be adjourned to accommodate vacations or other personal or professional commitments of the attorneys or parties…attorneys shall be charged with monitoring the schedules of their respective clients, experts and witnesses in order to ensure their availability at trial…no further adjournment of this matter shall be granted for failure to comply with the terms of this Order…
>
> (Pa113-14).

On April 4, 2023, the court entered a pretrial order setting a schedule for *in limine* motions, pre-trial memoranda and preliminary statement. (Pa116). On May

1, 2023, KDN filed a pre-trial memorandum. (Pa124). On May 2, 2023, Youry filed a pre-trial memorandum naming Todd G. Lipira, SCGREA (hereinafter "Lipira"), as a witness at trial. (Pa129). Lipira's report was dated June 22, 2022. (Pa209).

Two days after filing a pre-trial memorandum, Youry filed a motion to adjourn the June 12, 2023 trial date and appoint a new appraiser. (Pa133). In a two page, nine paragraph certification with no exhibits, Youry's counsel certified that Youry filed an ethics complaint against Lipira with the state appraisal board, and that Lipira could not testify at trial. (Pa134a). The certification provided no dates relative to obtaining the appraisal, the filing of the ethics complaint, or efforts to resolve the situation. (Pa134-35). On May 8, 2023, Youry's attorney filed a motion to be relieved as counsel. (Pa136). The reason stated for the request was that "[t]he relationship between myself and Youry Antipin has so deteriorated that it is impossible for me to represent him any longer." (Pa137).

KDN opposed the motion, arguing that Youry failed to demonstrate that exceptional circumstances existed, as the circumstances surrounding the asserted need for the extension were all within Youry's control, i.e., he had filed an ethics complaint against his own appraiser, and that the motion was an attempt to delay the proceedings. (Pa138-140). Youry's motions were heard on May 22, 2023[3] by the

[3] The transcripts filed in this matter shall be cited to as follows:

Honorable Lisa P. Thornton, J.S.C. (1T3-23:24). Judge Thornton was new to the matter; previous and subsequent motions in the matter were heard by the Hon. Gregory L. Acquaviva, J.S.C., and eCourts listed Judge Acquaviva as assigned to hear the motion, and the orders entered by Judge David F. Bauman, J.S.C. (Pa1-5). At the time of the argument, the assigned motion judge was not aware that KDN opposed the motion and had not received the opposition filed on eCourts, possibly due to her law clerks' travels. (1T4-19:1T5-11). Youry testified that Lipira failed to answer certain questions he had asked him pertaining to the credibility of the appraisal, and that Lipira's failure to respond was the basis for the ethics complaint. (1T8-23:1T9-11). Youry also testified that he had difficulty reaching his attorney to alert him to the issue. (1T9-19:1T10-20). The motion was filed the day after the Youry spoke with his counsel. (1T9-19:1T10-20).

After this testimony, the motion judge observed that, "…if there's a good reason why we find ourselves at this juncture, I haven't heard it." (1T21-22:24). The motion judge, (paraphrasing counsel for KDN) further stated, "It's a self-inflicted

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May 22, 2023 motion argument – "1T";
July 7, 2023 motion argument - "2T";
June 17, 2024 trial proceedings - "3T";
June 18, 2024 trial proceedings - "4T";
June 19, 2024 trial proceedings - "5T";
June 27, 2024 oral decision - "6T".

wound. You haven't really heard a really good reason why at this juncture you are going to reopen discovery and why I had to answer this motions, and I – and I can't disagree with him with what I've heard." (1T23-13:17). However, the motion judge, referring frequently to an "exchange" for the extension of discovery, ultimately granted Youry's motion to reopen discovery and obtain a new appraisal expert; the order granting the extension was, however, signed by Judge Bauman. (1T26-13:19; Pa142). Simultaneously, the trial court entered an order relieving Youry's counsel, also signed by Judge Bauman. (Pa143).

On June 16, 2023, KDN filed a motion to reconsider the trial court's decision permitting Youry to reopen discovery. (Pa144). The basis for the motion was that Youry had filed an ethics complaint against the Plaintiffs' appraiser, Robert Gagliano (hereinafter "Gagliano") with the state appraisal board. (Pa147-48; Pa153-55). Youry's complaint asserted that KDN's appraiser's value was allegedly too low due to his choice of appraisal methodology. (Pa155). Youry opposed the motion, reasserting his argument that lack of communication with Lipira was reason enough to terminate him about a month before trial, blaming his previous attorney for failing to properly handle the case and asserting his complaint against Gagliano was meritorious. (Pa164-65; Pa163-64; Pa166-67).

After hearing argument, the motion judge denied KDN's motion, finding that the interest of justice did not demand a reconsideration of the order in light of the new facts presented. (2T25-7:25). However, the motion court did find that, with respect to Youry's cross motion "…there's a lot of things in that cross motion and even said today that just aren't substantiated. A lot of speculation both ways, I think more so coming from the defendant on well, because of this, that, and because of that, this, and sham expert reports and all of these things. Just un –- baseless. Baseless, baseless, baseless." (2T26-4:9). The motion court entered a conforming order on July 7, 2023. (Pa249).

Following reconsideration, the parties completed discovery and the matter was tried to conclusion on June 17 – 19, 2024. (Pa536). The trial court issued findings of fact and conclusions of law on June 27, 2024, later incorporated into a written judgment dated July 9, 2024. (Pa536-37). On September 10, 2024, this judgment was amended following a motion for reconsideration. (Pa541-46).

KDN filed a notice of appeal on September 20, 2024. (Pa547). KDN filed an amended notice of appeal on September 24, 2024, correcting the notice as to the dates of orders and judgments on appeal. (Pa556). Transcript completion and delivery was certified on November 27, 2024. (Pa561). This briefing follows.

STATEMENT OF FACT

On or about May 3, 2000, 111 10th Ave. Associates (hereinafter the "Partnership") received title to the subject property. (Pa96-9). The property contains ten residential units in two structures, with five units in each building. (Pa271). It was built in approximately 1887 and was deemed to be in average to fair condition, in need substantial of repairs. (Pa300; Pa415-16). One of the two structures lacks heating. (Pa300). Youry's appraisal expert estimated repairs to one structure would cost approximately $142,786; KDN's obtained estimates, later adopted by its appraisal expert, reflecting the need for repairs to both buildings totaling $469,850 (Pa495-96; Pa332; Pa365-70).

The Partnership consisted of KDN and Youry, with KDN owning a 65% share, and Youry owning a 35% share. (Pa16). Nicholas is Youry's brother and the Chief Executive Officer of KDN. (Pa9). The partnership agreement provided for stated that if one partner decided to sell his interest, "…at that time a fair market value must be determined…". (Pa16).

Relations between the partners became troubled, and Youry certified that his attorney served notice on Nicholas that he was exercising his rights to be bought out pursuant to the Partnership agreement. (Pa160; Pa171-72). KDN desired to buyout Youry's share. (Pa10). However, Youry refused KDN's October 2020, August 2021

and September 2021 buyout offers, and refused further participation in negotiations on the issue. (Pa82). As a result, KDN filed suit to dissolve the partnership in November 2021. (Pa2; Pa9). Attached to the complaint was an appraisal valuing the property at $678,700 as of December 7, 2020. (Pa17-19).

During the litigation, the parties resolved disputes related to the disposition of other jointly owned properties by way of settlement. (Pa80a; Pa84-86; 3T12-16:3T14-2). However, the issue of the subject property's valuation, the interpretation of the Partnership's agreement, and the proper distribution of the Partnership's funds remained for trial. (Pa256-61). Gagliano, KDN's first expert, valued the property at $670,000 as of January 2022 (Pa177-78), Lipira, Youry's first expert, valued the property at $1,400,000 as of May 2022 (Pa209). Christopher Otteau (hereinafter "Otteau"), KDN's second expert valued the property at $1,400,000 as of October 2023. (Pa251-53). Theodore J. Lamicella, Jr. (hereinafter "Lamicella"), Youry's second expert, valued the property at $2,500,000 as of July 2023 (Pa397-99).

At trial, the court heard testimony and received appraisals from Otteau, Lipira and Lamicella[4]. (4T125-25:4T127-22; 4T140-4:4T142-9; 4T213-13:4T218-18; Pa209-222; Pa251-396; Pa397-535). During the direct testimony of Lamicella, KDN objected to a line of questioning reviewing Otteau's report. (5T6-2:14). The trial

[4] KDN called Lipira to testify. (4T120-13:14; 4T125-21:4T126-19).

court overruled the objection, stating that the trial was not before a jury and that the trial judge believed the testimony would be helpful. (5T7-20:5T9-1). The trial judge suggested that KDN might recall its expert in rebuttal to Lamicella's testimony, but there was no adjournment of the trial to permit any such testimony. (5T7-20:5T9-1; 6T3-24:6T4-1).

Subsequently, Lamicella made comments regarding Otteau's report with respect to Otteau's use of home improvement professional estimates, (5T10-4:14), USPAP requirements regarding verification of construction costs (5T10-21:5T11-4), choice of comparable properties, (5T12-24:17), choice of unit of comparison, (5T14-1:5T15-19), and propriety of accounting for a superintendent's apartment, (5T15-20:5T16-13). Lamicella also reviewed Lipira's report and commented on his choice of comparable properties (5T20-14:5T21-4) and unit of comparison (5T21-22:5T22-3). He clarified on re-direct that Lipira would not have had data related to sales post-dating his report. (5T22-22:5T24-1). The trial court noted this in its findings. (6T5-16:6T6-1).

The trial court issued an oral opinion that it later supplemented in writing. (6T3-24:6T4-4; Pa251). Notably, the trial court stated that, with respect to Otteau, "…the Court finds that Mr. Otteau mistakenly relied upon estimates supplied by Nicholas Antipin and incorrectly utilized square footage in lieu of a per unit

approach when determining fair market value related to the income approach." (6T6-5:9). However, the trial court failed to note that Otteau did utilize per-unit rents from both the subject and comparable properties to calculate a gross rent potential for his income approach. (Pa320; Pa322-25). Furthermore, the court failed to note that Otteau described how he would have supported a percentage adjustment in the sales comparison approach using Marshall & Swift. (4T188-23:4T189-22). Further, the trial court incorrectly concluded that Otteau testified that Marshall & Swift was appropriate to independently develop a cost to cure in the same manner as Lamicella, and that he would have done so without the estimates provided by KDN. (4T193-24:4T195-5; 6T22-6:17). The trial court ultimately rejected the estimates relied upon by Otteau and adopted Lamicella's cost to cure estimate, which alone resulted in a value difference of the property of approximately $327,064 (Otteau's cost to cure estimate less Lamicella's cost to cure estimate). (Pa319; Pa482; Pa544). Following a motion for reconsideration, the judgment was amended to account for a credit to KDN for expert fees and a payment schedule. (Pa7-8; Pa541-46).

LEGAL ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANT'S MOTION TO OBTAIN A NEW APPRAISER (Pa142; 1T26-24:1T25-3).

With a peremptory trial date ordered, a pretrial order established, pretrial memoranda exchanged and approximately one month left before trial, Rule 4:24-1(c) required exceptional circumstances for a discovery extension. The motion court made no findings of fact or conclusions of law but stated on the record that the delay was due to a self-inflicted wound caused by Youry himself. No facts were presented establishing extraordinary circumstances. Therefore, extending discovery was an abuse of discretion.

A. Standard of Review

Appellate courts review trial courts' discovery rulings, including those involving discovery extensions, for abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). An abuse of discretion occurs when a decision has no rational explanation, departs from established policy without explanation or rests on an impermissible basis. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007). In addition, discovery rulings are reversible when they are based on a mistaken understanding of the applicable law. Ibid., quoting Rivers v. LSC P'ship., 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005);

see also Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995) (holding that a trial court's interpretation of the law is entitled to no special deference). The standard is met in this case, because the trial court granted the motion despite the absence of the required exceptional circumstances; its failures to make findings of fact and conclusions of law and review the moving papers in advance further exacerbated the error and failed to fully alleviate the prejudice suffered by KDN.

B. The motion court's failure to make any findings of fact or correlated legal conclusions and failure to read the motion papers in advance exacerbated its error.

The trial court failed to make any findings of fact supporting its decision to extend discovery. R. 1:6-2(f). The motion judge did not review KDN's opposition prior to hearing the motion, and was not aware the motion was opposed. (1T4-19:1T5-11). See R. 1:6-7. While neither error alone would be grounds for reversal, in conjunction with the lack of exceptional circumstances, both errors compel this Court to correct the result.

This Court has stated that a "failure to perform the [trial court's] fact-finding duty 'constitutes a disservice to the litigants, the attorneys and the appellate court.'" Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990), quoting Curtis v. Finneran, 83 N.J. 563, 571 (1980). The rationale for requiring a statement of reasons

is "…so that parties and the appellate courts [are] informed of the rationale underlying [the decision]." Avelino–Catabran v. Catabran, 445 N.J. Super. 574, 594–95 (App. Div. 2016), quoting Monte v. Monte, 212 N.J. Super. 557, 565 (App. Div. 1986). Without it, a reviewing court cannot know whether the decision is based on the facts and law or is the product of arbitrary action and/or an impermissible basis. Monte, supra, 212 N.J. Super. at 565. And, while a court is not obligated to issue a statement of reasons for orders not appealable as of right, see Rule 1:7-4(a), a failure to issue findings when the decision is not supported by the record is independent grounds for reversal. Cardell, Inc. v. Piscatelli, 277 N.J. Super. 149, 155 (App. Div. 1994).

Rule 1:6-7 states that "[i]nsofar as possible judges shall read moving papers and briefs in advance of the hearing and to this end, when briefs are submitted in the trial courts, the matter shall be assigned insofar as possible to the judge in advance of the hearing." Although the Rule's advance review obligation is aspirational rather than mandatory, it is unquestionably the purpose of the Rule that judges be familiar with the moving papers in advance of argument. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:6-7 (2020).

In this case, there were no findings of fact and conclusions of law set forth orally by the motion court. There was no statement of reasons appended to the order

granting the discovery extension, and the order itself was signed by the presiding judge rather than the motion judge. It was apparent at argument that the motion judge had not reviewed KDN's opposition and appeared to believe that the motion was unopposed at the beginning of the argument. (1T4-19:1T5-11). The absence of any facts in the record warranting an extension of discovery makes the failure to give a statement of reasons independently reversible. At the very least, these conditions exacerbate the underlying error. Therefore, the Court should reverse the order and remand the matter for a redetermination of the value of the property as of the date of the prior appraisals.

C. The motion court erred in granting a discovery extension against the weight of the evidence establishing that no extraordinary circumstances existed.

Once a trial or arbitration date is set in a civil matter, Rule 4:24-1(c) forbids extensions of discovery; the only exception to this prohibition is where a party can show the existence of exceptional circumstances. To do this, a party must explain

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
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> [Hollywood Café Diner, Inc. v. Jaffee, 473 N.J. Super. 210, 217 (App. Div. 2022), quoting Rivers, supra, 378 N.J. Super. at 79].

A movant's demonstration of "exceptional circumstances" must include "[a] precise explanation that details the cause of delay and what actions were taken during the elapsed time." Bender v. Adelson, 187 N.J. 411, 429 (2006). Exceptional circumstances do not include inadvertence, attorney negligence, or a busy schedule. O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-552 (Law Div. 2003). Failure to seek timely extensions and failure to utilize allotted time are both grounds for denial of requests for extensions. See Huzar v. Greate Bay Hotel, 375 N.J. Super. 463, 472 (App. Div.), certif. granted and remanded, 185 N.J. 290 (2005); Quail v. Shop-Rite Supermarkets, 455 N.J. Super. 118, 133-34 (App. Div.), certif. denied, 236 N.J. 242 (2019). With respect to expert reports, courts are more likely to excuse late production where they are submitted well in advance of trial, the defaulting counsel did not engage in willful misconduct or any design to mislead, any prejudice could be remediated and the party is completely innocent. Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 51, 53-54 (App. Div. 2003).

There is no question that our courts seek to implement the fundamental principles of fairness and justice; examples of their patience and forbearance with litigants faced with real difficulties are legion. This includes active efforts to see that litigants working in good faith to prosecute their disputes are not hamstrung by circumstances outside their control. However, by application of those same

principles, courts should not allow a party to suffer for their adversary's decision to fire an expert witness on the eve of trial. Such conduct smacks of gamesmanship; the very purpose of Best Practices sought the implementation of credible trial dates by avoiding adjournments in such circumstances. Tucci, supra, 364 N.J. Super. at 53. In the words of this Court, "If parties must use last minute continuances to level a precipitously upset playing field, then gamesmanship has truly re-emerged in the trial of cases to the detriment of the litigants and the public." Smith v. Schalk, 360 N.J. Super. 337, 345 (App. Div. 2003).

In this case, the court entered an order in February 2023 setting a peremptory trial date. The order specified counsels' responsibilities in anticipation of trial. Pretrial memoranda were submitted by both parties; the trial court had entered a pretrial order. Trial was imminent. Youry provided no accounting of the issues with his expert in his moving papers, and gave little explanation in his testimony during argument. Neither Youry nor his counsel offered a statisfactory explanation as to why Youry's counsel was unaware of his client's issues with a year-old appraisal report until the eve of trial. Even though the motion court made no explicit findings of fact or corresponding conclusions of law, it characterized Youry's issue to be self-inflicted, and that no good reason to adjourn existed.

Here, the record shows that the "exceptional circumstances" exception to the prohibition against discovery extensions after trial is scheduled does not apply in this case. Rather, there is evidence that KDN suffered on account of Youry's conduc in the very manner this Court has sought to prevent. Granting the discovery extension in this case was an abuse of discretion. The Court should remand the matter to remedy the prejudice suffered by KDN, as discussed further below.

D. The value of the property must be determined retrospectively to remedy the prejudice to KDN.

A simple remand for redetermination of the value of the property is insufficient to fully remedy the prejudice to KDN on account of the trial court's error. As the trial court observed in its decision and the value data presented in this litigation demonstrate, property values have increased since the litigation was begun. A remand with a subsequent trial on the value of the property would be contrary to the interests of justice; doing so would grant Youry the benefit of additional appreciation and potentially cost KDN even more than the previous buyout number found following trial. Therefore, any valuation of the property on remand must be retrospective.

Respecting a buyout of the property by one partner from another, the language of the partnership agreement states that "[i]f one partner were to decide to sell his portion of the property he must first offer it to the partner, **at that time** a fair market

value must be determined to offer it." (Pa16). The import of the plain language of the partnership agreement is significant; clear contract terms are not rewritten by the courts. Dunkin' Donuts of America v. Middletown, 100 N.J. 166, 173-74 (1985).

Even if the appraised value is not determined as of the date of the buyout request as the language suggests (which, in this case, would be approximately as of November 2020, according to Youry, Pa171-72), it does manifest an intent to value the property as soon as possible after the buyout offer. In that manner, neither party would be unduly prejudiced by either appreciation or depreciation. They would be entitled to their proportionate share as of the time of the buyout request. The agreement language does not contemplate a three-year delay. The contract nowhere contemplates actions that, even if not intentional, were recklessly indifferent to the rights of the other partner to an expeditious and efficient buyout process. Bringing ethics complaints against an expert witness to light on the eve of trial is not in keeping with such a process.

As a result, KDN respectfully requests that the Court remand the matter with instructions for a redetermination of the value of the property for purposes of the buyout at the time of the filing of the complaint or, at minimum, no later than the first round of appraisal reports prepared by the parties in early 2022.

II. THE TRIAL COURT ERRED IN PERMITTING EXPERT REBUTTAL TESTIMONY WITHOUT A REPORT. (5T6-6:5T9-1).

A. Standard of Review

Appellate courts review trial courts' evidentiary rulings for abuse of discretion. Primmer v. Harrison, 472 N.J. Super. 173, 187 (App. Div. 2022). The same standard is applied to review a trial court's decision on *in limine* motions regarding the admissibility of evidence, including expert testimony. Ibid.; see also Pomerantz Paper Corp., supra, 207 N.J. at 371. Allowing surprise rebuttal testimony from Youry's expert without a report or meaningful opportunity for expert rebuttal was an abuse of discretion.

B. The trial court abused its discretion in allowing rebuttal expert testimony and did not ensure KDN had adequate opportunity to rebut the testimony.

A trial judge possesses the discretion to preclude expert testimony on matters not covered in the written expert reports furnished in discovery. Ratner v. General Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990); Congiusti v. Ingersoll-Rand Co., 306 N.J. Super. 126, 132 (App. Div. 1997). Factors suggesting that sanctions should be suspended include a lack of design to mislead, absence of the element of surprise and absence of prejudice if the testimony is permitted. Ratner, supra, 241 N.J. Super. at 202.

The issue of surprise rebuttal testimony has occurred in the venue of local property tax appeals. Due to the allocation of the burden of proof and the ability of municipalities to rely on the presumption of correctness in such cases, see, Pantasote Co. v. City of Passaic, 100 N.J. 408, 412-13 (1985), defendants may choose to forego presenting their own appraisal and only offer evidence undermining the taxpayer's appraisal. See Mori v. Secaucus, 17 N.J. Tax 96, 100-01 (App. Div.), certif. denied, 154 N.J. 608 (1998); Universal Folding Box. Co., Inc. v. Hoboken City, 351 N.J. Super. 227, 233-35 (App. Div.), certif. denied, 174 N.J. 545 (2002); Russo v. Bor. of Carlstadt, 17 N.J. Tax 519, 522-23 (App. Div. 1998). In some cases, that testimony is offered without advance notice. Mori, supra, 17 N.J. Tax at 100-01; Russo, supra, 17 N.J. Tax at 522. This Court upheld the exclusion of such testimony; when the matter was not remedied by the trial court, the Appellate Division remands to permit the aggrieved party the opportunity to respond. Russo, supra, 17 N.J. Tax at 522; Mori, supra, 17 N.J. Tax at 100-01.

In this case, Youry's counsel was permitted to have his expert, Lamicella, pick apart the methodology and conclusions reached by Otteau, even though his criticisms were not the subject of his appraisal, and a separate rebuttal report was never served in discovery. This "final word" on issues including the propriety of comparable sales, units of comparison and calculations of cost to cure was both

surprising and prejudicial to KDN. Lamicella's report was prepared prior to Otteau's and could not be expected to be the basis for a response to it.

Likewise, KDN was clearly prejudiced. The court's acceptance of Lamicella's cost to cure alone resulted in a value differential of over $300,000. Lamicella's comments, specific, detailed and directed by counsel as they were, differed markedly from Otteau's unprompted, general comparisons and approximations of the numbers concluded in the appraiser's reports, to which Youry's counsel raised no objection. The court's instinct to adjourn the trial and permit KDN the opportunity to recall its expert was appropriate, but it did not follow through on this remedial step. As a result, KDN was prejudiced in the result, and a remand is appropriate to remedy this error as well.

CONCLUSION

For all the reasons set forth herein, KDN, Inc and Nicholas Antipin respectfully request that the Court remand this matter for the limited purpose of redetermining the value of the subject property for buyout purposes as of the date of the filing of the complaint or, at minimum, as of the date of the reports submitted to the Court at the time discovery was improperly extended.

Respectfully submitted,
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/S KEVIN S. ENGLERT

By: _____
Kevin S. Englert, Esq.

Dated: January 22, 2025

Superior Court of New Jersey
Appellate Division

KDN, INC. and,	**Appellate Docket No.: A-00204-24T2**
NICHOLAS ANTIPIN	
Plaintiffs-Appellants,	On Appeal From: Superior Court of New Jersey Law Division – Monmouth County
v.	
YOURY ANTIPIN,	Docket No.: MON-L-3682-21
Defendant-Appellant.	Sat Below: Hon. Lisa P. Thorton, J.S.C. Hon. Gregory L. Acquaviva, J.S.C. Hon. Andrea Marshall, J.S.C. Hon. David F. Bauman, J.S.C.

DEFENDANT-RESPONDENT YOURY ANTIPIN'S APPELLATE BRIEF IN OPPOSITION

Date: March 24, 2025
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I. PRELIMINARY STATEMENT

Plaintiffs appeal from the Trial Court's June 7, 2023, Order (the "**Subject Discovery Order**") and a single evidentiary ruling. The Subject Discovery Order extended discovery in the matter to permit Defendant to engage a new expert and appraisal, affording Plaintiffs the same right, and sanctioning Defendant for the costs of Plaintiffs new appraisals.

Plaintiffs filed their appeal raising two (2) points alleging: (1) the Trial Court erred in finding exceptional circumstances to extend discovery; and (2) the Trial Court erred in permitting Defendant's appraiser to offer rebuttal testimony.

Firstly, Plaintiffs' insistence that no exceptional circumstances existed is incorrect. Defendant made a sufficient showing, explaining that, despite diligent effort the discovery could not be completed nor could an extension be requested during the initial period, the discovery was essential, and there existed exceptional circumstances. The Trial Court's decision to extend discovery was correct.

Secondly, Plaintiffs' argument that the Trial Court erred in permitting rebuttal testimony is unconvincing and confusing. Plaintiffs lack convincing authority and merely grasp at straws.

Thirdly, Plaintiffs have not noticed nor briefed any argument suggesting the Trial Court's valuation was incorrect, and mere dissatisfaction with the judgment is insufficient.

Fourthly, Plaintiffs fail to demonstrate any prejudice or harm. The status quo remained *pendente lite* with Plaintiffs in exclusive control of the Partnership and Belmar Property. Defendant was also ordered to pay their subsequent expert fees.

Finally, we simply cannot divorce ourselves from reality, which is: Plaintiff's own trial expert valued the Belmar Property at more than double the amount of their prior two (2) appraisals. Plaintiffs now seek a fourth bite of the apple in asking the Court to remand and reopen discovery again.

It is logically incongruent that Plaintiffs argue, on the one hand, it was inappropriate to extend discovery; and, on the other, contend the only remedy for their own retrospectively perceived trial errors is to remand and reopen discovery again.

Plaintiffs' thinly veiled goal here is to be provided with a redo, to swindle Defendant, and to prevent him from having a fair adjudication on the merits. At its core: their appeal asserts that it was unfair to allow Defendant to have an expert or challenge their expert. Plaintiffs are wrong. As they have suffered no harm or prejudice, their appeal should be denied.

II. PROCEDURAL HISTORY

On November 2, 2021, Plaintiffs filed their Verified Complaint. Pa1. On December 1, 2021, Defendant filed his Answer with a Counterclaim. Pa50. On December 9, 2021, Plaintiffs filed an Answer to the Counterclaim. Pa77.

On September 21, 2022, Plaintiffs filed an Amended Complaint. Pa80. Defendant subsequently filed an Answer to the Amended Complaint on September 26, 2022. Pa102.

On December 2, 2022, the Court entered an order extending discovery to January 2, 2023. Da1.

On January 11, 2023, Defendant filed a Motion to Extend Discovery and Compel Plaintiffs' Production of Documents, seeking production of Partnership records and a 60-day extension. Da2 and Da4.

On January 23, 2023, Defendant filed an Amended Answer to the Amended Complaint. Pa108.

On February 3, 2023, the Court extended discovery on consent to March 5, 2023. Da5. That same day the Court scheduled trial for June 12, 2023. Pa113

On May 4, 2023, Defendant filed a Motion to Extend Discovery. Pa133. In support, Defendant certified that the extension was necessary because his expert at that time, Mr. Todd G. LiPira, could not testify at trial. On Pa134. Defendant needed an expert for trial; it was essential, and he explained the exceptional circumstances warranting his request for an extension. Pa134; 1T8-22:1T10-20.

On May 8, 2023, Defendant's counsel also filed a Motion to be Relieved as Counsel. Pa136.

On May 22, 2023, the Trial Court held oral argument. 1T4-10:15. Defendant testified that there was a breakdown in the relationship and Mr. LiPira was not answering questions concerning the credibility of the appraisal report. 1T8-22:1T10-20. Defendant testified that these were brought to his attorneys' attention at the end of March/early April 2023. 1T8-22:1T10-20. Defendant testified that he filed an ethics complaint against Mr. LiPira to protect his rights and interests. 1T8-22:1T10-20. Defendant's counsel stated he filed the application as soon as possible. 1T10-24:1T11-7.

Plaintiffs were given ample time to present their objections, arguing perceived prejudice caused by a trial adjournment and additional expert costs. Pa138, 1T4-19:1T28-2.

On June 7, 2023, the Court entered the Subject Discovery Order, extended discovery, adjourned the trial, permitted the parties to obtain experts, and sanctioned Defendant. Pa124. That same day, it also relieved Defendant's counsel as well. Pa143.

On June 16, 2023, Plaintiffs filed a Motion to Reconsider the Subject Order largely reasserting their prior arguments. Pa144; Pa146. Defendant filed a cross-motion on June 29, 2023 seeking an extension in order to access the Belmar Property and complete his appraisal. Pa156; Pa158, Paras. 55 through 62.

The Court held oral argument on July 7, 2023. 2T3-20:25. Plaintiffs argued that the Court should reconsider the Subject

Discovery Order because Defendant filed a complaint against Mr. Robert Gagliano, of Gagliano and Company. Pa147-148, Pa153-155. Defendant stated his legitimate basis for the complaint, including: Mr. Gagliano's conflict of interest due to his long standing relationship with Plaintiffs' counsel's firm; his failure to inform of any work or inspection performed prior to Defendant's January 14, 2022 interview; the misrepresentation that the appraisal was "joint" despite Defendant never hiring Mr. Gagliano; the appraisal stated that the valuation was based upon the sales comparison approach despite later expressing it was not used and no sales comparisons were included; and the egregiously understated appraised amount. Pa154, Pa155, Pa162, Pa186, Pa187, and Pa195.

In its oral decision on July 7, 2023, the Trial Court explained Defendant's need for an expert was essential, not having an expert would "torpedo" Defendant's case, and Judge Thorton did not abuse her discretion. 2T23-17:20, 2T25-11:12, and 2T25-17:20.

The Court entered its denial order on July 7, 2023. Pa249.

On August 23, 2023, Defendant filed a Motion for Leave to File an Amended Counterclaim. Pa5. On August 31, 2023, Plaintiffs filed a Cross-Motion to Extend Discovery. Da7. Plaintiffs, blaming Defendant, argued that exceptional circumstances warranted further extension of discovery because

now Mr. Gagliano did not want to be involved in the matter any longer. Da10 at Para. 13 and 18. However, Plaintiff never explained why they waited until August 22, 2023, to inquire if Mr. Gagliano was willing to proceed as their trial witness. Da10.

On September 8, 2023, the Court entered its Order permitting the filing of the Amended Counterclaim extending discovery, and Defendant filed his Third Amended Counterclaim. Da62; Da64.

On January 17, 2024, the parties entered a Consent Order, without any reservations, extending discovery to give Plaintiffs more time to serve their expert report. Da81.

On April 3, 2024, Plaintiffs filed a request for adjournment of the trial based upon the unavailability of their expert. Da83.

On April 12, 2024, Defendant filed his Amended Pretrial Memorandum. Da84.

On April 30, 2024, Plaintiffs again requested an adjournment of trial because their expert was unavailable, and the Court rescheduled the trial to June 17, 2024. Pa7(specifically LCV20241090536), Da92.

Trial was held on June 17, 2024, June 18, 2024, and June 19, 2024. 3T, 4T, 5T. On June 17, 2024, the parties settled their dispute concerning the North Brunswick Property and East Brunswick Property. 3T12-16:3T14-4, Pa536, and Pa541.

The Court provided its oral trial decision on June 27, 2024. 6T, Pa536, Pa541. Judgment was entered on July 9, 2024. Pa536.

On July 17, 2024, Plaintiffs filed their Motion for Reconsideration of the Judgment, seeking fees and costs from Defendant based upon the Subject Discovery Order. Da96. On July 24, 2024, Defendant Cross-Motioned for reconsideration. Pa7.

On September 10, 2024, the Court filed an Amended Order and an Amended Judgment granting Plaintiffs' request for fees based upon the Subject Discovery Order. Da93 and Pa541.

On September 25, 2024, Plaintiffs filed a Motion to Stay, which was denied on October 21, 2024. Pa8-9 and Da106. In its statement of reasons, the Trial Court held Plaintiffs' appeal was untimely and lacked a likelihood of success because the Subject Discovery Order was not appealed prior to trial, was not raised at trial, and was only first raised on appeal following Plaintiffs' dissatisfaction with the judgment. Da107, Da110.

III. FACTUAL BACKGROUND

Plaintiff Nicholas Antipin and Defendant Youry Antipin are brothers. Da64. Plaintiff KDN, Inc. and Defendant Youry Antipin are partners in the Partnership. Pa16, Pa536, and Pa541. The Partnership owns and operates the Belmar Property. Pa16, Pa536, and Pa541. The December 15, 1999 Agreement governs the parties' relationship, rights, and interests. Pa16

The Partnership Agreement states: "If the [Belmar Property] is sold for a profit then Youry Antipin shall receive his original investment back of $117,000.00 […] plus [35%] of the profits from the Sale[,]" and, "[i]f one partner were to decide to sell his portion of the [Belmar Property] he must first offer it to the other partner, at that time a fair market value must be determined to offer it." Pa16 at ¶ 3 and 5.

In their Amended Complaint, Plaintiffs requested that the Court compel Defendant to sell his 35% interest in the Belmar Property to them. Pa9, All Counts, and Pa80 Counts I, II, and III.

The parties dispute the fair market value of the Belmar Property. Pa9, Da58. Defendant contended that Plaintiffs offered appraisals that grossly undervalued the Belmar Property, and thus never offered him fair market value. Da58.

On June 18, 2024, the Court commenced trial on the issues concerning the Partnership, the Partnership Agreement, and the valuation of the Belmar Property. Pa 9, Pa108, and Da58. Plaintiffs have offered wildly contrasting appraised values for the Belmar Property. Pa17 (Fisher Appraisal valuing at $678,000 as of Oct. 1, 2020); Pa177(Gagliano Appraisal valuing at $670,000 as of Jan. 4, 2022); and Pa251(Otteau Appraisal valuing at $1,924,000 as of Oct. 17, 2023 prior to deducting $469,850 based upon unreliable repair estimates provided by Plaintiffs).

At trial, Plaintiffs relied upon Christopher J. Otteau, MAI, AI-GRS, SCGREA at trial, who valued the Belmar Property at $1,924,000 prior to deducting $469,850 based upon unreliable repair estimates provided by Plaintiffs. 4T142-14:17, 4T157-16:18, 4T212-6, Pa251. Mr. Otteau's appraised value was more than double Plaintiffs' previous appraisals. Pa17, Pa177, Pa251.

Defendant relied upon Theodore Lamicella, SCGREA, CTA, who valued the Belmar Property at $2,700,000 as of October 1, 2022. 4T214-21:4T215-17; 5T123-15:18; Pa397. Mr. Lamicella's report was entered without objection. 5T123-14.

On June 27, 2024, the Trial Court placed its decision on the record (6T3-21:6T44-21), finding: Plaintiffs were in sole and exclusive control and possession of the Belmar Property since at least 2005 (6T5-5:13; 6T24-10:12), the disrepair was a result of Plaintiffs' mismanagement (6T4-17:6T5-8), Plaintiffs underutilized the Belmar Property by not renting out a prime two (2) bedroom unit, and Plaintiff has not proven that there was a need for a management unit, let alone the prime two (2) bedroom unit they exclusively used and enjoyed. (6T19-10:23).

The Trial Court explained with great detail its analysis and methodology to determine the value for the Belmar Property by employing both parties' experts' appraisals in rendering its decision. 6T15-7:6T28-4; 6T15-21:25. The Trial Court did not accept one part's appraisal over the other and raised issue with

both. 6T19-10:23. For example, the it determined that Mr. Otteau failed to include the entire two (2) bedroom apartment in his appraisal. 6T19-10:23.

The Trial Court determined that it was appropriate to employ the income approach and Marshall and Swift cost to repair analyses to determine the Belmar Property's value. 4T194-12:4T195-5, 6T15-7:6T16-20, 6T21-24:6T22-17. It noted that both experts agreed that the per unit valuation was correct as opposed to a square footage approach. 6T15-7:6T16-20.

Plaintiffs' own expert explained that the Marshal and Swift valuation service was the largest appraisal valuation cost guidebook, and it is used to determine renovation costs. 4T194-8:4T195-5. Their expert also testified that he did not do a Marshall and Swift analysis because he relied exclusively upon the repair estimates provided by Plaintiffs instead. Id.("[…] we didn't do that [Marshall and Swift] analysis here."). Mr. Otteau testified that he did not independently verify any of the repair estimates provided by Plaintiffs. 4T175-4:4T195-5.

The Trial Court did not utilize the repair estimates relied upon by Mr. Otteau holding that they were speculative because there was no testimony regarding the need for the repairs and they were unreliable. 6T21-24:6T22-5.

Ultimately, the Court determined that the Belmar Property was worth $1,900,933.56 and that Defendant was entitled to and

Adjusted Total Buyout of $527,102 pursuant to the Partnership Agreement. Pa541 at ¶ 13 and ¶ 21.

IV. LEGAL ARGUMENT

Plaintiffs have not made a showing that the Trial Court abused its discretion by entering the Subject Discovery Order or denying the evidentiary objection. Plaintiffs have further failed to make a showing of any prejudice or harm, and its appeal may likewise be denied on this basis alone. Finally, Plaintiffs' appeal – and their relief sought – is barred by their own waivers and trial decisions employed.

For all of the reasons set forth herein this opposition, the Appellate Court should respectfully deny Plaintiffs' appeal.

A. STANDARD OF REVIEW

The standard of review when analyzing the trial court's discovery rulings as well as evidential rulings is an abuse of discretion. Brugaletta v. Garcia, 234 N.J. 225, 240 (2018) (internal citation omitted); Hisenaj v. Kuehner, 194 N.J. 6, 12, 942 A.2d 769 (2008)(internal citation omitted).

On the one hand, a judge has a strong interest and designated responsibility to manage the progress of litigation to assure trial concludes in a timely manner. On the other hand, a party has an interest in his or her "day in court" obtaining an adjudication of a dispute on the merits, despite an unforeseen circumstance disrupting scheduled trial

dates. Kosmowski v. Atlantic City Med. Ctr., 175 N.J. 568, 574, 818 A.2d 319 (2003).

An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002) (internal quotation omitted).

Where a question which calls for the exercise of judicial discretion is properly presented, it is the duty of the court to consider and determine that question so that the rights of the parties may be fairly protected in an orderly manner." Santos v. Estate of Santos, 217 N.J. Super. 411, 415, 526 A.2d 223 (App. Div. 1986) (internal citation omitted)).

Therefore, in reviewing the exercise of discretion, it is not the appellate function to decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court. Gillman v. Bally Mfg. Corp. 286 N.J. Super. 523, 528 (App. Div.), certif. denied 144 N.J. 174 (1996)(internal citation omitted).

The question is only whether the trial judge pursues a manifestly unjust course or brings about an unjust result. Gillman, supra, 286 N.J. Super. at 528 (App. Div.), certif. denied 144 N.J. 174 (1996); Gittleman v. Central Jersey Bank &

Trust Co., 103 N.J. Super. 175, 179, 246 A.2d 757 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503, 246 A.2d 713 (1968); Graham v. Gielchinsky, 126 N.J. 36, 363 (1991).

The timeless guiding principle for our Courts is that they exist for the sole purpose of rendering justice between parties according to the law. Allegro v. Afton Village Corp., 9 N.J. 156, 161, 87 A.2d 430 (1952) (internal citations omitted). While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective. Id.

Justice and fairness never should be the price paid for achieving the goal of trial date certainty. Our system of justice favors the fair disposition of cases on their merits and the desire for expedience should never supplant the interests of justice. Sanchez v. Estate of Estate of Marco B. Fernando, No. A-4350-18T4, 2020 N.J. Super. Unpub. LEXIS 1995, at *16 (App. Div. Oct. 19, 2020); Leitner v. Toms River Reg'l Schs., 392 N.J. Super. 80, 91 (App. Div. 2007); Viviano v. CBS, Inc., 101 N.J. 538, 547, 503 A.2d 296 (1986); State v. Cullen, 428 N.J. Super. 107, 113, 50 A.3d 686 (App. Div. 2012).

"This deferential approach 'cautions appellate courts not to interfere unless an injustice appears to have been done.'" Quail v. Shop-Rite Supermarkets, Inc., 455 N.J. Super.

118, 133, 188 A.3d 348 (App. Div. 2018) (internal quotation omitted).

Thus, where a party has not demonstrated that it suffered an injustice, the Appellate Court should not interfere and overturn the disputed order. Manttif Mgmt. v. Emerson Donuts LLC, No. A-1528-17T4, 2019 N.J. Super. Unpub. LEXIS 1533, at *11-12 (App. Div. July 5, 2019).

B. RESPONDING TO PLAINTIFF'S POINT 1: EXCEPTIONAL CIRCUMSTANCES WARRANTED AN EXTENSION OF DISCOVERY

[Raised Below – Pa134, Pa142, Pa158, Pa249, 1T7-5:1T33-11, 2T3-1:2T36-23]

There were exceptional circumstances warranting the extension of discovery and the Trial Court did not abuse its discretion. The interests of justice were served, both were afforded a fair opportunity to present their case trial, and a ruling was entered on the merits. Plaintiffs have shown no harm or prejudice.

i. Responding to Plaintiffs' Point 1(A): Standard of Review Pertinent to the Trial Court's Discovery Ruling.

[Raised Below – Pa134, Pa142, Pa158, Pa249, 1T7-5:1T33-11, 2T3-1:2T36-23]

As stated above, the Appellate Court will review the Trial Court's decision to extend discovery upon the abuse of discretion standard.

The Appellate Court's review of the trial judge's decision whether or not to extend discovery is deferential. Castello v. Wohler, 446 N.J. Super. 1, 24-25 (App. Div. 2016).

Generally, deference is given to a Trial Court's disposition of discovery matters unless the Trial Court has abused its discretion or its determination is based on a mistaken understanding of the applicable law. Rivers v. LSC P'ship, 378 N.J. Super. 68, 80, 874 A.2d 597(App. Div. 2005)

The Gillman Court explained: The trial court's exercise of discretion may be disturbed only if it is `so wholly insupportable as to result in a denial of justice.' 286 N.J. Super. 523, 528 (App. Div.), certif. denied 144 N.J. 174 (1996), citing, Goodyear Tire and Rubber Co. v. Kin Properties, Inc., 276 N.J. Super. 96, 106, 647 A.2d 478 (App. Div.), certif. denied, 139 N.J. 290 (1994) (internal quotation omitted).

ii. Responding to Plaintiffs' Point 1(B): The alleged failure to read the pleadings or make factual findings, even if true, does not constitute reversible error.

[Raised Below – Pa134, Pa142, Pa158, Pa249, 1T7-5: 1T33-11, 2T3-1:2T36-23]

Plaintiffs allege that the Trial Court failed to read their motion papers and failed to make a finding of fact or conclusion of law. Plaintiffs contend that these alleged failures, in

concert, somehow exacerbate the alleged abuse of discretion, and constitute reversible error. Plaintiffs are incorrect.

Judge Thorton's tragic passing on May 26, 2023, may account for why no further statement of reasons was entered into the record. However, as conceded by Plaintiffs at Pb14, R. 1:7-4 expresses that a "court is not obligated to issue a statement of reasons for orders not appealable as a right." Likewise, Plaintiffs admit that the Subject Discovery Order accurately reflected Judge Thorton's ruling from the bench. 2T4-4:8.

Plaintiffs' reliance upon Salch v. Salch, 240 N.J. Super. 441 (App. Div. 1990), Curtis v. Finneran, 83 N.J. 563 (1980), and Avelino-Catabran v. Catabran, 445 N.J. Super. 574 (App. Div. 2016) are misplaced as none concern interlocutory pre-trial discovery orders. Monte v. Monte, 212 N.J. Super. 557 (App. Div. 1986) likewise concerned an appeal from a final judgement regarding equitable distribution. The Court's remark in Cardell, Inc. v. Piscatelli, 277 N.J. Super. 149 (App. Div. 1994) gives little guidance, and regardless, Plaintiffs concede that when a decision is otherwise supported by the record, there is no independent ground for appeal. Pb14.

Moreover, Plaintiffs' allegation that the Trial Court's failure to read their opposition in violation of R. 1:6-7 is belied by the fact that they were provided ample opportunity to present their argument at the hearing. 1T4-19:1T28-2. A

comparison of the submitted opposition and the transcript makes this incontrovertibly clear. Pa138a and 1T4-19:1T28-2. Indeed, Plaintiffs' opposition focused on what they perceived to be procedural fairness, financial burdens, and victim-blaming Defendant. Pa138; 1T6-9:18; 2T8-19:25.

When confronted with what they would perceive to be fair, Plaintiffs responded that Defendant should be monetarily sanctioned in exchange for an extension. 1T20-3:14. The Court addressed this: "THE COURT: […] What do you propose that if I allow the defendant to reopen discovery, what is your remedy to cure the impact? [,]" and Plaintiffs replied, "MR. ULIANO: That the defendant would compensate the plaintiff for his additional expert fees […]And for counsel fees for these motions." 1T20-3:14.

The Trial Court concluded that it was inclined to allow Defendant to get a new expert subject to him paying for the plaintiff's fees and costs. 1T26-24:1T27-17. This is what ultimately happened.

Furthermore, as addressed below, Plaintiffs suffered no harm or prejudice because they were in exclusive possession and control of the Belmar Property and Partnership, and their financial concerns were ameliorated by the sanctions entered against Defendant. Pa142, Pa541, Da87, 6T5-5:13; 6T24-10:12.

Thus, the alleged deficiencies are not reversible error.

iii. Responding to Plaintiffs' Point 1(C): Exceptional circumstances warranted an extension of discovery.

[Raised Below – Pa134, Pa142, Pa158, Pa249, 1T7-5:1T33-11, 2T3-1:2T36-23]

The Trial Court is afforded deference to extend discovery, and it is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance. Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968); Castello, supra, 446 N.J. Super. at 24-25 (App. Div. 2016).

Stated differently, if the trial court's order reaches the proper conclusion, it must be affirmed even if it is based on the wrong reasoning. Isko, supra, 51 N.J. at 175 (1968); MacFadden v. MacFadden, 49 N.J. Super. 356, 359 (App. Div. 1958) ("The written conclusions or opinion of a court do not have the effect of a judgment. From them no appeal will lie. 'It is only what a court adjudicates, not what it says in an opinion, which has any direct legal effect.'")(internal quotation omitted).

Therefore, the means are not necessarily as important as the ends achieved when those ends achieved are valid and not unjust. Gillman, supra, 286 N.J. Super. at 528 (App. Div.); Santos, supra, 217 N.J. Super. at 415 (App. Div. 1986).

The right of a trial court to manage the orderly progression of its cases is recognized as inherent in its function. Castello, supra, 446 N.J. Super. at 25 (App. Div. 2016)(internal citations omitted).

R. 4:24-1(c) provides in pertinent part that "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." The party seeking an extension therefore must satisfy four (4) inquiries to extend discovery based on exceptional circumstances:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

Rivers, supra, 378 N.J. Super. at 79 (App. Div. 2005).

Exceptional circumstances have been likened to extraordinary circumstances and explained as something that is unusual or remarkable; most unusual; far from common; rarely equaled; singular; phenomenal; strikingly impressive; having

little or no precedent; and usually totally unexpected. Vitti v. Brown, 359 N.J. Super. 40, 50 (Super. Ct. 2003), citing, Flagg, supra, 321 N.J.Super. at 260; Rivers, supra, 378 N.J. Super. at 78 (App. Div. 2005). They require "some showing that the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time." Vitti, supra, 359 N.J. Super. at 51 (Law Div. 2003).

Our system of justice favors the fair disposition of cases on their merits, and our Appellate Court has recognized that exceptional circumstances can arise where trial dates or other litigation deadlines should be extended in the interests of justice and to avoid punishing litigants unfairly. Viviano, supra, 101 N.J. at 547 (1986); Leitner, supra, 392 N.J. Super. at 91-94 (App. Div. 2007).

Therefore, synthesizing and appropriately applying the abuse of discretion standard and the great deferential latitude permitted to the Trial Court to manage the orderly progression of its cases, the Appellate Court's review of Plaintiffs' first point should respectfully consider whether the Trial Court could have found exceptional circumstances and if Plaintiffs suffered any harm or prejudice.

Here, Defendant met his burdens pursuant to R. 4:24-1(c) and the standard set forth in Rivers. There were exceptional

circumstances, and the correct decision was ultimately entered. Isko, supra, 51 N.J. at 175 (1968).

Plaintiffs incorrectly contend that the Trial Court expressed that Defendant had not provided exceptional circumstances warranting the reopening of discovery. Pb5-6. However, Defendant certified that there were exceptional circumstances for his request that the Court extend discovery for the limited purpose of permitting him to obtain a new expert and adjourn the trial. He certified that Mr. LiPira could not testify. Pa134. Defendant further certified that he had obtained appraisals from Mr. LiPira for the three subject properties at issue prior to the termination of discovery, and that the issues arose after the close of discovery. Pa134.

Defendant further certified that there had developed a conflict between him and Mr. LiPira preventing Mr. LiPira from testifying at trial. Pa134. Defendant certified that he had filed an ethics complaint against Mr. LiPira with the Appraisal Board of the State of New Jersey, and that he had promptly filed his application seeking an extension of discovery for the limited purpose of obtaining a new expert. Pa134.

Defendant certified that he needed an expert to testify regarding the appraisal value of the three subject properties at issue. Pa134. Defendant requested the relief sought in his

motion based upon the exceptional circumstances expressed in the certification. Pa134.

At the hearing, Defendant testified that there was a breakdown in communication and a loss of confidence and trust between him and Mr. LiPira. See, e.g., 1T8-23:1T9-5 wherein Defendant testified that he had a problem with his appraiser and not necessarily the valuation, and that he had, "a series of other questions that I approached him with which he wouldn't answer." Defendant continues: "I sent them emails and I wasn't getting answers to these questions. And I -- I felt these answers were important to the credibility of his appraisal." Id.

Defendant testified that he had no choice but to file the ethics complaint because: "[O]therwise, if I went through with him and it turned out to be a problem for me later on, and I'm going to wind up having an appeal, you know, --" at which time the Trial Court cut him off from finishing. 1T9-9:11.

Defendant testified that he attempted to bring the issue to his attorney's attention by email and finally a visit to his office at the end of March/early April 2023. 1T9-19:1T10-4.

Thus, based upon the records presented, the Trial Court was correct to extend discovery based upon the existing exceptional circumstances.

Importantly, Judge Thorton's alleged apprehensions are insufficient to overturn the discovery order and remand because

it is clear that the Trial Court arrived at the correct conclusion. Isko, supra, 51 N.J. at 175 (1968).

A full reading of the transcript informs that the Trial Court was wrestling with what to do. 1T. Contextually, when referring to "a good reason" the Trial Court was referencing Plaintiff's request for sanctions. 1T21-18:24. Indeed, just preceding the Trial Court stated: "If there is a good reason why I should not [grant] the plaintiff's request [for sanctions], I've got to hear about it[,]" was referring to granting Plaintiff's request for discovery sanctions. 1T21-9:11. Defendant was indeed sanctioned and paid. Pa142; Pa541; Da93.

Plaintiff's contention that the Trial Court expressed apprehension is at best a showing that it fairly considered and weighed the issues and rendered a decision within its discretion and the interests of justice. As the Trial Court expressed: "*Both sides are entitled to a fair trial*." 1T21-2:3.

After Plaintiffs' contention that the Trial Court was apprehensive about finding exceptional circumstances (1T18-7:24;1T21-9:11; 1T21-22:24), and after the Trial Court permitted Defendant's counsel to provide further supporting argument (1T21-12:17; 1T22-10:14), the Trial Court concluded that it would permit Defendant to get a new expert and ordered that Defendant be obligated to pay Plaintiffs' fees and costs. 1T26-24:1T27-17.

The Trial Court never explicitly stated that Defendant had not made a showing of exceptional circumstances. Thus, it must be reasonably presumed that it was persuaded by Defendant's counsel's arguments and the interest of justice.

Indeed, on reconsideration, the Trial Court conceded that Defendant's need for an expert was essential and not having an expert would "torpedo" Defendant's case. 2T23-17-20. The Trial Court further agreed that Judge Thorton decision was within her discretion, and it did not violate the interest of justice. 2T25-11:12 and 2T25-17:20.

(1) Why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time.

There is nothing in the record to suggest that discovery was not otherwise completed during the discovery period or that Defendant's counsel had not diligently pursued it. Plaintiffs brief is devoid of any suggestion otherwise, and it is thus conceded that Defendant satisfied the first Rivers' prong.

(2) The additional discovery or disclosure sought is essential.

There can be no legitimate question that the need for an expert appraisal was essential to each party's presentation of their case at trial. Both Plaintiffs and the Trial Court concede that it was essential and not having one would torpedo

Defendant's case. 1T18-7:24; 2T23-17:20. Thus, Defendant has satisfied the second Rivers' prong as well.

(3) an explanation for counsel's failure to request an extension of the time for discovery within the initial discovery period.

Here too, Plaintiffs' submission is devoid of suggestion that Defendant failed to seek an extension within the original discovery period. Nor can there be, because the issues giving rise to the filing of Defendant's application did not occur until after discovery closed.

Discovery had closed on March 5, 2023. Da1 and Da5. Defendant testified that he attempted to bring the issue to his attorney's attention by email and finally a visit to his attorney's office at the end of March/early April 2023. 1T9-19:1T10-4. Mr. Toto likewise confirmed that he investigated the issue and promptly filed the Motion to Extend Discovery after Mr. LiPira communicated that he had hired an attorney and could not testify. Pa134 at Para. 5. Thus, Defendant could not have made his request during the original discovery period.

It is worth noting that the Gagliano Appraisal was dated April 24, 2023, which means, that Plaintiffs could not have served that report until after discovery had likewise expired. Pa177. The Appellate Court should not disregard the "rules for me but not for thee," attitude consistently employed by

Plaintiffs. Their insistence that Defendant's request to obtain a new appraiser so late and near the trial date rings hollow when considering they could not have served theirs until nearly three (3) months after the discovery end date expired and less than fifty (50) days before trial. Pa113 and Pa177. It should also not be lost on the Appellate Court that Plaintiffs employed this same late filing approach when serving the Mr. Otteau's report dated February 27, 2024, again, less than fifty (50) days before the scheduled April 15, 2024, trial too. Pa251 and Da80. Surely, Plaintiffs' allegations of "gamesmanship" levied against Defendant ring hollow and are hypocritical.

Defendant has thus satisfied the third Rivers' prong as well.

(4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

Most importantly, the record presents clearly that there were circumstances beyond Defendant's control which necessitated the need for an extension of discovery. Plaintiffs' victim-blaming Defendant is unavailing, and the Trial Court's adoption of such an argument would have constituted inappropriate bias and an abuse of discretion in and of itself.

Plaintiffs' assumption here, wrongful as it may be, and enormous leap of logic without any support – completely

conclusory and speculative in nature – is that the Defendant suffered a self-inflicted wound. However, Defendant was not in control of Mr. LiPira's refusal to answer questions or the breakdown in communication. He was not in control of Mr. LiPira's credibility issues in the report either. Defendant believed that Mr. LiPira was acting unethically and filed a complaint against him in good faith and out of necessity of protecting his rights and interests. 1T9-9:11.

The logical flaw in Plaintiffs' argument is that it presupposes that the filing of an ethics complaint makes Defendant the wrongdoer and a victim of his own making. It does not, and the Trial Court was incorrect in even entertaining such an argument.

In arguendo, if Defendant has done nothing, and proceeded with trial, he certainly would have been forestalled from later returning and arguing that the ethical violations he charged warranted reversal. It is just as likely that Plaintiffs would have argued that Defendant waived that right and was merely a dissatisfied and disgruntled litigant.

Moreover, Defendant testified specifically that Mr. LiPira would not answer questions concerning the credibility of his appraisal.

An appraiser's appraisal must comply with the Uniform Standards of Professional Appraisal Practice ("**USPAP**")

standards when obligated by law. Da27. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice*, (2020-2021 Edition) at 1 and 7. Here, N.J.A.C. § 13:40A-6.1 obligates that all appraisals shall conform to the USPAP standards in effect on the date the appraisal was prepared. An appraiser's failure to comply with the USPAP provisions may be construed as professional misconduct. N.J.A.C. § 13:40A-6.1(a). At the relevant times, the 2020-2021 USPAP was in effect. Da27.

In order to comply with USPAP, an appraiser must meet the following obligations, without limitation, an appraiser must: (a) act competently and in a manner that is independent, impartial, and objective; (b) comply with the ETHICS RULE in all aspects of appraisal practice; (c) maintain the data, information and analysis necessary to support his or her opinions for appraisal; (d) must comply with the COMPETENCY RULE, JURISDICTIONAL EXCEPTION RULE, SCOPE OF WORK RULE, and the RECORD KEEPING RULE. Da24. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice*, (2020-2021 Edition) at 1 and 2.

The LiPira Appraisal expresses that it was prepared in accordance with USPAP. Pa209.

Concerning the Scope of Work Rule, the USPAP states that: The scope of work must include the research and analyses that are necessary to develop credible assignment results, including:

being prepared to support the decision to exclude any investigation, information, method, or technique that would appear relevant to the client, another intended user, or the appraiser's peers; and must not allow assignment conditions to limit the scope of work to such a degree that the assignment results are not credible in the context of the intended use. Da27. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice*, (2020-2021 Edition) at 14. An appraiser must be prepared *Id*.

Standards Rule 1-1 states that: "In developing a real property appraisal, an appraiser must: (a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal; (b) not commit a substantial error of omission or commission that significantly affects an appraisal; and (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that […] in the aggregate affects the credibility of those results." *Id.* at 16 and 25.

Comment to (b) explains that: An appraiser must use sufficient care and diligence to avoid errors that would significantly affect their opinions, conclusions, and the credibility of the assignment results. *Id*.

Here, Defendant testified that there was a breakdown in communication and a loss of confidence and trust between him

and Mr. LiPira. See, e.g., 1T8-23:1T9-5 wherein Defendant testified that he had a problem with his appraiser and not necessarily the valuation, and that he had, "a series of other questions that I approached him with which he wouldn't answer." Defendant continues: "I sent them emails and I wasn't getting answers to these questions. And I -- I felt these answers were important to the credibility of his appraisal." Id. This is in contravention with USPAP Scope of Work Rule requiring the appraiser to be prepared to support their findings, develop and explain credible results, and USPAP Standards Rules 1-1.

Again, Defendant testified that he had no choice but to file an ethics complaint against Mr. LiPira to protect his rights and interests, because: "[O]therwise, if I went through with him and it turned out to be a problem for me later on, and I'm going to wind up having an appeal, you know, --" he would have been forestalled from raising the issue. 1T9-9:11.

Defendant further testified that he brought this to his attorneys' attention by email and finally a visit to his attorney's office at the end of March/early April 2023. Defendant's attorney confirmed that Mr. LiPira communicated that he could not testify as well. Pa134 at Para. 5.

Moreover, Defendant filed the Motion to Extend on May 4, 2023, a mere ten (10) days after the date of the Gagliano Appraisal. Pa133 and Pa177.

Defendant has met thus the fourth Rivers' prong as well, and for all the reasons stated above, Defendant made a showing of exceptional circumstances warranting the reopening of discovery to allow him to obtain a new expert for trial.

Regardless of how the Trial Court arrived at the decision to ultimately extended discovery matters not, because it was the correct the decision. It was a just decision. It did not prejudice nor harm Plaintiffs, and it permitted all a fair opportunity to have their dispute justly determined on the merits. Indeed, the decision served the interests of justice.

iv. Responding to Plaintiffs' Point 1(D): Plaintiffs' argument that the Belmar Property must be reevaluated as of early 2022 should be disregarded because it is not properly noticed nor briefed.

[Not Raised Below – R. 2:6-2(a)(1)]

Plaintiffs cannot be afforded the relief sought because they did not raise the issue at trial, nor have they properly noticed or briefed the alleged issue. Pa547. Instead, Plaintiffs request constitutes a stealth attack on the Trial Court's findings of facts and methodology of valuation for determining the value of the Property. Plaintiffs cite to no case law supporting their position.

It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly

presented to the trial court when an opportunity for such a presentation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

"A [litigant] who does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error because 'to rerun a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'" State v. Santamaria, 236 N.J. 390, 404-05 (2019) (alteration in original)(internal quotation omitted); R. 2:10-2. "The doctrine prevents litigants from 'playing fast and loose' with, or otherwise manipulating, the judicial process." State v. Bailey, 231 N.J. 474, 490 (2018) (internal quotation omitted).

Moreover, a properly presented issue on appeal must also be adequately briefed. Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1 on R. 2:6-2 (2022). An issue not briefed is deemed abandoned. State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd o.b., 240 N.J. 56, 56 (2019); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

Plaintiff alleges that offers to buy out Defendant's interests were made in October 2020, August 2021, or September

2021 Pb8-9. However, this is irrelevant because they do not constitute a triggering event pursuant to the Partnership Agreement. They were never presented as being triggering events or date(s) to be used for an ultimate determination of value of the Belmar Property in Plaintiffs' expert appraisal report submitted as evidence or argument at the trial.

Plaintiffs allege that the valuation of the Belmar Property should have had an effective date earlier in time, and that now, the only proper recourse is to remand, reopen discovery and permit the parties to obtain new appraisals effective as early 2022. Their request is, if nothing more, curious because at trial Plaintiffs actually offered the appraisal with the latest-in-time effective date: the Otteau Appraisal bearing an effective as of October 17, 2023. Pa251.

By contrast, Mr. Lamicella's report provided two (2) valuations at different points in time, the earliest being valued at $2,700,000 as of October 1, 2022. 4T214-21:4T215-17; 5T123-15:18; Pa397. Mr. Lamicella's report was entered without objection. 5T123-14. Notably, Mr. Lamicella's report – bearing an effective date of October 1, 2022 – was effective a mere ten (10) after the filing of the Amended Complaint.

Plaintiffs' intention thus is laid bare: they want the Appellate Court to give them another shot – and perhaps to use the Fisher Appraisal, prepared for the purposes of a tax appeal.

Pa17. However, Plaintiffs made no effort to offer the Fisher Appraisal despite every right and ability to call Mr. Fisher to testify as a witness or supply an expert with an earlier effective appraisal date.

Plaintiffs are simply dissatisfied with their own trial expert and trial strategy, and they want a redo. This is not the Trial Court's error or fault, it does not constitute a matter of great public concern, and it is not this redressable by the Appellate Court.

C. RESPONDING TO PLAINTIFF'S POINT 2: PLAINTIFFS CITE TO NO AUTHORITY SUGGESTING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING ANY REBUTTAL TESTIMONY.

[5T6-6:5T9-8]

Plaintiffs allege that the Trial Court erred in permitting rebuttal testimony of their expert. However, Plaintiffs simply fail to make any case, supported by any law or authority, to even remotely suggest that the Trial Court abused its discretion in this regard. At best, their argument is confusing.

"In reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." Hisenaj, supra, 194 N.J. at 12 (2008) (internal citation omitted). The general rule as to the admission or exclusion of evidence is that "[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence,

and that determination will be reversed only if it constitutes an abuse of discretion." State v. Feaster, 156 N.J. 1, 82, 716 A.2d 395 (1998). Rulings to admit or exclude evidence are generally subject to a wide degree of discretion. Jacobs v. Jersey Cent. Power & Light Co., 452 N.J. Super. 494, 502 (App. Div. 2017).

Under this standard, an appellate court should not substitute its own judgment for that of the trial court and are not ordinarily apt to set aside a civil judgment unless "the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted.'" State v. Marrero, 148 N.J. 469, 484, 691 A.2d 293 (1997) (internal citation omitted); Jacobs, supra, 452 N.J. Super. at 502 (App. Div. 2017).

Pursuant to N.J.R.E. 611, the trial court is given broad discretion to " exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." State v. Pinkston, 233 N.J. 495, 511 (2018). "The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015).

Likewise, the admission of rebuttal testimony so too also lies within the sound discretion of the trial court. Casino Reinvestment Development Authority v. Lustgarten, 332 N.J. Super. 472, 497, 753 A.2d 1190 (App. Div. 2000).

Indeed, the Appellate Court has held that where a rebuttal witness, such as in this case, is prepared to offer non-repetitive, substantive testimony that directly attacks the value of defendants' expert testimony, the exclusion of such testimony has the capacity of producing an unjust result. Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 498 (App. Div. 2000); State v. S. Nalbone Trucking Co., 128 N.J.Super. 370, 378, 320 A.2d 186 (App.Div.), *certif. denied,* 65 N.J. 575, 325 A.2d 708 (1974) (stating that there was no error in permitting rebuttal testimony regarding comparable sales not included on lists that were exchanged prior to trial).

Here, there is nothing even remotely suggesting that the Trial Court abused its discretion. The Trial Court explained that it believed the testimony offered by Mr. Lamicella would be useful. 5T7-10:5T9-1.

Firstly, Plaintiffs fail to express where the Court went wrong or how they were prejudice. Interestingly enough, Plaintiffs' expert witness, Mr. Otteau, began with rebutting Defendant's expert, Mr. Lamicella. Thus, Plaintiffs want their cake and to eat it too. They want the Appellate Court to determine that only they may be permitted to offer rebuttal testimony. If anyone else does, that is wrong, an abuse of discretion, prejudicial, and must warrant reversal and remand.

To wit, Mr. Otteau criticized and rebutted Mr. LiPira's use of a per-unit basis as opposed to a square-footage basis. 4T151-14:20. Mr. Otteau's critique of Mr. LiPira methodology is, by extension, a rebuttal of Mr. Lamicella methodology which employed the same approach.

More to the point, Mr. Otteau criticized and rebutted Mr. Lamicella's assumption of income and inspection as well. 4T152-9:20; 4T153-5:9. He also criticized and rebutted Mr. Lamicella's method of projecting income for the Belmar Property (annual versus monthly), again square footage versus unit, and not using spurious, non-credible repair estimates. 4T167-3:14.

Thus, it was not only appropriate, but, applying Plaintiffs' own logic and argument, necessary for the Court to permit Mr. Lamicella to explain his use of a per-unit methodology as compared to the square-footage methodology employed by Mr. Otteau.

Secondly, despite the several requests to extend discovery after the Subject Discovery Order, Plaintiffs never requested any rebuttal reports nor sought any Court order requiring any rebuttal report to be submitted.

Thirdly, none of Plaintiffs' cited cases are apposite. This is not a tax appeal case, yet all of the cases offered by Plaintiffs concern tax appeals. Plaintiffs' attempt to draw

comparison to standards employed for municipal tax assessments and appeals is confusing at best and altogether irrelevant.

Fourthly, Plaintiffs cannot make a showing that they were prejudiced because they never sought to recall Mr. Otteau to explain his methodologies further.

The Trial Court appropriately exercised its discretion in the aide of the Court to permit Mr. Lamicella to provide testimony and clarity in response to Mr. Otteau's critique of the methodologies he (Mr. Lamicella) employed. The Trial Court limited the testimony objected to by Plaintiffs to Mr. Lamicella's explanation of the methodology. 5T8-11:18. The fact of the matter remains that Mr. Lamicella did no more than testify to the information that was in his report explaining why he used one approach which contrasted with that used by Mr. Otteau. The subject matter of the testimony provided was of course provided to Plaintiffs well in advance in Mr. Lamicella's report.

The Trial Court permitted Plaintiffs: "[…]if you want to bring back your expert on rebuttal, I have no problem with that." 5T8-1:3. Thus, while it is clear that the Court indeed afforded Plaintiffs with this the opportunity to recall Mr. Otteau, they never availed themselves of the opportunity. They simply never asked. That was a trial decision made by Plaintiffs, not the Trial Court's folly.

Finally, Plaintiffs make no showing that the Trial Court relied upon the alleged rebuttal testimony in rendering its decision. Indeed, the Trial Court determined there were incorrect determinations made in both reports, that the income approach was the analysis to employ, and that the "evidence supports that apartments rent and sell based upon the type of unit." 6T15-21:25; and 6T15-7:6T16-20.

The fact of the matter that Plaintiffs cannot escape is that the Court largely accepted Mr. Otteau's appraisal. Mr. Otteau appraised the Belmar Property at $1,924,000, prior to making deductions for repairs. 4T142-14:17, 4T157-16:18, and 4T212-6; Pa251.

However, the Trial Court held that Mr. Otteau's appraisal failed to include an entire apartment, wrongly relied upon the speculative repair estimates, and that he did not conduct a Marshall and Swift analysis Mr. Otteau himself testified was ordinary and appropriate. 4T194-8:4T195-5; 6T19-10:23; 6T21-24:6T22-17. When adding back the omitted two-bedroom apartment, the Trial Court determined the pre-cost to appraisal value of the Belmar Property to be $2,043,719. 6T23-15; Pa514.

Thus, the Trial Court's determined appraised value of $2,043,719 (prior to applying reductions for repairs) was a mere $119,719 more than Mr. Otteau's appraised pre-repair value of $1,924,000. Pa251. When deducting the correctly used Marshall

and Swift cost to cure amount of $142,786, the Trial Court's determined appraised value was reduced to $1,900.933. 6T23-15:18.

D. DEFENDANT'S COUNTERPOINT 1: PLAINTIFFS' APPEAL SHOULD BE DENIED BASED UPON THE HARMLESS ERROR STANDARD

[1T7-5:1T33-7, 6T15-7:6T23-18, Pa536, Pa541]

Plaintiffs have failed to make a showing of any prejudice or harm in the Trial Court's discovery or evidentiary rulings. Mere dissatisfaction without more should not be enough to warrant remand and a redo.

As the Trial Court correctly stated: "Both sides are entitled to a fair trial." 1T21-2:3. Both sides received a fair trial. The Trial Court's decision to extend discovery protected all parties' rights, was not a manifestly unjust course, and did it bring about an unjust result. Gillman, supra, 286 N.J. Super. at 528 (App. Div.); Santos, supra, 217 N.J. Super. at 415 (App. Div. 1986). The same rings true with permitting Mr. Lamicella's alleged rebuttal testimony as well. Id. Here, justice was ultimately rendered. Allegro, supra, 9 N.J. at 161 (1952).

In arguendo, and without making any waivers or admissions, even if the Trial Court erred in extending discovery or permitting rebuttal testimony, Plaintiffs' appeal should be denied because there was no harm or prejudice.

R. 2:10-2 states that any error or omission shall be disregarded by the Appellate Court unless it is of such a nature as to have been clearly capable of producing an unjust result.

Our case law teaches that, "When a party has brought an alleged error to the attention of the trial court, though, the error "will not be grounds for reversal [on appeal] if it was 'harmless.'" Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018)(internal citations omitted). An error is harmless where there is a lack of some degree of possibility that [the error] led to an unjust result. Id.(internal citations omitted).

Here, we cannot divorce ourselves from the fact that Plaintiffs have failed to indicate any prejudice or harm suffered.

Firstly, with regards to the Subject Discovery Order, Plaintiffs succinctly summarized their alleged harm and prejudice at the hearing on their Motion for Reconsideration on July 7, 2023: "[P]laintiff is […] inconvenienced, has his case put on hold, [he] is told there's going to be a new expert […] [, and] [he] might have to update [his] expert [report]." 2T8-19:25. Their argument has always centered on the additional financial costs. Pa138. 1T6-15:18. 2T8-19:25. However, the Trial Court inconvertibly took account of this, remedying it by sanctioning Defendant and ordering him to pay Plaintiffs' costs charged by Mr. Otteau. Pa142, Pa 541, and Da90.

Secondly, with regards to the evidentiary ruling, Plaintiffs show no harm or prejudice in the Court's permitting rebuttal testimony, because it is clear that the Court largely accepted Plaintiffs' expert's valuation methodology.

Plaintiffs fail to address the elephant in the room as well. Mr. Otteau appraised the Belmar Property at a value of more than double their prior appraisals, and that included the spurious repair estimates. Pa 17, Pa 177, and Pa251. Recall that the Trial Court found Mr. Otteau very knowledgeable and generally credible. 6T6-2:4.

The Trial Court's determined appraised pre-repair value of $2,043,719 was a mere $119,719 more than Mr. Otteau's appraised pre-repair value of $1,924,000 – which omitted an entire apartment, wrongly relied upon speculative repair estimates, and did not include a Marshall and Swift analysis. Pa251; 4T194-8:4T195-5; 6T19-10:23; 6T21-24:6T22-17.

When deducting the correctly used Marshall and Swift cost to cure amount of $142,786, the Trial Court's determined appraised value was reduced to $1,900.933. 6T23-15:18.

There is and can be no showing that this was incorrect or that Plaintiffs suffered any harm.

Finally, Plaintiffs can show no harm or prejudice because the status quo always remained *pendente lite* and they were financially compensated. Plaintiffs have been in sole possession

of the Belmar Property, froze the Defendant out, and have made all decisions concerning the Belmar Property since 2005. 6T5-5:13; 6T24-10:12. Plaintiffs also benefitted from the sole use and occupation of one of the prime two-bedroom rental units of the Belmar Property as well. 6T19-10:23.

Plaintiffs were compensated for the additional expert costs and fees they incurred as well. Pa541, Da93.

As such, the Appellate Court should respectfully and independently deny Plaintiffs' appeal on the basis that they suffered no harm or prejudice.

E. DEFENDANT'S COUNTERPOINT 2: PLAINTIFFS HAVE WAIVED ARGUMENTS LEVIED AND RELIEF SOUGHT IN THEIR APPEAL

[Not Raised Below and Not Noticed on Appeal]

By way of failing to present an issue before the Trial Court, failing to present the issue properly before the Appellate Court, and/or consenting to the Trial Court's entrance and application of orders extending discovery, Plaintiffs have waived the relief they seek from the Appellate Court.

As addressed above in Response to Plaintiffs Point 1(D), the Appellate Court will decline to consider issues not properly presented to the trial court. Nieder, supra, 62 N.J. at 234 (1973). A party is barred from raising an objection for the first time on appeal." State, supra, 213 N.J. at 561 (2013).

Moreover, an issue not briefed on appeal is deemed waived. Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021).

i. Plaintiffs' stealth attacks of the Trial Courts' determinations finding of facts and conclusions of law must be disregarded because they were not raised as a point on appeal.

[Not Raised Below and Not Noticed on Appeal]

R. 2:5-1(f)(2)(ii) requires an appellant in civil cases to designate, in the notice of appeal, the judgment, decision, action or rule appealed from. If a question, issue, or matter is not designated in a party's notice of appeal, it is not subject to the appeal process. Kornbleuth v. Westover, 241 N.J. 289, 299 (2020); W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008).

Plaintiffs have neither designated, noticed, nor briefed any issue concerning the Trial Court findings of fact, conclusions of law, methodology concerning the determination of the value of the Belmar Property, the Trial Court's ultimate determination concerning the value of the Belmar Property, and/or the appropriate buy-out amount of Defendant's interest.

Regardless, Appellate Courts apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271

(2019). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). Deference is given to credibility findings. State v. Hubbard, 222 N.J. 249, 264 (2015).

"Appellate courts owe deference to the trial court's credibility determinations as well because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (internal quotation omitted).

"A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (internal quotation omitted). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (internal quotation omitted).

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial,

credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015)(internal quotation omitted).

Here, Plaintiffs' stealth attack of the valuation should neither be condoned nor considered. Plaintiffs have not briefed nor even remotely suggested by what standard the Trial Court mis-judged the determination of the value of the Belmar Property and the Defendant's buy-out amount, and Defendant should not be made to guess. Indeed, a full review of the record indicates that the Trial Court was careful, reasoned, meticulous and fair.

Simply stated, Plaintiffs are not affirmatively appealing that Trial Court's interpretation of the Partnership Agreement, the valuation of the Belmar Property, or the Defendant's buy-out amount, and their end around game attempting to achieve the same through a back-door approach of arguing that the extension of discovery or evidentiary ruling were in appropriate are unavailing.

ii. The doctrine of invited error bars the relief Plaintiffs seek.

[Not Raised Below]

"The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." N.J. Div. of Youth & Fam. Servs., supra, 201 N.J. at

340 (2010) (internal quotation omitted). "In other words, if a party has 'invited' the error, he is barred from raising an objection for the first time on appeal." State v. A.R., 213 N.J. 542, 561 (2013).

Firstly, Plaintiffs relied upon the Subject Discovery Order urging the Trial Court to reconsider its monetary judgement downward by including sanctions against Defendant for reimbursing Plaintiffs for the fees incurred and paid to Mr. Otteau. Da93 and Pa541.

Plaintiffs failed to appeal the Subject Discovery Order prior to the trial and instead relied upon it when seeking its own extensions and adjournments. See, e.g.: Da7 through Da1 (Plaintiffs' August 31, 2023 Cross-motion to Extend Discovery), Da59 (September 8, 2023 Order Extending Discovery), Da78 (January 17, 2024 Order Extending Discovery), Da80 (Plaintiffs' April 3, 2024 Letter Requesting Adjournment due to Expert Unavailability), Da89 (Plaintiffs' April 30, 2024 Letter Requesting Adjournment due to Expert Unavailability), Da110.

Secondly, Plaintiffs never asked the Trial Court to determine the value of the Belmar Property at a specified date. As expressed above, they offered the Otteau Appraisal, effective October 17, 2023, and asked the Trial Court to make a determination of value. The Trial Court did exactly what Plaintiffs asked it to do.

Plaintiffs had every right and ability to submit an expert report effective as of a date of their own choosing; however, they did not. They did not call Mr. Fisher or Mr. Gagliano, nor did they ask to recall Mr. Otteau despite the Trial Court permitting it. That is not the fault or cause of the Trial Court, but rather these were litigation decisions – and now Plaintiffs' retrospectively perceived litigation errors – that are not redressable by the Appellate Court.

iii. Plaintiffs' lack of objection to Mr. Lamicella's Appraisal constitutes a waiver.

[Not Raised Below]

"[W]hen counsel does not make a timely objection at trial, it is a sign 'that counsel did not believe the remarks were prejudicial' when they were made." State v. Pressley, 232 N.J. 587, 594 (2018) (internal citations omitted).

Here, the Lamicella appraisal was entered without objection. 4T215-17; 5T123-14:18; Pa397. Plaintiffs thus failed to preserve any objection to the use of the report in the Trial Court's decision. The lack of objection is a waiver.

iv. Plaintiffs' consent to the extension of discovery without reservation constitutes a waiver.

[Not raised below].

Parties cannot ordinarily appeal as of right from an order entered on consent. Winberry v. Salisbury, 5 N.J. 240, 255

(1950); Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc., 458 N.J. Super. 194, 205 (App. Div. 2019).

Plaintiffs consented to the Subject Discovery Order by (a) arguing in favor of its entrance only upon the condition that Defendant be ordered to pay Plaintiffs costs and fees (1T20-3:14); (b) relying upon it to seek their own extensions of discovery (Da7, Da10, Da14, and Da62); and (c) relying upon it when seeking fees and costs to be paid by Defendant (Da93).

Moreover, the January 17, 2024 Consent Order rendered the Subject Discovery Order – and this appeal – moot. Da81. That order too was entered without reservations concerning the Subject Discovery Order. Plaintiffs thus benefited and were afforded additional time to serve the Otteau Appraisal.

V. CONCLUSION

In reality, Plaintiffs know they have no legitimate basis to challenge the Trial Court's careful, reasoned, and meticulous valuation for the Belmar Property and ultimate judgment and thus attempt a Hail Mary run-around suggesting that the Subject Discovery Order and a singular evidentiary ruling were an abuse of discretion warranting a complete redo.

Since at least 2005, Plaintiffs were and have been in exclusive possession of the Belmar Property and in exclusive control of the Partnership. That status quo remained *pendente*

lite, and Defendant was made to pay Mr. Otteau's fees for his expert report.

Plaintiffs failed in their attempt to cheat Defendant out of hundreds of thousands of dollars and have failed to show that they suffered any actual harm or prejudice. This matter was fairly presented to the Trial Court and justly tried on its merits. The Trial Court properly considered the opinion of the parties' respective experts presented at trial and employed an appropriate methodology in determining the value of the Belmar Property and Defendant's buy-out amount.

On balance, the Trial Court's decision to extend discovery was not a manifestly unjust course. Nor did it bring about an unjust result. The Trial Court's permitting Mr. Lamicella's testimony at issue was likewise neither manifestly nor ultimately unjust either.

For all the reasons set forth above, the Court should respectfully deny Plaintiffs' appeal.

Dated: March 24, 2025

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April 7, 2025

VIA ECOURTS APPELLATE
Marie C. Hanley, Clerk
Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
25 Market Street
5th Floor, North Wing
Trenton, N.J. 08625

Superior Court of New Jersey, Appellate Division
KDN, Inc. and Nicholas Antipin, Individually, Plaintiffs/ Appellants, v. Youry Antipin, Defendant/Respondent
Appellate Docket No.: A-000204-24T2
On Appeal From: Superior Court of New Jersey, Monmouth County, Law Division - Docket No. Mon-L-3682-21
Sat below: Hon. Lisa P. Thornton, J.S.C., Hon. Gregory Acquaviva, J.S.C., Hon. Andrea Marshall, J.S.C., Hon. David F. Bauman, J.S.C.
Letter-Brief and Appendix of Plaintiff/Appellant's in Reply to the Opposition Brief of Defendant/Respondent Youry Antipin
Kevin S. Englert, on the brief

Dear Ms. Hanley:

Kindly forward the within letter brief to the assigned Honorable Judges.

Your Honors:

Please accept this letter brief pursuant to Rule 2:6-2(b) for filing as Plaintiff/Appellants KDN, Inc. and Nicholas Antipin's (hereinafter referred to as

"KDN" and "Nicholas", respectively, and "KDN" collectively) brief in reply to the opposition of Defendant/Respondent Youry Antipin (hereinafter referred to as "Youry"[1]) with respect to the above matter. For all the reasons set forth herein and in its initial brief, KDN respectfully requests that the Court reject Youry's arguments, reverse the lower court's judgment and order a limited remand for redetermination of the property as of the filing of the complaint.

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[1] Nicholas and Youry are referred to by their first names for clarity and ease of reference. No disrespect to the parties is intended.

TABLE OF JUDGMENTS, ORDERS & RULINGS

KDN adopts and incorporates by reference herein the table of judgments, orders and rulings set forth in its affirmative brief filed on December 17, 2019. (Pb3-11). To the extent that Youry adds further judgments, orders, and rulings in his brief, same are likewise incorporated only to the extent that they are relevant to the within appeal and constitute actual judgments, orders and rulings of the Court on appeal in this matter. (Dbv – vi).

PROCEDURAL HISTORY

KDN adopts and incorporates by reference herein the procedural history set forth in its affirmative brief filed on February 6, 2025. (Pb3-11). Respecting further history added in Youry's brief, to the extent that they are inconsistent with the procedural history in KDN's brief, inconsistent with and/or mischaracterize the record, or irrelevant to the within appeal, KDN requests that the Court disregard same.

By way of example and without limitation, 1) Youry cites KDN's opposition to its motion to appoint a new appraiser for the proposition that its position was fully heard, even though the motion judge had not read the moving papers (Db4, 1T4-19:1T5-1); and 2) Youry asserts that the basis for KDN's reconsideration motion "largely reasserted their prior arguments", when the basis

for the motion was a complaint filed with the New Jersey Division of Consumer Affairs (hereinafter "DCA") against KDN's appraiser, Robert Gagliano (hereinafter "Gagliano") which KDN did not know about, and that the second DCA complaint against an appraiser in the litigation showed a pattern in Youry's conduct aimed at a litigation advantage. (Db4, Pa147-48).

STATEMENT OF FACTS

KDN adopts and incorporates by reference herein the statement of fact set forth in its affirmative brief filed on February 6, 2025. (Pb12-29). Respecting additional facts in Youry's statement of facts as well as those introduced in his legal argument, to the extent that they are inconsistent with those set forth in KDN's brief, inconsistent with and/or mischaracterize the record, or irrelevant to the within appeal, KDN requests that the Court disregard same.

By way of example and without limitation, in the body of his brief, Youry states that he certified that issues with his appraiser, Todd G. LiPira (hereinafter "LiPira"), arose after the close of discovery in January 2023[2]. (Db21, Pa134, Da1). However, the certification, signed by Youry's former counsel, Antonio J. Toto, Esq., (hereinafter "Toto") does not state when the issues with LiPira arose, nor did it attach a copy of Youry's DCA complaint against LiPira. (Pa134-35).

[2] Discovery was later extended to March 5, 2023, but only on a limited basis related to a previous discovery request, excluding any further inquiries and maintaining the June 12, 2023 trial date. (Da5-6, Pa113-15).

Youry also did not testify when his issues with LiPira arose during the motion hearing. (1T8-18:1T10-20). Youry only testified about when the problem was revealed to Toto. (1T8-18:1T10-20). Youry first asserted that he visited the attorney in "end of March, sometime early April", and Toto represented that he filed the motion a day after learning about the dispute between Youry and LiPira. (1T9-25:1T10-16). Youry then clarified the motion was filed on May 4, and did not contradict Toto's assertion that the motion was filed immediately after Youry first brought the matter to his attention. (1T8-9:20; Pa4).

Youry never explained when the issue with LiPira arose, why he did not initially ask Toto about a potential witness credibility issue, nor why the question was brought to Toto's attention only a month before trial, nor why he did not provide a copy of the DCA complaint filed against LiPira[3]. (Pa134-35; 1T8-18:1T10-20). It should be noted that LiPira's appraisal was dated June 2022, almost a year prior to the trial date, and that Youry's May 2, 2023 pretrial exchange identified LiPira as a witness. (Pa209, Pa129-30).

KDN also respectfully requests that the Court take judicial notice of the DCA license status records of LiPira and Gagliano, retrievable at

[3] Youry's complaint against Gagliano was filed on April 30, 2023, just days before Youry met with Toto to inform him about his complaint against LiPira. (Pa155, Pa134-35). If the two DCA complaints were filed simultaneously, it could certainly explain why no copy was provided. As it stands, the date of the LiPira complaint remains a matter of speculation.

"newjersey.mylicense.com/verification/". The DCA online license verification system is a "real-time system with access to the most current professional license information" by the DCA. (Pra1). As of April 7, 2025, each record shows no discipline against either LiPira or Gagliano[4]. (Pra1-3).

LEGAL ARGUMENT

I. YOURY'S OPPOSITION CLARIFIES THAT A REMAND IS NECESSARY DUE TO THE TRIAL COURT'S ERROR IN GRANTING YOURY'S MOTION DESPITE THE LACK OF EXCEPTIONAL CIRCUMSTANCES.

Youry's arguments crystallize the need to remand this case to remedy the injustice of the proceedings below. Citing an amalgamation of marginally applicable legal principles, Youry asserts that this Court's inquiry should be whether the trial court *could* have found exceptional circumstances. (Db20). Youry then proceeds to assert that he *did* establish exceptional circumstances, and that the trial court must have agreed. To reach this conclusion, Youry relies on a tortured reading of the hearing transcript and a factually hazy recitation of the contents of the two-page, nine-paragraph certification Toto submitted in support of the motion. Youry's arguments cannot alter what the record makes plain – no

[4] This Court may properly take judicial notice of the DCA's license records, including the disciplinary history of a New Jersey state certified appraiser. A court may take judicial notice of an adjudicative fact that is "not subject to dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," such as the government-maintained, real-time website of the DCA. N.J.R.E. 201(b); N.J.R.E. 202(b).

exceptional circumstances were demonstrated, and no exceptional circumstances were found by the motion court.

A. Youry's motion to extend discovery was insufficiently supported to establish exceptional circumstances.

The Law Division gave a detailed explanation of the kind of submission required to demonstrate the existence of exceptional circumstances:

> Clearly, merely advising the court in conclusory terms that the attorney and the client have hectic schedules does not qualify. Advising the court in factual detail about how and why a schedule has prevented discovery would be a place to start. **Failure to provide such detail should always be fatal.**…Unfortunately, failure to properly prepare a matter in a timely manner is not exceptional circumstances in and of itself. **Additional facts must be shown in a detailed certification to the court, making clear that the reasons were beyond the reasonable control of the party seeking relief.**
>
> [O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003)(emphasis added)].

In sum, Toto's certification in support of the motion to extend discovery a) gave a brief procedural history in paragraphs 1 through 4, b) stated that Youry filed a complaint against LiPira with the DCA, and that LiPira advised Toto that he could not testify in the case in paragraph 5; c) asserted Youry's need for an appraiser and reasserted LiPira's inability to testify in paragraph 6; d) requests that the court adjourn the trial and allow Youry to get a new appraiser in paragraph 7; e) represents that Youry was in the process of obtaining a new appraiser in

paragraph 8; and f) repeats Youry's request for an adjournment and opportunity to obtain a new appraiser. (Pa134-35). Nothing more.

Contrary to Youry's assertion, Toto's certification did not state that Youry's issues with LiPira arose after the end of discovery. (Db21). Instead, it simply stated that Toto was informed of the issue in May. It gave no details as to the precise nature of the issues that prompted the complaint. No copy of the DCA complaint was attached to the certification. No date for the submission of the DCA complaint was given. No mention of the fact that Youry had also filed a complaint against Gagliano was made. (Pa134-35). It did nothing to explain why any issue with an appraisal obtained in June 2022, could not have been resolved or brought before the court by way of motion before the close of discovery six months later. (Pa209).

Even considering facts adduced during the motion argument, Youry failed to establish exceptional circumstances allowing the motion to be granted. Youry's testimony gave no details as to the nature of the dispute, other than that he did not have questions answered he believed relevant to the credibility of the report. (1T8:22-1T9-12). Youry failed to testify as to when his questions arose, when or how the questions were first posed to LiPira, whether LiPira responded at all or whether he responded but refused to answer or why he did not approach Toto about a credibility issue either initially or simultaneously with LiPira. Youry did

not testify if there were any follow ups regarding his questions, the amount of time elapsed since his inquiry, the complexity of the questions, or anything else that would suggest that there was a legitimate issue and that it arose at such a time as to necessitate an adjournment in the 11th hour, and the replacement of both his expert witness and his attorney.

At its core, Youry's problem presents as a failure to prepare the matter for trial on time. LiPira's appraisal was prepared in June 2022. Youry had ample time to review the report, relay any concerns to LiPira and Toto and, if no satisfactory resolution was forthcoming, obtain a new appraisal well in advance of the original discovery end date in December 2022. Youry failed to take the opportunity to present the kind of facts that would support the conclusion that exceptional circumstances warranted extending discovery, and as a result the lower court erred in granting the motion and adjourning the trial.

B. No exceptional circumstances existed.

To establish the exceptional circumstances allowing a discovery extension, Youry had to show (1) why discovery has not been completed within time and diligence pursuing discovery prior to the discovery end date; (2) the importance of the additional discovery; (3) an explanation for the failure to request an extension of time during discovery; and (4) the circumstances were beyond the control of

the moving attorney and litigant. Hollywood Café Diner, Inc. v. Jaffee, 473 N.J. Super. 210, 217 (App. Div. 2022).

Youry's opposition blatantly contradicts the record when it asserts that the issues in question arose after the close of discovery. The central issue was why Youry had to obtain a new appraisal with only a month to go before trial[5]. Instead of offering a factual explanation, Youry misrepresents the contents of Toto's certification and turns to factually distinct, irrelevant issues to which no objection was raised below. Youry bore the burden to establish the existence of exceptional circumstances. The lack of explanation for failing to address issues with LiPira prior to the close of discovery fails to satisfy the first or third prong of the test.

With regards to the second prong concerning the importance of the discovery, while Youry would have been unable to offer the testimony of an appraisal expert if discovery were not extended, Youry would not have been defenseless. He was at liberty to introduce other evidence of the property's value as well as cross-examine KDN's appraiser. Even the importance of an appraisal in a matter where the valuation of real property is in issue alone is not enough to overcome Youry's failure to satisfy any other prong of the test.

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[5] Youry's complaints about the timing of service of KDN's appraisals is misplaced. Gagliano's report was initially served on Toto in January 2022. There was no objection raised, so the date of service is not a matter of record. Otteau's report was served prior to the close of discovery. At the time of service, discovery was to close March 15, 2024, by virtue of consent order signed by Youry's current counsel. (Pra4-5).

With respect to the final prong, Youry vociferously argues that the ethics complaint he filed against LiPira was out of his control. Had Youry offered any testimony about the nature of the credibility issue, offered a copy of the complaint, or provided more detailed information about the exchange between he and LiPira, it might have given the motion court or this Court the ability to evaluate his claim and determine whether he genuinely faced Hobson's choice and had to file an ethics complaint despite the impending trial. As it stands, the blanket assertion that Youry couldn't get LiPira to answer questions does not establish that Youry was unable to address the problem during discovery, nor that the problem was such that he was indeed in a catch-22 where he had no choice but to file an ethics complaint.

Indeed, Youry's concern did not seem to relate to any right he had against LiPira, but rather that he had to file the complaint or proceed to trial with a report he questioned. (1T9-6:12). His own hypothetical supports this, as Youry contends he had to file the ethics charge or lose the ability to raise LiPira's conduct as a basis to challenge the outcome of a trial with LiPira as his expert. (Db27). Youry's comments and hypothetical point to the conclusion that his purpose for filing the DCA complaint against LiPira was to derail the impending trial. Therefore, KDN respectfully requests that the Court reject Youry's arguments, reverse the lower

court's judgment and order a limited remand for redetermination of the property as of the filing of the complaint.

II. KDN DID NOT WAIVE THE ARGUMENTS RAISED OR RELIEF REQUESTED IN THIS APPEAL.

In a somewhat scattershot fashion, Youry asserts that various procedural actions or missteps taken below forestall either KDN's arguments or the requested relief. Suffice to say, while a failure to brief an argument raised on appeal can result in a waiver, KDN's appellate brief fully addressed both the issue of the motion court's error in granting the extension at issue, and the trial court's error in allowing Lamicella's rebuttal testimony and sought an appropriate remedy to correct these errors.

Likewise, KDN preserved these issues for appeal by appropriate opposition/objection at the time that the lower court ruled. To conclude otherwise could lead litigants to repeat every possible objection on every occasion, seek intermediate appellate review for every unfavorable interlocutory ruling and, in general, further drag out what is often already a long, arduous process for litigants and courts alike. Youry's arguments on this score are without merit and KDN respectfully requests that this Court reject them.

CONCLUSION

For all the reasons set forth herein and in its initial brief, KDN respectfully requests that the Court remand this matter for the limited purpose of redetermining the value of the subject property as of the date of the filing of the complaint.

Respectfully submitted,
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KDN Inc. and Nicholas Antipin

By: 

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Cc: Christian R. Oehm, Esq. (via eCourts Appellate only)