ROSEMARY BRODY	**: SUPERIOR COURT OF**
	: NEW JERSEY
	: APPELLATE DIVISION
Plaintiff-Appellant	**: DOCKET NO. A-000209-24**
	:
vs.	**: Civil Action**
	:
	: ON APPEAL FROM
NICHOLAS SANTORO, CEI	**: JUNE 10,2024 ORDER**
CONTRACTORS, SOLEIL	**: DISMISSING PLAINTIFF'S**
SOTHEBY'S INTERNATIONAL	**: COUNTS AND JULY 2,2024**
REALTY, TROY ROSENZWEIG	**: ORDER DISMISSING**
RE/MAX PLATINUM	**: PLAINTIFF'S COMPLAINT**
PROPERTIES, LINDA NOVELLI	**:**
FUNK INSPECTION SERVICE	**: SUPERIOR COURT**
AND BRUCE FUNK	**: LAW DIVISION-CIVIL**
	: ATLANTIC COUNTY
Defendant-Respondent	**:**
	: Sat Below
	: Hon. Danielle Walcoff, JSC

BRIEF AND APPENDIXES FOR APPELLANT ROSEMARY BRODY

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I. Preliminary Statement

This matter concerns the Plaintiff/Appellant's (hereinafter Plaintiff) purchase of a home at the New Jersey Shore in Ventnor City located at 911 Cambridge Avenue. (Hereinafter the subject property). The home was built in 2009 by/for the Respondent/Defendant (hereinafter "Defendant" Nicholas Santoro). The subject property abuts the bay in the city of Ventnor in an area that is prone to flooding. In 2011 the subject property suffered damage via a phenomenon known as a "derecho". Thereafter, on October 29, 2012 the home was subject to further substantial damage via Super Storm Sandy "according" to the claim filed by the Defendant.

The Defendant placed claims for Hurricane Sandy flood and wind damage for over $271,000.00 with his carrier Lloyds of London. The Defendant Santoro hired an adjuster and an attorney to represent him in this claim. The Defendant's claims adjuster submitted a report totaling $271,000.00 which included replacement of <u>all</u> the subfloors because of the severe water damage. The Defendant accepted and relied upon this report. Lloyds of London agreed with the Defendant that there was water damage **<u>but,</u>** Lloyds expert engineer concluded the damage was based upon long-term water penetration and **<u>not</u>** a one-time event (i.e. Hurricane Sandy). Santoro's $271,000.00 claim was rejected by Lloyds.

The Defendant appealed the decision of Lloyds and filed a claim in Superior Court. In Superior Court the Defendant received an arbitration award to repair the water damaged subfloors in the amount of $45,000.00. The Defendant never repaired the damaged subfloors and filed for a trial De Nova wherein he ultimately settled with Lloyds of London.

After replacing the roof the Defendant listed the property without addressing the ongoing water penetration issues highlighted in the Lloyds report prepared in response to Defendant's $271,000.00 Hurricane Sandy Claim. After the Defendant dropped the listing price by $300,000.00, the Plaintiffs purchased the subject property. The Defendant never disclosed the ongoing water penetration issue identified in the Lloyds report nor did he disclose the litigation with Lloyds in which his $271,000.00 claim was denied.

Upon habitation of the subject property, the Plaintiffs immediately began to recognize "water leakage issues". When one of the contractors was addressing the water issues and a broken pipe for the Plaintiff, he was required to remove some of the flooring and noticed that the second floor subflooring was completely rotted via long term water damage. Shortly thereafter the Plaintiffs' daughter moved in with them and while preparing a former "extra room" for her and her new baby, discovered a box of documents left behind by the Defendant. The contents of the box consisted of Defendant's claim adjuster report from

Hurricane Sandy, the transcripts from Defendant's deposition wherein he testified under oath regarding the substantial water damage, the Lloyds of London engineer report highlighting the long-term water issue and pleadings appealing the Lloyds of London Insurance rejection of the $271,000.00 claim.

The Defendant was confronted with Plaintiffs discovery of the afore referenced documents and Defendant denied any knowledge of long-term water issues and claimed the damage was based upon Plaintiffs kids and dogs. Thereafter the Plaintiff filed the underlying Complaint.

In depositions the Defendant stated that he left the subject "Hurricane Sandy Box" behind to "help" the Plaintiff because that is "what good Christians do". In depositions the Defendant was confronted with multiple items in the "Hurricane Sandy Box" and he never denied the nature of these items and repeated they were left behind to "help" the Plaintiff.

In a Motion in Limine, Judge Paolone (the Judge "handling this matter prior to the trial judge) specifically enumerated why the Hurricane Sandy documents were not hearsay and exceptions to hearsay. The Plaintiffs prepared their case based upon this ruling. At trial and before a new Judge, Defense counsel objected to the Hurricane Sandy documents as hearsay and the trial Court, contrary to the previous Orders of Judge Palone, sustained such objections overruling Judge Paolone.

II. Procedural History [1]

1.On February 13, 2019 the Plaintiff filed the subject complaint against the Defendant Santoro as well as against Linda Novelli, Troy Rosensweig, ReMax, Soleil Sotheby's, and CEI contractors. (Pa.1-13)

2.On July 30, 2019 an Amended Complaint was filed. (Pa. 14-29)

3.On September 3, 2019 a motion was submitted by the attorney for Sotheby seeking to dismiss the Complaint. (Pa. 30-67)

4. On October 21, 2019 the Motion was denied in part and granted in part. (Pa. 68-69)

5. On October 3, 2019 Defendant Santoro filed an Answer to the Amended Complaint (Pa. 70-87)

6. Thereafter the various Defendants filed an Answer with cross claims and filed a third-party Complaint against the building inspector, Bruce Funk. (Pa. 70-87, Santoro Answer, Pa. 88-93 ReMax Answer Pa.94-117 - Sotheby's Answer (Pa.118-127)

7. On October 6, 2020, Plaintiff filed a Motion to strike against defendant Santoro for failure to provide discovery (Pa. 128-158 ReMax Answer to Crossclaim)

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[1]T1 = June 3, 2024 Trial Transcript; T2= June 4,2024 Trial Transcript; T3= June 5,2024 Trial Transcript; T4 = June 6, 2024 Trial Transcript; T5 = June 10, 2024 Trial Transcript; T6=June 12,2024 Trial Transcript; T7=July 19, 2024 Motion Hearing

8. The Motion to Strike was withdrawn on November 2, 2020. (Pa. 158)

9. On January 29, 2021, Plaintiff filed a Stipulation of Dismissal as CEI contractors, the original builders of the subject building as any claim against them was well beyond the statute of repose. (Pa. 158)

10. On November 22, 2021 the Plaintiff filed for summary judgement as to Defendant Santoro and, this motion was denied. (Pa. 160-181)

11. On June 24, 2022 Defendant ReMax filed a Motion to Bar Santoro's expert's testimony (Pa. 182-204))

12. On July 20,2022 Plaintiff and Defendant ReMax and Sotheby's signed a Settlement and Release (Pa. 205-214)

13. On July 27, 2022 all Motions and Crossmotions for Summary Judgment were denied. (Pa. 215)

14. On January 4th and 5th 2023 Motions were filed to bar the testimony of Defendant Santoro's "alleged" expert. (Pa. 216-255)

15. On January 24, 2023 the Court granted the Motion to strike the testimony and report of Defendant Santoro's expert. (Pa. 256-274)

16. In February of 2023 the Defendant Santoro filed Several Motions In Limine as follows:

a. Motion to Strike testimony on Damages;(Pa. 275-276)

b. Motion to Strike testimony of William Sasso, Plaintiffs neighbor who witnessed a third-party emptying buckets of water from Plaintiffs house while it was owned by Defendant Santoro. (Pa. 277-278)

c. Motion to Strike testimony from the Hurricane Sandy box as hearsay (Pa. 279-280)

d. Motion to Strike testimony regarding the Sellers Disclosure Statement. (Pa. 281-282)

e. Motion to prohibit Plaintiff's expert from referring to the Hurricane Sandy report prepared for Lloyds of London. (Pa. 283-284)

f. Motion to preclude Plaintiff's expert from testifying to the minor repair and the subject subfloor. (Pa. 285-286)

17. Only the Motion regarding the Sellers Disclosure statement was Partially granted. The remainder of the requests were denied and in particular the Court set forth in express detail why the Hurricane Sandy documents were not hearsay and also exceptions to hearsay. (Pa. 287 - Pa. 325, and in particular Pa. 293-300) The Defendant Santoro did not appeal these decisions nor did he file a Motion for Reconsideration.

18. On February 2, 2024 Defendant Santoro again filed for Summary Judgment on the issue of damages which was partially granted on March 12, 2024

however, Plaintiff was permitted to provide the testimony of contractors who actually performed work on Plaintiffs' house. (Pa. 326-327, 328-351)

19. On May 13, 2024 Plaintiff filed a Motion in Limine seeking to bar any testimony from Defendant Santoro's alleged expert and on May 31, 2024 Plaintiff's Motion was partially granted. (Pa. 352-354)

20. The parties then prepared Pre-Trial Memos and provided a list of premarked exhibits. (Pa. 355-358)

22. The Plaintiffs proceeded in accordance with decisions of Judge Paolone and all exhibits addressed on the Pre-Trial Exchange were presented to Santoro during 2021 depositions and expressly deemed admissable by Paolone's previous Order.

23. On May 30, 2024 the Court barred Defendant's expert from testifying to certain repair items. (Pa. 369)

24. The Defendant was well aware of the Court's previous ruling and yet when the matter was assigned to a different trial judge, Defendant once again objected to certain documents and testimony as hearsay despite the previous rulings.

Rimkus Report, Union Roofing quote, Arbitration Award, Santoro Hurricane Sandy Complaint, Lloyds of London, SEA Report, Remmy Insurance adjuster report; Santoro 2014 deposition (Pa. 356-357).

The following is a list of such objections and the trial Court's decision overruling and disregarding Judge Paolone's previous Orders.

a. Objection sustained with sidebar; T3:15:1-16:21 & T3:69:l-72:23, which is an example of the mistake mixing up when the testimony was being offered for the truth or whether the statement fit into a hearsay exception.

b. Objection sustained with sidebar; T3:22:4-24:ll & T3:35: to 39:20, which are examples of the Court misunderstanding of or misapplying the foundation.

c. Other examples of objections sustained with sidebar: T3:10:12-13:1 & T3:16:14, 22.

25. Having eliminated most of the documents used in depositions and permitted via Judge Paolone's Order but overturned by the trial court, the Defendant Santoro moved to enter judgment on June 10, 2024 on all claims for common law fraud leaving only the claim for breach of contract. Almost every premarked exhibit ruled admissible by Palone was excluded by the trial court as inadmissible hearsay. Plaintiff filed a Motion for the Court to reconsider her rulings on the Hurricane Sandy Documents attaching the Order from Judge Paolone. (Pa. 359-368)

26. On June 10, 2024 the Court denied the Motion for Reconsideration and dismissed all claims except the claim for breach of contract. (Pa. 370)

'll. During trial the Defendant Santoro, armed with the trial Court's overruling of Judge Paolone's Order on Hurricane Sandy documents, simply denied any knowledge of his Hurricane Sandy insurance claim, his adjuster's report claiming $271,000.00 in damages including replacement of all subfloors, the SEA report prepared by Lloyds regarding Hurricane Sandy and the long term water penetration problem at the house, his appeal of the Lloyds determination, his 2014 testimony under oath regarding the extensive water damage at the house, his appeal of the Lloyds decision in Superior Court, the Arbitration Award, his filing for a trial de novo and the notes prepared regarding the denial of insurance coverage following Hurricane Sandy. (Pa. 356-357)

28. The following is a list of such objections and the trial Court's decision over ruling and disregarding Judge Paolone's previous Orders.

a. Objection sustained with sidebar; T3:15:1-16:21 & T3:69:l-72:23, which is an example of the mistake mixing up when the testimony was being offered for the truth or whether the statement fit into a hearsay exception.

b. Objection sustained with sidebar; T3:22:4-24:ll & T3:35: to 39:20, which are examples of the Court misunderstanding of or misapplying the foundation.

c. Other examples of objections sustained with sidebar: T3:10:12-13:1 & T3:16:14, 22.

29. During trial, after excluding almost all Plaintiff's documents prepared relying on Judge Paolone's Order, the Court crafted a verdict sheet that allowed the defense counsel to instruct the jury that Plaintiff had an obligation, to the Defendant, to "follow up" on a suggestion in her home inspection report. T6 p. 9, L 925, p. 10 Ll-25, p. 11 Ll-25, p. 12 Ll-25, p. 13 L 1-13, p. 14 L. 17-25, p. 15 L. 1-25, p. 16 L. 19-25, p. 17 L-14, p. 18 L 1-11.

30. At trial the Court gave an improper instruction regarding an adverse inference. (T6 p. 8, L. 7-25)

31. During closing arguments the Defendant counsel improperly instructed the jury that they could consider whether Plaintiffs breached the contract. (T5, p. 170, L. 19-25, p. 177 L. 7-15, p. 201 L. 12-17) During deliberations the jury asked "if both parties breached the contract can we proceed". (Pa. 384-385)

32. On June 12, 2024, after deliberating for almost two days, the jury came back and found no cause of action as to the breach of contract, the only claim remaining. (Pa. 386)

33. On July 22, 2024 Defendant Santoro filed for attorney fees and Plaintiff objected and filed a Crossmotion seeking to have the entire judgement vacated based upon Defendant's counsel's lack of candor with the court specifically addressing the Paolone ruling.

34. On August 16, 2024 the Court denied both Motions. (Pa. 388-389)(T7 p. 7, L. 19-24)

III. STATEMENT OF MATERIAL FACTS

1. CEI Contractors LLC applied for the permit to construct the subject property at 911 Cambridge Avenue in Ventnor Heights New Jersey on July 14, 2005. (Pa 389-394)

2 . The subject property is on the bay and intercoastal waterway and has a boat slip.

3 . CEI completed construction on the subject property and received a Certificate of Occupancy on January 9, 2007.

4 . In the Summer of 2011, the subject property received wind damage from a Derecho (see Pa. 395-466, Pa. 420 L.18-25. P. 26, L. 1-25. L. 27 L. 1-9).

5. The Defendant Nicholas Santoro (hereinafter "Santoro") filed an insurance claim for the Derecho in 2011 and allegedly fixed the damage to his roof (see Pa. 420 p. 28, L. 1-25, Pa. 424 p. 29 L. 8).

6 . On October 29, 2012 the interior of Santoro's property suffered significant water damage from Hurricane Sandy as testified under oath by Santoro (See Pa. 427 P. 32, L. 6-22, Pa. 428 P. 33, L. 1-25, Pa. 429 P. 34 1. 1-25, Pa. 431 P. 35 1. 1-25, P. 36, 1. 1-225, Pa. 432 P. 37 1. 1-9, Pa. 444, P. 49 L. 2-20, Pa. 452 P. 57 L. 9-25, Pa. 453 P. 58 L. 1-25, Pa. 454 P. 59 L. 1-25, Pa. 455 P. 60 L. 1-24, Pa. 459 P. 64 1. 10-25. **Santoro testified that the damage was not just to the roof but practically the entire house.**

7 . Sometime after Hurricane Sandy Santoro filed a claim with his insurance carrier 100% Underwriters at Lloyds a/k/a Certified Underwriters at Lloyds of London (hereinafter "Lloyds"). Santoro claimed to have received wind driven rain damage, wind damage and flood damage to the property. Santoro's agent filed a claim asserting over $271,000.00 in damages. (See Pa. 467-474). **The request from Santoro's agent included replacement of almost the entire subfloors throughout the entire house.** (Pa. 468) It must be noted that to claim damage to the subfloor would require removal of the existing surface floor that would have exposed the extent of the claimed damage.

8 . Santoro received quotes and/or invoices from contractors to make repairs to the property which he claimed were from Hurricane Sandy as follows:

a. On December 18, 2012 Santoro received a quote from Union Roofers to repair the entire roof for $139,000.00. (See Pa. 475) This document was discovered in the box left behind by Santoro.

b. On February 25, 2013 Santoro received a quote from Providence tile to replace all of the subfloors for $48,750 (Pa.476). This document was discovered in the box left behind by Santoro.

c. On February 27, 2013 Santoro received a quote from Robert R Boselli & Sons to repair the roof at the property for $147,750.00. (See Pa. 477-479). This document was discovered in a box left behind by Santoro.

d. On March 15, 2013, Vericlaim produced a report demonstrating the value of the damages to Santoro's property were approximately $23,107.82. (See Pa. 480-493). This document was discovered in the box left behind by Santoro.

9 . On May 8, 2013 Santoro signed a sworn Statement in Proof of Partial loss to Certain Underwriters at Lloyd's London of London England (hereinafter "Lloyd's") in the amount of $23,107.82. (See Pa. 495). This document was discovered in the box left behind by Santoro.

10 . On June 10,2013 Scientific Expert Analysis (hereinafter "SEA") rendered a report on the damages for Lloyds. **The SEA report concluded that the water damage at the property was the result of continued leaks and faulty workmanship on the property and, not the result of wind driven rain from Hurricane Sandy.** (See Pa. 495-537, and in particular Pa. 534). ***The SEA report concluded that there was in fact water damage to the property but, the damage was the result of long term problems and not Hurricane Sandy.*** This document was discovered in the box left behind by Santoro.

11. Santoro filed a Complaint against Lloyds on October 23, 2013 under Docket Number ATL-L-6538-13. (See Pa. 538-540). This document was discovered in a box left behind by Santoro.

12 . **Sometime after filing the Complaint Santoro or somebody on his behalf put together notes indicating that she/he knew about the**

damaged/rotten subfloor and knew that it was not covered by insurance.

(See Pa 541-542). This document was discovered in the box left behind by Santoro.

13 . On February 12, 2015, Arbitrators awarded Santoro $48,575.00 for the damages alleged in the Complaint. (Pa. 543). There was no allocation for the roof and the amount is the **same amount** set forth in the Providence quote to remove tile and the rotten subfloor. (See Pa. 476). This document was left behind in the box by Santoro.

14. On February 25, 2015 Santoro filed for Trial De Novo. (See Pa. 544). This document was left behind in the box by Santoro.

15 . On April 24, 2015 Lloyds filed an Offer of Judgement for $60,000.00. (See Pa. 545-547). This document was discovered in the box left behind by Santoro.

16 . A Stipulation of Dismissal was filed by Santoro and Lloyds on July 17, 2015. (See Pa. 548). This document was left in the box left behind by Santoro.

17. Santoro then listed the property with Sotheby's originally for $1,499,000.00 but after 100 days on the multiple listings service the price was dropped to $1,399,999.00. (See Pa. 549).

18 . In November of 2015 Santoro signed a contract with Union Roofers to repair the entire roof for $ $75,000.00. (See Pa. 550).

19. On February 12, 2016 Santoro signed a Seller's Property Condition Disclosure Statement indicating that the roof was just replaced due to Hurricane Sandy Damage (almost 3 years after the storm) **and fraudulently set forth that there were no other Material Defects to the property.** (See Pa. 550).

2 0. At the time Santoro signed and affirmed the Seller's Disclosure Statement, he had already testified under oath concerning the extensive damage to his property and while he had in his possession an engineer's report indicating that his property suffered from long term water damage. (See Pa. 551-556).

21. On August 22, 2016 Plaintiff and Plaintiff's realtor, Novelli, were greeted by Santoro who was asked if there was Hurricane Sandy Damage. Santoro explained there was no water damage but, there was some minor wind damage. (See Pa. 557-633 and Pa. 569 p. 48 L. 1-25, Pa. 569 p. 49, L. 1-25, Pa. 570 p. 50, L. 1-25, Pa. 570 p. 51 L. 1-25, Pa. 570 p. 52 L. 1-25, Pa. 570 p. 553,1. 105). The Plaintiff relied upon Santoro's misrepresentation.

22 . The Plaintiff and Santoro signed a Contract of Sale on August 23, 2016. (See Pa. 635). The purchase price was approximately $300,000.00 less than the original listing price.

23 . On August 31, 2016 the Plaintiff received a property inspection report (See Pa.642-676). The subject report, prepared by Bruce Funk noted he only based his opinion upon a visual inspection, indicated stucco surfaces could be a

problem, recommended a moisture intrusion analysis but, **noted that he could not determine if there was a water intrusion problem based upon his visual inspection.** (See Pa. 642-676).

2 4 . The Plaintiff prepared a list of damages revealed in the property inspection report which Santoro agreed to prepare before closing (see Pa. 677). This list was based upon a visual inspection only.

2 5 . The closing for the sale of the property occurred on November 9, 2016. (See Pa. 678-684).

26. Following the closing, and after approximately one and a half years of continued water leakage problems, the Plaintiff's insurance company hired Rimkus Consulting Group (hereinafter "Rimkus") to prepare a Moisture Intrusion Evaluation. The Rimkus report was completed on March 7,2018. (See Pa. 685-715)

2 7 . The Rimkus report revealed that there was long term and continuous water damage to the property that was the result of negligent construction and oversite by CEI who built the property for Santoro. The Rimkus Report contained the same information as contained in the 2013 report on behalf of Lloyds and which was in Santoro's possession. (See Pa. 685-715).

2 8 . Plaintiff also obtained another report which came to the same conclusions as the other reports, i.e. there was long term water damage to the property. (See Pa. 716-726).

29. Santoro knew of the long-term water damage problem at the subject property and the total amount of Hurricane Sandy Damage but fraudulently concealed such from the Plaintiff. This is readily evident in his Sandy insurance Complaint and the ensuing rejection and lawsuit.

3 0 . The Plaintiff discovered Santoro's Hurricane Sandy documents in a box left behind at the property. The box also contained Santoro's vacation pictures, birthday cards, pictures of family events, life insurance information and investment account information. (See Pa. 727-759). The box also included Santoro's insurance claim via hurricane Sandy wherein he claimed $271,000 in damage but was rejected because of the long-term water issue.

31. In a 2021 deposition, Santoro denied any water damage to the property (see Pa. 760-798, Pa. 769 p. 36, L. 17-25, Pa. 770 p. 38 L. 13-22, Pa. 770 p. 39 L. 16-24, Pa. 777 p. 51 L. 5-22, Pa.774 p. 57 L. 2-22, Pa. 780 p. 81 L. 7-20). Furthermore, when confronted about the box left behind, Santoro stated it was left behind intentionally, the box contained information that he took time to gather to help the Plaintiff, and that was what "good Christians do". (See Pa. 774, p. 54, L. 1-18).

32 . Santoro's 2014 deposition testimony on damages is diametrically opposed to his 2021 deposition testimony as well as the information he affirmed in the Seller's Disclosure Statement.

3 3 . When Plaintiff began addressing the water penetration problems which were subsequently revealed as the result of the long-term water damage that Santoro intentionally concealed, the contractors uncovered that the subfloors and inner walls were rotted and black with mold. (See Pa.799-810).

IV. Legal Arguments

A. THE COURT BELOW IMPROPERLY PRECLUDED DOCUMENTS, PREVIOUSLY RULED AS ADMISSABLE IN RESPONSE TO A MOTION IN LIMINE, WHICH VIOLATED THE RULE OF THE LAW OF THE CASE DOCTRINE (Pa359-368)

As set forth in the Statement of Facts and Procedural History, the Defendant herein filed multiple motions in Limine in February of 2023. For the most part, the Defendant was trying to exclude the Defendant's previous Hurricane Sandy Claim wherein he claimed water damage to the entire house in the amount of $271,000. The documents Defendant looked to exclude included his insurance adjuster's report, the engineers report from Lloyds that demonstrated to Defendant's the water at the subject property was an on-going long term water penetration problem, quotes from contractors, Defendants deposition testimony where he enumerates the alleged extensive "Hurricane Sandy Damage", his or his wife's personal notes regarding his Hurricane Sandy claim, and the report from Plaintiffs expert that shows part of the subfloor was exposed and replaced, i.e. indicating the only other previous owner, i.e. Defendant Santoro or his agent, knew of the extensive water damage.

Judge Paolone's ruling on this issue is not subject to debate. The Judge took the time to review Defendant Santoro's previous claims, the deposition transcripts and the pleadings filed by Defendant Santoro. To make this perfectly clear, Plaintiff presented Santoro with the afore-referenced documents at his

2021 deposition as well as his previous testimony wherein he was trying to extract $271,000.00 from Lloyds. The Defendant Santoro acknowledged the documents in question at his deposition and stated he left them behind intentionally to help the Plaintiff and stated this is "what good Christians do".

Despite Judge Paolone's ruling, at trial under a **new** Judge, Defendant's counsel raised the same hearsay argument unsuccessfully raised in the afore referenced Motions in Limine. The trial judge amazingly denied questioning the Defendant Santoro regarding these Hurricane Sandy documents as she concluded they were hearsay. Judge Paolone ruled these documents established Defendant's knowledge of the long-term water penetration issue and were either hearsay exceptions or, not hearsay at all. The Hurricane Sandy documents were prepared for Santoro and he relied upon them in his insurance claim appeal.

Armed with the trial Court's erroneous conclusions in direct violation of the "law of the case doctrine", the Defendant "sat back" and denied any knowledge of the Hurricane Sandy Claim, the report prepared on his behalf and the report used to deny his claim , his testimony in 2014 and even denied ever seeing such document's despite previously testifying to intentionally leaving the documents at the house for the Plaintiff because that was "what good Christians do".

At trial, now armed with the court's erroneous evidentiary ruling, the Defendant changed testimony and stated he left a manilla envelope behind containing warranties and names of contractors and ignored his previous testimony regarding the box which he proclaimed to leave behind intentionally. The Defendant Santoro was aided and abetted by the trial Court's misinterpretation of the law and facts to perpetuate an ongoing and substantial fraud which completely "flies in the face" of Judge Paolone's express and well-reasoned conclusions to Defendants six Motions in Limine. To be specifically on point, whether the subject documents were in a box, an envelope, or a plastic container is of no significance. All these documents demonstrate Santoro knew and his agents (i.e. his attorney and claims adjuster) knew there was a long-term water issue. Santoro fraudulently "covered up the issue" for profit regardless of the harm he intentionally inflicted on the Plaintiff. Santoro's actions were fraudulent and in breach of his duty to disclose.

The simple and salient facts demonstrate there was a request by Santoro after Hurricane Sandy to replace **all** the subfloors which is significant. How did Santoro or his agent know the subfloors were damaged if they didn't remove the main floors? Why was a piece of the subfloor removed and replaced by the only prior owner, i.e., Santoro? How could Santoro deny knowledge of his Adjusters report when it was prepared and relied upon by him? How can Santoro deny

knowledge of the SEA report when he appealed Lloyds decision denying the Hurricane Sandy damage he requested to be repaired and when he subsequently appealed the arbitrator's decision? The answer to these rhetorical questions is axiomatic yet, Santoro was permitted to continue his fraud on the jury based upon the protection provided by the trial court's obvious misinterpretation of the law.

Judge Paolone expressly provided that the "Hurricane Sandy Documents" were not being used to admit the matters contained therein but to demonstrate the Defendant Santoro has knowledge there was a pre-existing water penetration issue which was why his S271,000.00 claim was denied. (Pa293-300). Notably, Santoro never got a report or provided testimony by a qualified expert to refute the SEA report.

The subject documents left behind by Santoro that he never revealed and denied knowledge of unequivocally demonstrate Santoro knew about a long-term water issue and failed to disclose. The documents demonstrate Santoro's knowledge and are otherwise exceptions (i.e. adjuster report is a business records exception) to hearsay. The trial Court's significant oversight of Judge Palone's decisions in several pretrial motions in limine excluded almost every document linking the Defendant Santoro to knowledge of long term water issues that were in the box he "intentionally left behind".

On this issue, the Defendant will argue that Santoro left a manilia envelope with warranties behind and that was what he "mistakenly" referred to at his deposition in 2021. A cursory review of Santoro's depositions completely debunks yet another lie from the Defendant. This Court need only review the documents Santoro was confronted with at his deposition to determine they were left in a box and not an envelope. The whole box/envelope issue was just another part of Santor's ongoing fraud and change of testimony to avoid his improper actions. Santoro was confronted with the subject documents in his 2021 deposition and unequivocally stated he purposefully left them behind to "help" the Plaintiff. After being confronted with these documents at depositions, the Defendant never denied leaving the documents behind and stated they were left behind to "help" the plaintiff.

To be specific, whether the documents discovered by the Plaintiff were left in a box, an envelope, or a plastic bag makes no difference. Likewise, whether the Defendant denied any "knowledge" of these documents makes no difference. The fact is they are non hearsay and/or exceptions to hearsay documents that demonstrate Santoro's knowledge of long-term water issues. Santoro filed the insurance claim. Santoro was denied his insurance claim. Santoro testified under oath to the extensive water damage from Hurricane Sandy in 2014. Santoro was provided with an expert report from Lloyds of

London that expressly stated the damage was due to a long term and on-going water penetration issue and not Hurricane Sandy damage. Santoro appealed this determination and received an arbitration award to replace the subfloors which Santoro never completed. Santoro ultimately appealed the arbitration award. Santoro never got a report of his own to refute the conclusions, in the Lloyds of London report.

The long-term water issues are the polestar of this matter, not, how or in what item Plaintiffs found the documents concealed by Santoro. Although the cause of the long-term damage is significant, the center of this litigation is Santoro's obvious knowledge of an ongoing and long term water issue for which his insurance carrier, i.e. Lloyds of London, denied coverage. It is inconceivable that the trial court created a mechanism for Santoro to completely deny these issues via the trial Court's complete oversight of the Paolone ruling.

As stated in Brunswick Village v Knof 29 NJ Super 238 (1954) and State v McCabe 201 NJ 34 (2010) a Superior Court Law Division Judge cannot overrule another Superior Court Law Division Judge's ruling on a Motion in Limine. The trial Court's ruling more or less prohibited 85% of Plaintiff's case which they prepared for trial relying on Judge Paolone's ruling. Judge Paolone made it expressly clear that the subject documents were being introduced to

demonstrate the Defendant Santoro's knowledge of the long-term water issue at this house.

"Under the law-of-the-case doctrine, 'where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.' *"Bahrle* v. *Exxon Corp.,* 279 *N.J. Super.* 5, 21 (App.Div.1995) (quoting *Slowinski v. Valley Nat'l Bank,* 264 *N.J. Super.* 172, 179 (App.Div.1993)), *affd,* 145 *N.J.* 144 (1996). For that reason, the decision "should be respected by all other lower or equal courts during the pendency of that case." *Lanzet v. Greenberg,* 126 *N.J.* 168, 192 (1991) (citing *State* v. *Reldan,* 100 *N.J.* 187, 203 (1985)). Thus, if the doctrine applies, it prohibits "a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling." *Hart v. City of Jersey City,* 308 *N.J. Super.* 487, 497, (App.Div.1998).

Again at trial, armed with the protection provided to him via the trial Court's complete oversight or complete disregard of the Paolone Orders, the trial court virtually allowed the Defendant Santoro to "sit back" and simply deny knowledge of any documents prepared for him and relied upon him in a substantial Hurricane Sandy insurance claim made by him, knowledge of his insurer's rejection of this claim, and to deny knowledge of his litigation of this claim. At the risk of being bold and, with all due respect, the trial Court "missed"

on this issue and allowed the Defendant Santoro to perpetrate a substantial fraud on the Plaintiff and the jury.

B.THE COURT IMPROPERLY STRUCK PORTIONS OF TESTIMONY IN VIOLATION OF NEW JEREY RULES OF EVIDENCE 804(a)(4) (T1 p. 99 L.l-9)

In Twp. of Bloomfield, Body Corporate v, Bloomfield Daval Corp., 2018 W.L. 1720931 (App. Div. 2018) the trial judge overturned a prior ruling allowing the Township's expert to testify, finding his testimony too speculative and not in compliance with the net opinion rule (13-14). The property in question was a historic train station, unused for twenty years, and located within a designated redevelopment area (3). The appellate court found that the expert's testimony was not speculative, as it directly rebutted the financial feasibility of the defendant's proposed mixed-use project (16-18). The Appellate Division concluded that the trial judge's exclusion of the rebuttal testimony was an error that had the capacity to produce an unjust result, thus warranting a new trial (18-19).

In Bahrle v. Exxon Corp., 652 A. 2d 178, 279 N.J. Super. 5 (App. Div. 1995) the trial judge erroneously allowed a defendant to present evidence of post-1975 discharges, despite a prior adjudicated finding that such discharges were not a causative factor (22-24). The plaintiffs alleged that gasoline from a service station contaminated their wells (15-16). The Appellate Division

concluded that the trial judge's error in allowing the defendant to present evidence of post-1975 discharges was not harmless, warranting a reversal and remand for a new trial (24). The law-of-the-case doctrine holds that an unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit (21).

Facts

The Township of Bloomfield appealed a final judgment awarding Bloomfield Daval Corporation $2,900,000 as just compensation for its property, arguing that the trial judge erred by denying its motion to preclude defendant's experts from testifying about a proposed mixed-use project and by granting defendant's motion to preclude the Township's expert from testifying as a rebuttal witness (2-3). The property in question was a historic train station, unused for twenty years, and located within a designated redevelopment area (3). The Township had previously terminated a redevelopment agreement with the defendant and initiated an eminent domain action (4). The trial was a contest of expert opinions on the fair market value of the property, with the Township's expert valuing it at $450,000 and the defendant's expert at $3,207,000 (6-7).

Issue

The legal issue is whether the trial judge's decision to preclude the Township's expert rebuttal testimony constituted an abuse of discretion, warranting a new trial (9).

Legal Principles

The admission or exclusion of expert testimony is within the trial court's discretion, and the abuse of discretion standard applies to such decisions (9). N.J.R.E. 702 and 703 govern the admissibility of expert testimony, requiring that opinions be grounded in facts or data (10). The net opinion rule prohibits speculative testimony and requires experts to provide the factual basis for their conclusions (10-11). A trial court's decision to conduct an N.J.R.E. 104 hearing is discretionary, but advisable when the ruling on admissibility may be dispositive of the merits (11-12).

In Twp of Bloomfield, Body Corporate v. Bloomfield Daval Corp.,, 2018 W.L. 1720931 (App. Div. 2018) the trial judge's exclusion of testimony was deemed a mistaken exercise of discretion, as it prevented the Township from effectively challenging the defendant's valuation (18-19). The appellate court concluded that the trial judge's exclusion of rebuttal testimony was an error that had the capacity to produce an unjust result, thus warranting a new trial. Docket No. A-5248-15T4 (N.J. Super. App. Div. 2018).

In Bahrle v. Exxon Corp., the plaintiffs, residents of the Barnegat Pines Development area, alleged that gasoline from Rule's service station, which operated as a Texaco station between 1959 and 1975, contaminated their wells. The plaintiffs advanced negligence and strict liability theories against Rule and claimed Texaco was liable for owning the underground tanks and vicariously liable for Rule's conduct. The trial judge allowed Texaco to present evidence that post-1975 discharges from the Exxon/Ritchie gas station contaminated the wells, despite a summary judgment dismissing Exxon/Ritchie from the suit (15-16).

The legal issue in Bahrle v. Exxon Corp., 652 A.2d 178, 279 N.J. Super. 5 (N.J. Super. App. Div. 1995) was whether the trial judge's decision to allow Texaco to present evidence ofpost-1975 discharges, contrary to a prior summary judgment, constitutes grounds for a new trial (20-21). The law-of-the-case doctrine holds that an unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit (21). Judicial estoppel precludes a party from assuming a position in a legal proceeding that is totally inconsistent with one previously asserted in the same or another proceeding (22).

In Bahrle v. Exxon Corp., the trial judge erroneously allowed Texaco to present evidence that post-1975 discharges from the Exxon/Ritchie station

contaminated the wells, despite a prior adjudicated finding that such discharges were not a causative factor. This allowed Texaco to argue an 'empty chair' defense, pointing to Exxon/Ritchie as the source of contamination, which was prejudicial to the plaintiffs' case against Rule (22-24). The appellate court concluded that the trial judge's error in allowing Texaco to present evidence of post-1975 discharges was not harmless as to Rule, warranting a reversal and remand for a new trial concerning Rule's liability (24). 652 A.2d 178, 279 N.J. Super. 5 (N.J. Super. App. Div. 1995). In our case, it was not harmless error for Defendant Santoro to deny having read anything, talked to his lawyers about anything and had no idea what the water damage.

C. THE COURT GAVE IMPROPER ISTRUCTIONS TO THE JURY (Pa379-382)

It is well settled that erroneous jury instructions are presumed to be reversible error and constitute reversible error if they might have affected the trial's outcome. Accurate and understandable jury instructions are essential for a fair trial. The trial court must instruct the jury on the law governing the facts of the case, providing a comprehensible explanation of the questions the jury must determine, including the law applicable to the facts. A charge must guide the jury by explaining the controlling legal principles and the questions the jury is to decide.

In Das v. Thani, 795 A.2d 976, 171 N.J. 518 (N.J. 2002), the trial court submitted the case to the jury with a medical judgment charge, and the jury found in favor of the defendant. The Appellate Division affirmed the decision, but the Supreme Court of New Jersey reversed, finding that the trial court failed to properly instruct the jury on the medical judgment defense (795 A.2d 878-884). The court emphasized that clear and correct jury charges are essential to a fair trial, and failure to provide them may constitute plain error. A charge must guide the jury by explaining the controlling legal principles and the questions the jury is to decide. Erroneous instructions are presumed to be reversible error (795 A.2d 882).

In Washington v. Perez, 98 A.3d 1140, 219 N.J. 338 (N.J. 2014), the court concluded that the trial court's error in giving the adverse inference charge was not harmless but reversible, warranting a new trial (98 A.3d 1157). The Appellate Division's judgment was affirmed, and the case was remanded for a new trial (98 A.3d 1157). Ultimately, in our case, there was trickery from start (relitigating the in limine motions) to finish (closing and jury instructions); therefore, if the matter is not reversed and remanded for a new trial this will send a terrible message to trial judges and unscrupulous counsel.

D.THE DEFENDANT'S COUNSEL WAS PERMITTED TO ARGUE IMPROPER LEGAL CONCLUSIONS TO THE JURY DURING CLOSING (T6 p. 9-18)

During closing arguments the Defense counsel was permitted to argue that somehow the Plaintiff breached a duty to the Defendant in the transfer of the subject property. (T5, p.170 L.19-25; p.177 L.17-15, p.200 L.11-15, p.201 L.12-17). In the sole remaining breach of contract claim before the jury, (after the Plaintiff's claims for fraud were improperly dismissed) Defendant's counsel, after obliterating his duty of candor and apparently feeling emboldened from the trial court's sustaining his improper "hearsay objections over Judge Paolone's order", decided it was a "good idea" to improperly instruct the jury during closing.

During closing, as referenced above, Defendants counsel argued that Plaintiff breached her duties and obligations under the contract by not "following up" on Plaintiff's property inspector's suggestions.

Plaintiff's only obligation under the contract was to secure financing to pay for the subject property. That is it, as a matter of law. The Defendant had a duty to disclose latent defects and his knowledge of the defects was glaring in the items the trial court prohibited. Consequently, not only did the trial Court permit the Defendant to perpetrate a fraud on the Plaintiff and Jury, the trial court subsequently and improperly allowed the Defense counsel to "fabricate a

contrived obligation of a buyer under a real estate contract" and thereafter instructed the jury that the Plaintiff violated or breached her duties under this improperly contrived duty or obligation.

The Defendant's attorney presented this "contrived" legal duty/obligation to the jury on **five** occasions during his closing. Not unlike ignoring Judge Paolone's orders, Defense counsel's improper actions were not a mistake.

By way of example, the Defense counsel argued to the jury:

1. Not getting a masonry inspector, isn't that a breach of contract. She had a right to an inspection but **didn't** have the **right** to ignore what he said. **That's not complying with all her obligations under the contract.** (T6-10-24, pl70 L19-25)

2. Did the Plaintiff do everything she was required to do under the contract, if the answer is no, the case is over (T6-10-24 p. 177 L 7-15).

3. Has the Plaintiff Rosemary Brody proved by a ponderance of the evidence that she performed substantially all of her obligations under the contract of August 23, 2016? That's the purchase agreement. And you check yes or no. There we think you should check no because that contract says its being sold as is. No representations were making it. You have the right to all the inspections you want. You have the right to all the time periods set forth in the contract. **You did your inspections and then you ignore all of the advice in the inspections.**

And we don't believe that's carrying forward with all of her duties and obligations. And we think that's were it ends. If you check no on that, you, that's it. (T 6-10-24 p 201 L. 12-17).

It is axiomatic that the Plaintiff's duty under the real estate contract was to obtain the proper financing and tender a payment at closing. She has a **right** to an inspection and a **right** to interpret the inspection any way she justified. A right and a duty/obligation are two dramatically different things. Plaintiff had a duty/obligation to make payment and a right to an inspection. That is the law. For instance, and by way of example, the second amendment gives one the right to purchase arms but this does not equate to an obligation or a duty to purchase a revolver.

The law is the Defendant had a duty/obligation to reveal the long term water penetration issue which he obviously concealed. At the time of trial Santoro was permitted to testify he never saw the items he relied upon and appealed in an insurance claim based on the trial courts disregard of previous decisions.

The Defendant herein "created" an obligation/duty for the Plaintiff. Who was the duty /obligation owed to, the Defendant? The answer is rhetorical. None the less, the Defense Counsel was permitted to further perpetrate fraud on this jury by giving them a "fabricated" legal theory and then instructed the jury this

"fabricated obligation" was breached. This was done not once but five times by Defense Counsel during closing.

After one day of deliberations the jury came back with five questions. Three of the questions were as follows:

1. If we find **both** parties breached the contract do we need to proceed? (Pa382).

2. If the Plaintiff is in breach of the contract by not following up on inspection recommendations? (Pa384)

3. If we find both the Plaintiff and Defendant at fault can we award the Plaintiff 50% of the money? (Pa384)

In the matter before the trial Court there was no issue of Plaintiff's breach. The Plaintiff fulfilled her obligation under the contract, i.e., she paid the Defendant the amount on the contract. Allowing the Defendant to improperly create and instruct the jury on this fabricated obligation /duty was beyond prejudicial.

In Jackowitz v. Lang, 408 N.J. Super. 495, 504-05, 975 A.2d 531, 537 (App. Div. 2009) the Appellate Division wrote:

"In addressing the issue here, we consider the limits of advocacy as the trial and jury system achieves resolution of disputes. Counsel's arguments are expected to be passionate, "for indeed it is the duty of a trial attorney to advocate." *Geier,*

supra, 358 *N.J Super,* at 463, 818 A2d 402. At the same time, however, arguments should be fair and courteous, grounded in the evidence and free from any "potential to cause injustice," *ibid.,* such as "(ujnfair and prejudicial appeals to emotion," *id.* at 468, 818 *A.*2d 402, and "insinuations of bad faith on the part of defendants who sought to resolve by trial validly contested claims against them." *Id.* at 469, 818 *A.*2d 402 (citing *Henker, supra,* 216 *N.J. Super,* at 518, 524 A.2d 455); *AccordRodd v. Raritan Radiologic Assocs., P.A.,* 373 *N.J. Super.* 154, 171-72, 860 A 2d 1003 (App.Div.2004).

In Szczecina v. PV Holding Corp., 414 N.J. Super. 173, 184, 185, 997 A.2d 1079, 1086 (App. Div. 2010) the Court concluded:

"Despite the failure to object, we cannot simply overlook the conduct of plaintiffs counsel, who unwarrantedly and inappropriately accused the entire defense of spinning the evidence. The conduct was "clearly capable of producing an unjust result." Under the circumstances of this case, we conclude that the trial judge had an affirmative duty to intervene on his own initiative. It is the responsibility of the judge to ensure that a fair trial is received by the parties, notwithstanding that counsel fails to object. *Hitchman v. Nagy,* 382 *N.J. Super.* 433,453, 889^4.2d 1066 (App.Div.), *certif. denied, lMN.J.*.600, 897zL2d 1056 (2006). As we said in *Hitchman,* "[o]ur courts have long rejected the arbitrary and artificial methods of the pure adversary system of litigation which regards

the lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed." *Id.* at 451, 889 A2d 1066 (internal quotations omitted). We should not be understood to imply that a trial judge should interfere generally with trial tactics employed by counsel when there is no objection. We appreciate the importance of letting the attorneys "try their own cases." However, when counsel engages in patently inappropriate conduct, such as derisive statements and other invectives aimed at opposing parties, counsel or witnesses, or when there is an inappropriate request to "send a message," the trial judge should act before the situation reaches the point at which an unjust result is likely or even possible. Attorneys who engage in this type of conduct risk losing a favorable jury verdict, even if there is no objection.

Defense counsel's improper conduct and the results forthcoming therefrom were evident by the questions presented by the jury. The injustice stemming from Defense counsel's conduct does not need a lot of deliberation and the effect on the outcome of this case is obvious.

The inability for the Plaintiff's to present their case on the common law fraud claim based upon the trial courts disregard of the motion in limine is obvious. However, the Defendant's closing arguments quoting the non-definable

and nonexistent law and the conclusions therefrom to the jury is worthy of contempt sanctions.

Significant time and money were expended on trying this matter. Time spent by the parties and time and resources spent by the Court. The Defendant, faced with tacit admissions and no hearsay documents, decided to reject prior Court's rulings in violation of the law of the case doctrine and recited contrived duties to the jury in violation of NJ RPC 3.3.

The Plaintiff knows they will have to "chase down" the Defendant in Florida for his devious actions. However, the process starts with a proper determination of Defendant's nefarious actions and comforting him with the documents prepared on his behalf in his previous insurance litigation. It also starts with Defense cancel not contriving new legal obligations and instructing the jury on such.

E.THE DEFENDANT'S COUNSEL VIOLATED RPC 3.3 IN HIS OBJECTIONS TO THE INTRODUCTION OF DOCUMENTS AND IMPROPER INSTRUCTIONS TO THE JURY (T6, p. 9-18)

Plaintiff specifically refers to RPC 3.3. The Defendant had a duty of candor to abide by the "law of the case" doctrine. The Defendant knew of Judge Paolone's ruling because, it was in response to his own Motion. Defense counsel did not appeal or file a Motion for Reconsideration of these decisions. The Plaintiff proceeded to prepare for trial based upon Judge Paolone's ruling.

The Plaintiff proceeded in accordance with the Court's Orders prior to trial but, the Defendant waited until after the jury was selected to even exchange trial exhibits. The Court requested that both sides exchange exhibits before the jury was selected so as not to waste the jury's time during trial arguing over potential evidentiary matters. It is now readily apparent that the Defendant intentionally disobeyed the Court's request because he knew he was going to improperly object to evidence as hearsay regardless of Judge Paolone's Decision as if it never occurred.

The Defendant's tactics violated RPC 3.3 in a very meaningful manner. Almost as offensive as the Defendant's unethical trial tactics was Defendant's opposition to Plaintiffs' Crossmotion after the trial. In the opposition the Defendant Santoro explained that he believed Judge Paolone's ruling only applied to pretrial matters. This may be the most preposterous explanation ever presented. A "motion in limine is '[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial.'" (quoting Jeter v. Sam's Club, 250 N.J. 240, 250, 271 A.3d 317 (2022)) Conforti v. Cnty. of Ocean, 255 N.J. 142, 170, reconsideration denied sub nom. Conforti v. Ocean Cnty. Bd. of Chosen Freeholders, 255 N.J. 280, 300 A.3d 268 (2023).

In addition to ignoring the law of the case doctrine, Defense counsel intentionally misled the jury by "creating" a duty and then instructed the jury on

the breach of this fictious duty. Defense counsel's tactics were diametrically opposed to his duty of candor.

Appellate courts 'will not disturb a trial [judge's] ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice.'" State v. Smith, 224 N.J. 36, 47 (App Div 2020) (quoting State v, Jackson, 211 N.J. 394, 407). Unfortunately, based upon Defense counsel's rogue tactics and continuous and focused violations of ethical duties this court is left with no appropriate alternatives other than to issue sanctions, require that Defendant pay for the cost of trial and, declaring a mistrial.

The Plaintiff had to "stand back" as the Defense counsel objected to 85% of the evidence that was to be presented based upon Judge Paolone's ruling and thereafter have two of Plaintiff's claims dismissed based upon the lack of evidence. In this matter, the jury became completely disengaged because of Defense counsel's unethical behavior and continuous disruptions. The Plaintiff cannot think of a greater injustice particularly when the cornerstone of this miscarriage was the Defense counsel's knowing and blatant breach of his ethical responsibilities.

F. THE PLAINTIFFS SHOULD NOT HAVE BEEN BARRED FROM REQUESTING A NEGATIVE INFERENCE INSTRUCTION TO THE JURY (T6 p. 8 L.7-15)

In our case, the Court not permitting the plaintiff request for an adverse inference charge to the jury was the equivalent of the trial court giving an improper jury instruction and, therefore, constitutes grounds for a new trial Washington v. Perez, 98 A.3d 1140, 1144, 219 N.J. 338 (N.J. 2014). The court noted that erroneous jury instructions constitute reversible error if they might have affected the trial's outcome (98 A.3d 1147). The adverse inference rule allows a factfinder to infer that a missing witness's evidence would be unfavorable to the party's case, but this requires a case-specific analysis (98 A.3d 1148).

CONCLUSION

For the reasons as set forth herein the Plaintiff respectfully requests that this Court remand this matter for a new trial and issue sanctions against the Defendant and/or his attorney.

LAW OFFICE OF
DANIEL J. GALLAGHER, ESQUIRE

DATE 1-22-25

Daniel J. Gallagher, Esquire

ROSEMARY BRODY, **Plaintiff - Appellant,** **v.** **NICHOLAS SANTORO, CEI CONTRACTORS, SOLEIL SOTHEBY'S INTERNATIONAL REALTY, TROY ROSENZWEIG, RE/MAX PLATINUM PROPERTIES, LINDA NOVELLI, FUNK INSPECTION SERVICE, AND BRUCE FUNK,** **Defendants - Respondents.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-000209-24** **Civil Action** **ON APPEAL FROM JUNE 10, 2024 ORDER DISMISSING PLAINTIFFS COUNSTS AND JULY 2, 2024 ORDER DISMISSING PLAINTIFF'S COMPLAINT** **SUPERIOR COURT LAW DIVISION – CIVIL ATLANTIC COUNTY** **Sat Below: Hon. Danielle Walcoff, J.S.C.**

BRIEF IN OPPOSITION TO APPEAL

FROM DEFENDANT, NICHOLAS SANTORO

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December 1, 2023 Order - Motion in Limine to Preclude Plaintiff from Introducing Damages at Trial	Da7

I. PRELIMINARY STATEMENT

This matter relates to the purchase and sale of certain residential property located in Ventnor City, New Jersey. Defendant sold the property to Plaintiff subject to a written contract, which provided Plaintiff was not relying on any representations from the Seller and that she was entitled to have the property inspected. Plaintiff sought damages for the costs she allegedly incurred in making repairs to the property for damages she asserts came from long term water intrusion. That long-term damage was caused by a construction defect by the original contractor in the installation of the stucco/EIFS with inadequate flashing and a lack of drainage features which "caused moisture to become entrapped within/behind the system, resulting in repetitive, long-term moisture exposure cycle to the substrate materials that had occurred over the life of the exterior wall cladding system". (Pa685-715)

At the time Plaintiff purchased the property she was an experienced real estate. She was aware of her rights to have inspections and understood why they were important, acknowledging that she always recommended such inspections to her clients. She had experience with additional specialized professionals who may be needed to further examine a potential issue identified by home inspection reports. She had also previously terminated another residential real estate contract based upon the results of the home inspection. Plaintiff had an

inspection of the property performed and understood the report provided to her, including "Major Defects" and the concerns raised by the inspector about stucco and the potential for water intrusion and long-term damage. Plaintiff knowingly chose not to have this further inspected.

Less than two years after moving into the property, Plaintiff had filed three separate insurance claims for damage. When making repairs after the third claim, evidence was uncovered that the water was leaking through the stucco. The Rimkus Report found that the original contractor improperly installed the stucco resulting in the water infiltration over the life of the exterior wall cladding system. Significant repairs ensued. Plaintiff claims Defendant knew.

Defendant testified that when he sold Plaintiff the property he left her a box of documents with brochures, manuals, contractor lists and other documents related to home ownership on the kitchen counter. Separate, and apart from that box, Plaintiff's daughter subsequently found other documents, including photos, cards, financial statements and documents related to an insurance claim made by Defendant following Hurricane Sandy. These other documents were found in cabinets in a second-floor room, separate and apart from the box left by Defendant. Plaintiff and her family then placed the items in a box, a second box not to be confused with the first box Defendant intentionally left in the kitchen. Plaintiff claims those separate documents found by her daughter prove

Defendant knew about potential long term water damage. Defendant did not testify that he left the documents and further testified that he does not recall having or reviewing the documents. Rather than address the admissibility issue facing the documents head on, Plaintiff and her counsel made and continue to make efforts to confound the facts to place the documents within those purposefully left by Defendant thereby conferring knowledge where such knowledge does not otherwise exist.

Plaintiff's version of the facts was accepted by the Court, as it was required to be, in pretrial motions denying requests to preclude Hurricane Sandy related documents. This trial had substantial testimony and evidence concerning the Hurricane Sandy damage to the property, the steps taken to identify, and repair same, including insurance claims and related litigation. The testimony deduced at trial, however, left Plaintiff without a means to introduce certain documents, which she otherwise failed to have properly authenticated. It did not, however, leave her without means to address the damages, the claims, the repairs, and Defendant's credibility concerning same. Plaintiff was given a fair opportunity to present her case in accordance with the Rules. Plaintiff was not the victim of an unfair Court, improper evidentiary rulings, or improper jury charges. Plaintiff may be dissatisfied with the outcome, but there is nothing in the record or legal precedent to support her appeal.

II. PROCEDURAL HISTORY[1]

1. Admitted that the Plaintiff filed her initial Complaint as indicated.

2. Admitted that an Amended Complaint was filed as indicated. By way of further response, the Amended Complaint was filed because the Court entered an Order dated July 24, 2019 dismissing Count 1 with prejudice and dismissing all remaining Counts without prejudice. Plaintiff was granted leave to file an Amended Complaint within twenty (20) days. (Da1-2)

3. Admitted.[2]

4.-7. Admitted.

8. It is admitted that the Motion was withdrawn, it is denied that the documents referenced relate to the withdrawal.

9. Admitted that the Stipulation was filed but deny the referenced document is the Stipulation. (Pa159 (not Pa158))

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[1] Defendant will respond to the Procedural History presented by Plaintiff's Brief in numbered paragraphs, adding information where relevant.

[2] Certain pages referenced (Pa30-67) appear to be in violation of Rule 2:6-1(a)(2). To the extent this is accurate, we request the Court disregard the assumed inadvertently attached pages; specifically attached are the Notice of Motion (Pa30-31), the proposed Order (Pa32-33), the Certification of Counsel with Exhibits (Pa34-52), the Brief (Pa53-65), and the Certification of Service (Pa66-67).

10. Admitted.[3]

11. Admitted.[4] By way of further response, there were several motions filed by the parties on June 24, 2022, including Defendant's Motion for Summary Judgment. (Da3-4) The Order subsequently entered on July 25, 2022, included a ruling that Counts 2, 5, 6 and 7 and the Amended Complaint were dismissed with prejudice as to Defendant. (Pa215)

12. Admitted upon information and belief.

13. Denied. There were three (3) Orders dated July 25, 2025, entered on the Court's electronic docket on July 27, 2025. The three Orders were identical and entered three times in response to three separate Motions: the Plaintiff's Motion for Partial Summary Judgment addressed at ¶1 of the Order; the Motion for Summary Judgment filed by Defendants Beach to Bay, LLC d/b/a

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[3] Plaintiff's Procedural History at ¶10 references Pa160-181, which is the Summary Judgment Motion indicated, but inadvertently appears not to reference the Order denying the Motion, which is at Pa215. Additionally, referenced pages (Pa160-181) appear to be in violation of Rule 2:6-1(a)(1)(I) and (2). To the extent this is accurate, we request the Court disregard the assumed inadvertently attached pages; specifically attached are the Motion for Summary Judgment (Pa160-161), the proposed Order (Pa162), the Statement of Material Facts (Pa163-169), and the Brief (Pa170-181).

[4] Certain referenced pages (Pa182-204) appear to be in violation of Rule 2:6-1(a)(2). To the extent this is accurate, we request the Court disregard the assumed inadvertently attached pages; specifically attached are the Notice of Motion (Pa182-183, the proposed Order (Pa184-185), the Certification of Counsel (Pa186-187), Brief (Pa188-193), Proof of Service (Pa194-195), and Exhibit A (to the Certification of Counsel) (Pa196-204).

Re/Max Platinum Properties i/p/a Re/Max Platinum Properties and Linda Novelli addressed at ¶3 of the Order; and the Motion for Summary Judgment filed by Defendant Santoro addressed at ¶2 granting the Summary Judgment Motion and dismissing with prejudice Counts 2, 5, 6 and 7 of Plaintiff's Amended Complaint. (Pa160-181: Plaintiff's Motion for Summary Judgment, Da3-4: Defendant Santoro's Motion for Summary Judgment, and Pa215: the collective Order)

14. Admitted that the Motions were filed.[5]

15. Denied as stated; admitted that the Court's Order granted the Motion to Bar Expert Testimony of Paul Friedman.

16. Denied as stated. It is admitted that a total of seven (7) Motions in Limine were filed by Defendant Santoro in February 2023 as follows: (i) to Preclude Plaintiff from Introducing Damages at Trial filed February 14, 2023 (Pa275-276), and denied by Order dated December 1, 2023 (Da7); (ii) to Preclude Plaintiff from Eliciting Testimony or Introducing Evidence Related to Alleged Damage to her Home Beyond the Limited Portion of her Home Defined

[5] Again, certain referenced pages (Pa216-255) appear to be in violation of Rule 2:6-1(a)(2). To the extent this is accurate, we request the Court disregard the assumed inadvertently attached pages; specifically attached are the Plaintiff's Notice of Motion (Pa216-217) and proposed Order (Pa218), as well as the Third-Party Defendant's Notice of Motion (Pa219-220), the Brief submitted in support of that Motion (Pa221-252), related Proof of Service (Pa253) and proposed Order (Pa254-55).

in the Expert Report of Peter Tantala ("Observed Portion") filed on February 14, 2023 (Pa283-284), and denied by Order dated June 12, 2023 (Pa311-316); (iii) to Preclude Expert from Testifying Concerning Referenced Hearsay Reports and Alleged Prior Repair to Subfloor filed February 16, 2023 (Pa285-286), and granted in part by Order dated June 12, 2023 (Pa317-325); (iv) to Preclude Hearsay Damage Documents filed February 16, 2023 (Da5-6), and denied by Order dated June 12, 2023 (Pa287-292); (v) to Preclude Plaintiff from Asserting Common Law Fraud Based upon Representations Made in Seller's Disclosure Form filed on February 20, 2023 (Pa281-282), and granted by Order dated June 12, 2023 (Pa306-310); (vi) to Preclude Testimony of William Sasso filed on February 20, 2023 (Pa277-278), and denied by Order dated June 12, 2023 (Pa301-305); and (vii) to Preclude Testimony or Introduction of Documents Relating to Hurricane Sandy or Hurricane Sandy Insurance Claim filed on February 20, 2023 (Pa279-280), and denied by Order dated June 12, 2023 (Pa293-300). In short, the Court granted the Motion to preclude Plaintiff's expert from testifying about the SEA or Rimkus Reports (but denied the request in the same Motion to preclude Plaintiff's expert from testifying about the alleged prior repairs) (Pa317-325), and further granted the Motion to preclude Plaintiff from asserting common law fraud based upon representations in the Seller's Disclosure Form (Pa306-310).

17. Denied as set forth in paragraph 16 above. By way of further response, the Plaintiff was barred from using the Seller's Disclosure Form as a basis to prove her common law fraud claim. (Pa306-310). The Court left open, however, whether the Form would be admissible for another limited purpose at trail. (Pa306-310) The Court further ordered that Plaintiff's expert was precluded from testifying as to the SEA and Rimkus reports. (Pa317-325) In its Order denying the Motion in Limine to Preclude Hearsay Damage Documents (Da7), the Court found it "must defer until trial to determine what the evidence is being offered for, if an proper foundation has been laid, and whether the evidence is permitted by the Rules of Evidence, including the determination as to whether any exception to or exemption from the rule against hearsay applies." (Pa291). Accordingly, the Court denied the Motion and permitted the Plaintiff the right to amend interrogatories (despite discovery having been long closed) to name general contractors who performed the repair work on the subject property and permitted Defendant to then depose those contractors identified based upon an abbreviated discovery period that would be set at a subsequent conference. (Pa287-292).

18. Denied as stated. It is admitted that Defendant filed a Motion for Summary Judgment on February 2, 2024. (Pa326-327). The thorough Order on the Motion specifically identified the damages by contractor that the Plaintiff

was and was not permitted to submit to a jury. (Pa328-351) The Order further reopened discovery for thirty (30) days to allow Defendant Santoro the opportunity to obtain a damages expert. (Pa328-351)

19. Admitted that the Motion in Limine was filed by Plaintiff. (Pa352-354). The May 30, 2024 Order granted in part and denied in part, the motion. (Pa369) Specifically, the Order identified those damages Defendant Santoro's expert would be permitted to testify to, those he was not permitted to testify to, and those that would be determined at trial. (Pa369)

20. Denied as stated. It is admitted that the parties exchanged Pre-Trial Memos. The document attached and referenced in the Appendix, Pa355-358, however, is Plaintiff's Amended Pretrial Memo, not the original and the document fails to include the Pretrial Memo from Defendant Santoro.

21. There is no corollary paragraph in Plaintiff's Procedural History.

22. Denied. The exhibits identified in Plaintiff's Pre-Trial and Amended Pre-Trial Memo are general descriptions of documents and the documents themselves were not provided until they were introduced during trial. (T3:36:24-38:16) Moreover, and more importantly, although the documents were not precluded by the Motions in Limine heard by the Court, Plaintiff's contention that those documents were somehow expressly deemed admissible by any Judge or any prior Order is inaccurate. (Pa287-325 and Da7).

23. See ¶19 above.

24. Denied. There were multiple Motions in Limine filed throughout this litigation and not all Motions in Limine were heard or decided by the trial judge; however, the trial Judge made clear in her communication and her rulings both before, during and after trial that she read and understood the Motions, Orders and Decisions, as well as the application of the Court Rules and relevant case law, including the truncated references cited to in this paragraph by Plaintiff. Further reference is made to T3:9:1-17:15, T35:1-44:12, and T61:23-72:23. More importantly, the assertions in this paragraph and elsewhere in this appeal illustrate a misunderstanding that a denial to preclude evidence in advance of trial does not mean that evidence is automatically admissible at trial.

25. Denied as stated. Reference is made to ¶24 above. It is admitted that Defendant Santoro moved to enter judgment under Rule 4:40-1 and that Motion was granted as to the claims for common law fraud and fraud in the inducement, leaving only the breach of contract claim. (Pa370 and T5:124:16-165:9) The Motion for Reconsideration raised by Plaintiff the following day was denied.[6] (June 11, 2024 Transcript at 5:17-18:2)

[6] Certain referenced pages (Pa359-368) appear to be in violation of Rule 2:6-1(a)(2). To the extent this is accurate, we request the Court disregard the assumed inadvertently attached pages; specifically attached are the Plaintiff's Notice of Motion (Pa359-360), Certification of Counsel (PA361-362), Brief (Pa363-367), and Certification of Service (Pa368).

26. Denied as stated. Reference is made to ¶25 above.

27. Denied. The self-serving summary that lacks any citation to the record for support should be disregarded by the Court. Reference is further made to ¶¶ 19, 22, 24, and 25, as well as T1:46:18-105:15 and T2:8:2-226:1).

28. Denied. Despite Plaintiff's contention that certain admissibility rulings were contrary to the Motion in Limine rulings entered by Judge Palone before trial, those denials to preclude testimony or evidence do not mean that same are automatically admitted at the time of trial and, similarly, because evidence is precluded on one issue does not mean it cannot be asserted for another. In fact, Orders specifically made reference to same. (Pa306-316 and Da7) Rather, the trial judge can determine whether the information, testimony and/or evidence is admissible based upon the Rules of Evidence as applied. That is exactly what occurred here. The trial Judge's decision on admissibility in no way contravened prior Orders and at all times properly evaluated the evidence sought to be introduced with the proofs presented and the Rules of Evidence. Further reference is made to ¶ 24 above, including the citations and references therein.

29. Denied. Reference is made to ¶¶ 16, 17, 19, 22, 24, and 28 above, June 11, 2024 Trial Transcript 148:1-156:4, and T6:8:1-20:19)

30. Denied there was any improper instruction concerning adverse inference. Further reference is made to June 11, 2024 Trial Transcript 34:25-36:19, 71:15-72:18, 87:1-106:20)

31. Denied that the closing argument was improper or that there is a specific correlation to that aspect of a closing argument and a subsequent jury question, which could have come from testimony and/or evidence admitted or potentially deemed missing by the jury. More importantly, there was no objection to the closing argument. (June 11, 2024 Trial Transcript 163:8-204:4 and T6:9:18-19)

32. Admitted that the jury found Plaintiff failed to prove by a preponderance of the evidence that Defendant Santoro failed to perform substantially all of his obligations under the contract of August 23, 2016. (T6:24:1-28:2 and Pa386)

33. Denied as stated. Admitted that there was post-trial motion practice by the parties, which Motions are not subject to this Appeal.

34. Admitted that the post-trial Motions were denied. (Pa387-388)

III. RESPONSE TO STATEMENT OF MATERIAL FACTS AND COUNTER STATEMENT OF MATERIAL FACTS

1. Denied. The assertion is not supported by the citation in violation of Rule 2:6-2(a)(5) and should be disregarded.

2. Denied. The assertion lacks any citation in violation of Rule 2:6-2(a)(5) and should be disregarded.

3. Denied. The assertion lacks any citation in violation of Rule 2:6-2(a)(5) and should be disregarded.

4. Denied as stated. The assertion is not supported by the citation in violation of Rule 2:6-2(a)(5) and should be disregarded.

5. Denied as stated. The assertion is not supported by the citation in violation of Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, Defendant testified about prior damage, the insurance claims, a subsequent litigation, and the repairs that were made throughout his testimony at trial. (T1:48:10-99:1 and T2:-8:10-225:23) Defendant made clear that he retained an insurance adjuster and entrusted that person with the job of making the necessary repairs. (*Id.* and T2:16:4-19:11)

6. The response to ¶5 above is incorporated here.

7. The response to ¶ 5 above is incorporated here.

8. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, Plaintiff asserts that each of the documents referenced in the subparagraphs were "discovered in *the* box left behind by Santoro." (Pb13-15) (Emphasis added.) As established at trial, there

were in fact two (2) boxes. The first was intentionally left by Defendant on the kitchen counter with various manuals, warranties, brochures, contractor lists, and similar homeowner paperwork. T1:82:19-83:16, T3:227:21-2:30-12 The second box of documents was found by Plaintiff's daughter (not called as a witness) in Defendant's old office when she moved into the property approximately six months after Plaintiff. T3:231:3-234:13, In fact, these documents were found loose in cabinets; they were placed into a box by Plaintiff and her family before being stored in a closet. *Id.* The second box contained each of the documents referenced by Plaintiff. (*Id.* and Pb13-15)

9. The response to ¶ 8 above is incorporated here.

10. The response to ¶8 above is incorporated here. Further reference is made to Pa317-325.

11. The response to ¶8 above is incorporated here.

12. The response to ¶8 above is incorporated here.

13. The response to ¶8 above is incorporated here.

14. The response to ¶8 above is incorporated here.

15. The response to ¶8 above is incorporated here.

16. The response to ¶8 above is incorporated here.

17. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded.

18. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded.

19. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, the Seller's Disclosure Statement was the subject of Defendant's Motion in Limine to preclude Plaintiff from asserting common law fraud based upon representations in the Seller's Disclosure Form. (Pa306-310).

20. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, the responses to ¶¶8-19 above are incorporated here.

21. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded.

22. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded.

23. Denied as stated. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, Plaintiff became a licensed real estate agent in 2004 and remained one as through the purchase of the

property, but for an approximate four (4) year period where her license was placed in escrow. T3:158:3-159:16 During her tenure she represented individual residential buyers, such as herself and always recommended those buyers engage a home inspector. T3:159:17-160:19 and 163:20-166:15. She further reviewed the home inspection report with them and recommended they engage such other specialized investigation as was recommended or suggested. T3:183:3-185:3. Plaintiff previously terminated another residential contract due to concerns with the home inspection report. T3:185:4-189:13. Plaintiff admitted she retained a home inspector and received a report for this property. T3:220:3-222:14 the report identified "Major Defects" and areas for suggested specialized investigation, including including water intrusion; she did not engage any additional inspections or professionals to further inspect the potential issue(s) identified in the report she reviewed. (*Id.* and T5:81:11-115:7)

24. The response to paragraph 23 above is incorporated here.

25. Admitted. By way of further response, Plaintiff reviewed the parties' contract, understood the parties' contract, including that she was not relying on any representations from Defendant, and she had a right to both an inspection and an attorney review. T3:200:1-220:2

26. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded. Defendant otherwise agrees.

27. Denied. The assertions and citations in this paragraph are not in compliance with Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, Defendant agrees with the first sentence regarding what the Rimkis report revealed. Defendant denies that the 2013 report referenced in the second sentence was in Defendant's possession.(T2:14:17-112:21)

28. Admitted that the report was obtained.

29. Denied. There are no citations in this paragraph in compliance with Rule 2:6-2(a)(5) and should be stricken. The entirety of this paragraph is an argument unsupported by the record.

30. Denied. The response to ¶8 in incorporated here.

31. Denied. There are no citations in this paragraph in compliance with Rule 2:6-2(a)(5) and should be disregarded. Without waiving the foregoing, by way of further response, Defendant's trial testimony does not support any of these contentions. Defendant references his responses to the above paragraph, including their references to the evidence deduced at trial. (T2:48:12-221:23)

IV. LEGAL ARGUMENTS

A. THE COURT PROPERLY PRECLUDED CERTAIN DOCUMENTS AT TRIAL

There were several dispositive motions and motions in limine filed by the parties in advance of trial. More specifically, Defendant filed seven (7) Motions

in Limine in February 2023, of which one was granted, one was granted in part and denied in part, and the remaining five were all denied. This is consistent with the Court's general trepidation towards such motions. See *Bellardini v. Krikorian*, 222 *N.J. Super*. 457, 464 (App.Div.1988) (noting that "in limine rulings on evidence questions . . . should be granted only sparingly and with the same caution as requests for dismissals on opening statements"); *Rubanick v. Witco Chem. Corp.*, 242 *N.J. Super.* 36, 46-47 (App. Div. 1990), *mod. on other grounds*, 125 *N.J.* 421 (1991) (noting that a hearing on motion in limine required judge to make factual determinations more properly left to the jury); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 4 on N.J.R.E. 104 (2013).

The Motion and resulting Order Plaintiff appears to take specific issue with is Defendant's Motion in Limine to preclude testimony or introduction of documents relating to Hurricane Sandy or the Hurricane Sandy insurance claim, which the Court denied. The denial of this Motion was based upon an inaccurate understanding of the facts. The denial of this Motion has also resulted in an inaccurate understand of its meaning.

The Court made a valent and through review of the plethora of documents, transcripts and other evidence presented in support of and in opposition to the Motions in Limine. On this Motion the Court accepted Plaintiff's version of the

facts, which was not subsequently supported by the trial testimony. Plaintiff relies on the pre-trial ruling not to preclude as a guarantee that the documents and evidence at issue is therefore automatically admissible at trial without the application of the Evidence Rules. In short, the foundation upon which Plaintiff's argument is based is flawed. A refusal to preclude pre-trial is not an automatic admission at trial. Rather, as was the case here, the Trial Court must apply the Rules of Evidence to determine whether a document is admissible.

The Court's Opinion provided, in pertinent part:

> Contrary to Defendant's contentions, information regarding the Hurricane Sandy insurance claim is directly relevant to Plaintiff's claims. Whether the home sustained some type of water damages is not at issue. The issues for the trier of fact are whether Defendant knew about the water issues and whether he failed to disclose the issues to Plaintiff.
>
> * * *
>
> The 2012 insurance claim is relevant to the issue of whether Defendant knew about water damage and his actions thereafter.
>
> * * *
>
> The fact that Defendant made an insurance claim for damage to the subfloor caused by water intrusion is not hearsay. The SEA report is being introduced to show that the listener, (Santoro) took certain action as a result thereof.
>
> * * *
>
> Lastly, Defendant's prior testimony about the extensive water damage to the property in the prior action may be admitted under *N.J.R.E.* 803(b)(1).

(Pa299-300) To that end, the Trial Court allowed significant testimony from multiple witnesses regarding the Hurricane Sandy damage and the water intrusion/long term water damage issue. Trial testimony opened with the very first witness, Defendant himself, being asked about the Hurricane Sandy damage. Thereafter, testimony was elicited from Plaintiff, her husband, neighbor witnesses, the home inspector, contractors and damage witnesses, as well as experts on these topics. The Trial record is replete with information, testimony and documents about the Hurricane Sandy damage, the prior issues and claims for damage, the repairs, and the knowledge of such issues by Defendant.

The divergence from the Court's Motion Opinion and the admission, or non-admission of certain documents at trial is thus, the pre-trial Opinion was based upon the following (mis)understanding of the facts:

> Plaintiff discovered a box of items Defendant left behind that contained the SEA report, the 2012 insurance claim, and a transcript of Defendant's 2014 deposition along with personal items such as photographs and bank statement. Defendant testified leaving the box of items "was purposeful and it was for the right reasons. This was not accidental as [Plaintiff] (sic) claimed. It was purposeful. It was what good Christian people that are selling their home to people with good intent do. (Citations omitted). Defendant also testified that the items were "left behind purposely to assist the buyers. (Citations omitted).
>
> * * *

> Defendant included the SEA report within the box of items "he left behind for Plaintiff." Thus, the SEA report is relevant to show Defendant was put on notice that the damage to the property was not caused by a one-time storm event, but ongoing water issues.

(Pa299) Plaintiff asserted then, as she does now, that all documents found by Plaintiff were left in a box that Defendant admitted he left for the Plaintiff as it was the right thing to do. As such, Plaintiff maintains claims Defendant had knowledge of the documents and their content. Based upon that version of evidence presented before trial, the Court determined it would be inappropriate to preclude the evidence and the Motion was denied.

The trial testimony, however, was not as Plaintiff presented in opposition to the Motion. Rather, the testimony from Plaintiff and Defendant made clear that there were in fact two boxes of documents. The first box of documents Defendant claimed he left, and Plaintiff agreed she found in the kitchen containing a variety of manuals, brochures, warranties, contractor lists and other homeowner type paperwork. That box of documents is the box Defendant testified to purposefully leaving "for the right reasons." "It was what good Christian people that are selling their home to people with good intent do." (Pa299).

The second box contained documents that Plaintiff testified were, in fact, not found in a box and were not found in the kitchen. Rather, many months after

moving into the property when Plaintiff's daughter came to live with her, various documents were found in the cabinets of a second-floor room Defendant had maintained as an office and Plaintiff's daughter was using as her bedroom. Those documents were placed in a box in the closet by Plaintiff and her family. Plaintiff reviewed the contents of the box sometime after they had been stored in the closet. The documents located and the box created by Plaintiff and her family contained personal photographs of Defendant, his family and friends, cards, personal financial statements, and various documents related to the insurance claim made by Defendant following the Hurricane Sandy damage to the property.

The trial testimony failed to establish the evidentiary prerequisites to admit many of the insurance related documents. The Court's analysis applied in reaching its decision not to preclude the documents in advance of trial is consistent with the analysis applied by the Trial Court in not admitting the documents. The ultimate difference was that Plaintiff failed to establish at trial testimony to support the same conclusion reached before trail.

"[I]n making relevance and admissibility determinations," the trial judge's exercise of his "broad discretion" "will not [be] disturb[ed], absent a manifest denial of justice." *Lancos v. Silverman*, 400 *N.J. Super.* 258, 275 (App. Div.), *certif. denied sub nom*., *Lydon v. Silverman*, 196 *N.J.* 466 (2008). While

Plaintiff relies upon the "law of the case doctrine" those arguments are misplaced. A decision in advance of trial not to preclude evidence is not an admission of the evidence at trial. Plaintiff is not relieved of her obligations to comply with the Rules of Evidence simply because Motion in Limine to preclude was denied.

B. TESTIMONY WAS NOT IMPROPERLY STRICKEN

Plaintiff makes one factual argument in this section of her Brief and one citation to testimony. The factual reference comes at the very end: "In our case, it was not harmless error for Defendant Santoro to deny having read anything, talked to his lawyers about anything and had no idea what [sic] the water damage." (Pb31) This assertion, that Defendant was permitted to testify is contrary to the argument that the Court improperly struck testimony.[7] Rather, Plaintiff appears to be frustrated because she considers the testimony of her advisory to be suspect. The courthouse is overflowing with adversaries who do not believe one another. Accordingly, the credibility of every witness is something to be determined and weighed by the trier of fact, here the jury. In fact, when considering post-trial motions Plaintiff argued and the Court acknowledged that there was reasonable inferences that could be drawn,

[7] Testimony, which is not identified anyway.

although it was not the Court's current role to make credibility determinations, against Defendant's credibility. Accordingly, the Court denied Defendant's post-trial motions. (June 11, 2024 Trail Transcript 38:2-71:25) Plaintiff's frustration with Defendant's testimony is inconsistent with the request to this Court concerning improperly stricken testimony and should be disregarded.

Plaintiff's argument cites to only one testimonial reference: "The Court improperly struck portions of testimony in violation of New Jersey Rules [sic] of Evidence 804(a)(4) (T1 p.99L.1-9)." (Pb27). The testimony cited includes: one question from Plaintiff's counsel to Defendant; Defendant's response; defense counsel's objection; Plaintiff's counsel's voluntary withdrawal of the question; and the Court striking the answer. The question: "Do you [Defendant] know why Remmy doesn't mention the roof at all?" (T1:99:2-3) The response: "I don't know why. You have to ask him." (T1:99:4) Defense counsel's objection follows and Plaintiff's counsel responds: "I'll strike that." (T1:99:7) To which the Court responds: "Okay. So that last question and answer is stricken. It must be disregarded by the jury." (T1:99:8-10). Plaintiff's assertion that this testimony (the only testimony placed at issue here) was improperly stricken must fail as it was voluntarily withdrawn.

C. THERE WERE NO IMPROPER JURY INSTRUCTIONS

Plaintiff's brief provides citation to case law underscoring the import of jury instructions and those citation are addressed below. (Pb31-32) Plaintiff cites only to the Verdict Sheet (Pa379-382) as being at issue. Importantly, the Jury Verdict Sheet referenced appears different than the Jury Verdict Sheet provided to the jury when you compare Pa379-382 to the reading of the verdict. (T6:23:24-27:7)

Plaintiff relies upon *Das v. Thani*, 795 A.2d 976, 171 *N.J.* 518 (2002), asserting the Court found failure to properly instruct the jury on the medical judgment defense was reversible error. (Pb32) Since the medical judgment defense is not at issue in this case, the citation can only be to further support the overall contention concerning the import of jury instructions. In the second citation, *Washington v. Perez*, 98 A.3d 1140, 219 *N.J.* 338 (2014), the Court found that giving an adverse inference charge when none was warranted was reversible error. Since an adverse inference charge was given and another requested, but not given in this matter, this instruction will be briefly addressed.

Following testimony from the last witness and before resting, defense counsel requested to make motions for adverse inferences. (June 11, 2024 Trial Transcript 34:23-36:19) The Court acknowledged the request and reserved on

hearing the motions until its decision on other motions. *Id.* The Court heard the Defendant's motions for, and Plaintiff's opposition to the adverse inference request. (June 11, 2025 Trial Transcript 87:1-104:1) After an analysis placed on the record, the Court granted some and denied some of Defendant's motions and the jury was charged accordingly. (*Id.* and at 221:12 – 242:12) Plaintiff also made a motion for an adverse inference, but the motion was fatally flawed as untimely. Plaintiff did not reserve the right to make the motion prior to resting, prior to defendant resting, or even after defendant advised of his intent to so move. Rather, Plaintiff's motion followed the Court's hearing and ruling on the Defendant's motion. (*Id.* at 104:2-106:20) The Court properly denied the motion as untimely. *Id*.

Plaintiff's appeal on this point references only the Verdict Sheet without any further support, argument or reference to the record at issue. Plaintiff has failed therefore to place before this Court an issue appropriate for appellate review and determination. Simply put, Plaintiff is dissatisfied with the outcome of trial and has taken a throw everything and the kitchen sick approach to an appeal as a last-ditch effort. The Court and counsel reviewed the Verdict Sheet and all parties' contentions were considered before being ruled on. (*Id.* at 148:1-156:4) Plaintiff fails to cite any individual issue or decision it believes to be improper, rather citing to the entirety of the document as improper. The Jury

Verdict Sheet provides the jury with a systematic way to assess and deliberate each specific issue or element of a case. The Verdict Sheet employed here did exactly that. The decision reached by the jury in this matter should not be disturbed.

D. THERE WERE NO IMPROPER ARGUMENTS MADE DURING CLOSING

There was a single objection made by Plaintiff during defense counsel's closing argument. (*Id.* at 163:8-204:4, specifically 168:7-170:8) Plaintiff now takes issue with five specific comments that were made and appears to content (because it is the only portion of the record cited to) that those allegedly improper comments lead to certain juror questions. Specifically, Plaintiff's reference to the record here is to "T6 p. 9-18". (Pb33) This reference picks up and ends in the middle of colloquy between the Court and counsel in response to certain jury questions. Ultimately, Defendant maintains the questions were properly responded to by the Court and there is no action that need by taken on appeal regarding same.

Addressing the alleged improper comments, all deal with the same issues surrounding the home inspection, the terms of the parties' agreement, and the parties' respective responsibilities and obligations based upon the remaining claim for breach of contract and Defendant's affirmative defenses to same.

Plaintiff testified that she reviewed the home inspection report, she understood the report, she recognized she could have gotten further inspections for issues, including the potential water infiltration damage issue identified in the inspection report but that she knowingly chose not to. Plaintiff also testified that she understood when signing the contract that she was not relying on any representations of Defendant. These issues were addressed by the parties during the Charge Conference. (June 11, 2025 Trial Transcript 77:9-82:3, 118:14-125:22 and 140:8-142:6)

Defendant maintains that Plaintiff's alleged reliance on Defendant's alleged (mis)representations in support of her breach of contract claim fails as a matter of law because she obtained an independent examination of the house from a licensed inspector of her choosing and the contract specifically provide she was not relying on any representations. See *Simpson v. Widger*, 311 *N.J. Super.* 379, 709 A.2d 1366 (App.Div.1998); see also *Bryne v. Weichert Realtors,* 290 *N.J. Super.* 126, 675 A.2d 235 (App.Div.), *certify. denied,* 147 N.J. 259, 686 A.2s 761 (1996). More specifically, as argued in support of the motions made following the close of evidence:

> [I]n light of Mr. Funk's testimony, there is law that talks about what happens when somebody does an independent investigation and they rely upon that investigation.

> And if they do an independent investigation and they rely upon I, that cuts off any claims they can make relating to a breach of a duty owed to them through failure to disclose or making a false disclosure. Specifically, Your Honor, I cite to the case of *Golden v. Northwestern Mutual Lide Insurance Company*, 229 N.J. Super. 405 (1988) where the Court held as follows. However, the law governing independent investigations seems clearly to have settled the principal that when one undertakes to make an independent investigation and relies upon it, her or she is presumed to have been guided by it and bound accordingly.
>
> One cannot secure redress from another when he acted in reliance upon his own knowledge or judgment based upon an independent investigation. A false representation made to a person who know I to be false is not a legal estimation of a cause of action.

(June 11, 2024 Trial Transcript 38:10-39:6). The remainder of the arguments asserted are incorporated herein, as if set forth at length. (*Id.* 39:7 – 51:7). Ultimately, the Court determined since "reasonable minds could differ, the motion must be denied." (*Id.* 45:14-15) *citing, Dolson v. Anastasia*, 55 *N.J.* 2 (1995). The Trial Court further stated: "under the preponderance of the evidence standard looking at the light as I must on behalf of the plaintiff and the reasonable inferences that can be drawn therefrom, there is enough evidence on this record to get to the jury on the breach of contract case." (*Id.* 49:5-10)

The comments made by defense counsel during closing go to the very issue the Court found the trier of fact, the jury and not the Judge, was to determine. There is no argument, no reference to the record, and no law cited

to by Plaintiff that supports the jury's decision on these issues should be overturned.

E. THERE WERE NO VIOLATIONS OF THE PROFESSIONAL RULES OF CONDUCT

Plaintiff's arguments here are built upon the fundamentally flawed arguments addressed above. Plaintiff's arguments here also rely only upon the same record designations as the prior section, specifically an incomplete portion of the colloquy between the Court and counsel concerning certain juror questions. As set forth above, Plaintiff maintains that because the Court denied a Motion in Limine to preclude evidence, that evidence is admissible at trial without Defendant having a right to object and without need to apply the Rules of Evidence to the actual testimony and evidence presented to the trier of fact. Rather than risk repetition, Defendant incorporates the arguments above, as well as those of the Trial Court throughout the trial on each individual evidentiary ruling, as well as when the issue was addressed in a more collective fashion. By way of example:

> What this order says is that the defendant filed a motion and they want to preclude the plaintiff from introducing documents or testimony relating to Hurricane Sandy or the Hurricane Sandy claim and that was denied and there has been plenty of evidence in this trial with regard to Hurricane Sandy.
>
> I think every single witness was asked about Hurricane Sandy, about the fact that [Defendant] hired a public adjuster, Mr. Remmy about the fact that he made an insurance claim to the

> insurer, Lloyds of London. About the fact that they weren't giving him what he wanted so he bought a lawsuit about what the resolution was, which was they paid for a new roof so there has been evidence in the case about Hurricane Sandy or Hurricane Sandy insurance claim. . .
>
> * * *
>
> . . . for purposes of the record, Judge Palone's order from June 12th, 2023 with regard to the particular order that [plaintiff's counsel]referred to is an order denying defendant's motion o preclude the plaintiff from introducing documents or testimony relating to Hurricane Sandy or the Hurricane Sandy insurance claim.
>
> I obviously rule on documents and testimony as they come up. . .evidence was rejected for the reasons on the record at that time.

(June 11, 2024 Trial Transcript 11:11 – 12:1 and 17:5-24)

There were no efforts by counsel to deceive, mislead or in any way misrepresent information, evidence or rulings to the jury or to the Court who made the findings of admissibility. Moreover, a review of the record and the Trial Court's findings and rulings, including the post-judgment motion that was denied confirm the Trial Court properly denied Plaintiff's claims of violations of the Professional Rules of Conduct. In that regard, the Court found:

> I don't find any attorney in this case acted in any type of bad faith or any type of culpable or willfully wrongful conduct. Objections to hearsay were made and objections to other things throughout the course of the trial. I thought they were made appropriately.
>
> There were times where I did not allow the hearsay documents to be admitted. I became intimately familiar with Judge

> Palone's rulings purposefully leading into the pretrial conference and trial to make sure I had a background of where we were coming from. Trial testimony, in my mind, was completely different than what Judge Palone thought the facts of the case were when he was ruling upon his motions. . .
>
> Judge Palone's pretrial rulings are not binding upon me. If there is different testimony at trial, I have to rule on the objections as they come at the time. If there is different testimony at trial than there was pretrial, which in my mind in this case there was, not only do I have a duty to determine what the testimony has been in the trial, but I also have a duty to weigh under the 403 balancing whether or not it's coming in which the pretrial judge is not always in a position to do because they're not sitting at the trial.
>
> * * *
>
> I believe this was a well-tried case. I believe that the objections were reasonable and appropriate and I ruled on them as they came in with full knowledge of Judge Palone's rulings. And so the motion for sanctions is denied.

(July 19, 2024 Transcript and, specifically, 19:4-21:13)

Plaintiff submitted nothing to this Court that was not presented to the Trial Court, not considered by the Trial Court, and not appropriately ruled upon by the Trial Court. The decision(s) below should stand, and this appeal should be dismissed, including all claims related to a violation of the Professional Rules of Conduct.

F. PLAINTIFF FAILED TO TIMELY REQUEST AN ADVERSE INFERENCE

Model Civil Jury Charge 1.18 provides:

> Before charging the jury as to adverse inference, the party seeking the charge must, before the parties rest, notify the trial

> judge and the opposing party outside the presence of the jury, state the name of the witness(es) not called, and indicate why this witness(es) have superior knowledge of the relevant facts. *State v. Hill*, 199 *N.J.* 545, 560-61 (2009). The trial court must rule on this issue before a jury instruction is allowed. Id at 561. In making its decision, the trial court must consider various factors and place on the record findings as to each of these factors. Id. To guide that assessment, the Court in Hill prescribed a four-pronged test: (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts issue; and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven. Id. at 561-62. (See also *Torres v. Pabon*, 225 N.J. 167 (2016). In a personal injury trial context, this charge should rarely be given to address the absence of an expert witness. *Washington v. Perez*, 219 *N.J.* 338 (2014).

As set forth above and as is clear from the record below that the Plaintiff failed to timely request an adverse inference. Despite being required to make such a motion before the close of his case in chief, Plaintiff waited until after Defendant made such a motion prior to resting his case, and until after those motions were heard and decided to make the belated request. The Court properly denied the Motion and there is nothing in Plaintiff's appeal that suggests the decision was or should be subject to being overturned.

IV. CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court uphold the decisions of the Trial Court and deny Plaintiff's request to remand, and for sanctions against Defendant and counsel.

Respectfully submitted,

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ROSEMARY BRODY	**: SUPERIOR COURT OF**
	: NEW JERSEY
	: APPELLATE DIVISION
Plaintiff-Appellant	**: DOCKET NO. A-000209-24**
	:
vs.	**: Civil Action**
	:
	: ON APPEAL FROM
NICHOLAS SANTORO, CEI	**: JUNE 10,2024 ORDER**
CONTRACTORS, SOLEIL	**: DISMISSING PLAINTIFF'S**
SOTHEBY'S INTERNATIONAL	**: COUNTS AND JULY 2,2024**
REALTY, TROY ROSENZWEIG	**: ORDER DISMISSING**
RE/MAX PLATINUM	**: PLAINTIFF'S COMPLAINT**
PROPERTIES, LINDA NOVELLI	**:**
FUNK INSPECTION SERVICE	**: SUPERIOR COURT**
AND BRUCE FUNK	**: LAW DIVISION-CIVIL**
	: ATLANTIC COUNTY
Defendant-Respondent	**:**
	: Sat Below
	: Hon. Danielle Walcoff, JSC

REPLY BRIEF OF APPELLANT ROSEMARY BRODY

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The Defendant's opposition to Plaintiff's appeal is exactly what was expected; specifically the recreation of facts and the attempt to recreate the procedural history in Plaintiff's effort to masquerade the documented fraud on the Court and the Plaintiff. As will be demonstrated by the evidence, the Trial Court made a substantial mistake in overturning the results of Judge Paolone's Decision. The Plaintiff will rely on facts as opposed to undocumented arguments which intentionally misrepresent facts and make no reference to facts (for obvious reasons). A cursory review of pages 18-21 of Defendant's opposition brief demonstrates this inappropriate "technique". In the Defendant's opposition, real and significant facts are glossed over or not mentioned at all; in particular, facts relied upon in Judge Paolone's Decision. Almost 85% of the documents Plaintiff wanted to confront the Defendant with that demonstrate knowledge or imputed knowledge of ongoing and long-term water damage at the subject property were excluded by the trial Judge; wherein, the previous Judge handling the matter ruled in Motions in Limine these same documents were not hearsay, or, hearsay exceptions. This is the cornerstone of this appeal. There are some additional transgressions that will also be addressed in this reply; however, the Trial Court's wrongful exclusion of critical evidence is the cornerstone of this appeal.

In the Motions in Limine Judge Paolone addressed each of the Defendant's objections to very relevant documents in detail. The Defendant, seeing that a new

Judge was handling the trial, once again objected to certain items being introduced after Judge Paolone ruled specifically on these matters. The Defendant's lack of candor with the Trial Court (under a different Judge) and complete dismissal of the rulings by Judge Paolone to Defendant's own Pre-trial Motions in Limine are egregious and significant.

The significant underlying relevant facts which cannot be in dispute are as follows:

1. The Defendant had a new house built on the bay in 2009. (Pa 389-394)
2. In 2012, after Hurricane Sandy, the Defendant had an adjuster file a claim for approximately $271,000.00 in damages, which did not include damage to the property's roof, and primarily based upon water damage. (Pa 467-474)
3. The Defendant testified in a 2014 deposition concerning the substantial water damage to the subject property. (Pa 395 - Pa 466)
4. The damage Defendant claimed from Hurricane Sandy included the costs to replace the floors and subfloors "allegedly" damaged by the storm. (Pa 475)
5. Nobody could have, in good faith, claimed damage to the subfloors unless they removed the primary floors.
6. The Defendant's insurance carrier, Lloyds of London, denied Defendant's claim and issued an expert report prepared by SEA Engineers that explained

that there was water damage; however, determined that the damage was caused by a long-term water issue and not the storm. (Pa 495-537)

7. The Defendant appealed this denial by Lloyds in a lawsuit, but the Defendant never retained an expert to refute Lloyd's conclusions, presumably because he knew the truth of the matters referenced in the report. (Pa 538-540)

8. Defendant testified in a deposition in 2014 about the "horrific" water damage to his property. The Defendant was adamant about recovering the damages identified by his adjuster that he proffered to his insurance company, Lloyd's of London. (Pa 395-466)

9. The Defendant received an Arbitration Award that only covered a fraction of his original claim, and Defendant filed for a Trial de Novo. (Pa 543)

10. The Defendant ultimately settled with Llyod's. (Pa 548)

11 .Immediately after settling with Lloyd's, Defendant placed his property for sale and dropped the price by over $100,000.00 in a year before the Plaintiff purchased it. (Pa 549)

12. The Defendant never disclosed the long-term water damage indicated in the SEA report which was the basis for the denial of his substantial Sandy insurance claim. (Pa 551-556)

13. The Plaintiff, after she purchased the subject property, discovered the documents including the SEA report left behind at the subject property.

14. The Plaintiff confronted the Defendant with these documents left behind before filing a suit and Defendant indicated they were left behind to "help" the Plaintiff.

15. After the underlying lawsuit was filed, Defendant was confronted at his deposition in 2021 with the documents left behind. He was confronted with the SEA report, the insurance adjusters claim, and the quotes for repairs. **He was not and has never been confronted with warranties he saved.** (Pa 760-798)

16. When confronted with the relevant documents at his deposition in 2021, the Defendant stated he left them behind purposefully to "help" the Plaintiff with her purchase because that is "what good Christians do".

17. Again, at his deposition, the Defendant was not confronted with any warranties. He was presented with the very documents in question, not warranties, and he unequivocally stated in no uncertain terms that they were left behind purposefully. (Pa 760-798)

18. Plaintiff's expert testified that upon inspection he discovered that a portion of the subfloor was removed and replaced, demonstrating that the Defendant or one of his agents knew there was long term water damage to the property (as determined by Lloyds), replaced a section of the damaged subfloors and

covered it up by placing the tile floor over it. Again, a substantial part of the Defendant's Sandy claim was for the subfloor. (Pa 716-726)

The Defendant has attempted to confuse the facts. The Defendant during trial testified he left behind warranties but did not know about the other documents wherein he was denied a substantial insurance claim, testified under oath, and filed a lawsuit. The documents in question were part of a lawsuit prepared for him, an insurance claim prepared for him by his agent which he adopted, and testimony he himself provided under penalties of perjury.

The Trial Court's rulings on these matters only assisted the Defendant in his continual fraud upon the Court and the Plaintiff. The documents in question were prepared for the Defendant by his agents, he relied upon and adopted them, he was confronted with them at a 2021 deposition, and he explained they were left behind purposefully, only to be allowed, via the Trial Court's decision overruling Judge Paolone, to deny any knowledge about them at the time of trial.

Judge Paolone ruled the documents were not hearsay and expressly opined they demonstrated Defendant's knowledge of the long-term water damage at the property. **With all due respect where and how the documents were found is insignificant.** What is significant is the Defendant knew of long-term water damage and intentionally failed to disclose it.

I. JUDGE PAOLONE'S RULING REGARDING THE HURRICANE SANDY DOCUMENTS WAS CORRECT AND THE TRIAL COURT'S DECISION TO LATER EXCLUDE SUCH DOCUMENTS PROVIDED THE DEFENDANT WITH A MECHANISM TO CONTINUE TO PERPETRATE FRAUD ON THE PLAINTIFF AND THE JURY

As stated herein, Judge Paolone's rulings had nothing to do with what receptacle the Hurricane Sandy documents were found. Judge Paolone expressly opined that the subject documents demonstrated the Defendant's knowledge of ongoing water damage (Pa294-300). At trial, based upon the Trial Court's misinterpretation of the law, the Defendant was allowed to deny knowledge of his insurance adjusters claim, quotes he received for work, his complaint filed regarding Lloyds denial of his insurance claim, notes left behind that refer to the rotted subfloor, and the expert report prepared by Lloyds that was the basis for denying his insurance claim and his subsequent appeal. One must remember this was damage to Defendant's primary residence (Pa 440). It is simply unfathomable that Defendant was permitted to simply deny any knowledge of these documents.

The Defendant in his opposition has attempted, once again, to twist facts indicating that when the Defendant was previously confronted with the Hurricane Sandy documents (particularly at his deposition in 2021) he was "really" referring to warranties and a list of contractors left behind. As will be demonstrated this is a perfect example of the Defendant acting with a complete lack of candor and why sanctions are warranted. **Not once during this litigation was the Defendant**

confronted with a warranty. (Defendants 2021 Deposition transcript Pa 760-798). The documents the Defendant was confronted with at depositions in 2021 which were precluded by the trial court were:

1. The Remmey Insurance Adjuster Hurricane Sandy claim for $271,000 (which did not include damages to the roof) prepared for and submitted to Lloyds on behalf of the Defendant (Pa 467-475).
2. The Union Roofing contract for $130,000.00 to replace the entire roof (Pa 475)
3. The 2013 quote to replace the subfloors for the entire house (Pa 476).
4. The SEA report, prepared for Lloyds of London which indicates Defendant's house was suffering from ongoing water issues and that damages were the result of long-term moisture exposure (Pa495-537).

The Defendant was confronted at his deposition with many of the items the Brodys discovered after they purchased the subject house and which unequivocally demonstrate Defendant's knowledge regarding the ongoing water issue at his house. The following is list of documents left behind by Defendant, which he claimed were intentionally left behind to "help" the Plaintiff at Defendants 2021 deposition:

1. Providence Tile quote to replace all subfloors (Pa 773 pages 52-53). At Pa 774 page 54 the Defendant under oath states this document was left behind intentionally. THIS DOCUMENT IS NOT A WARRANTY. Defendant

admitted under oath the Providence Tile quote was the type of document he would have intentionally left behind (Pa 775 page 58 lines 12-24).

2. Defendant claimed nobody took up the subfloor (Pa 774 page 57 lines 7-14) yet, Plaintiff's expert concluded and showed pictures of Defendants subfloor that was previously exposed and superficially repaired (Pa 325 and Pa 727).
3. The Defendant was confronted with the SEA report (Pa 776-777).
4. Defendant was confronted with notes that state "after the tile is removed, rotten floor damage would not be covered (Pa 779, page 74 lines 9-12).
5. Defendant stated that if the document was in the box, it was left there intentionally by he or his wife (Pa 780 page 79 lines 3-14).
6. The Defendant was confronted with the Complaint against Lloyds of London that he also left behind (Pa 781).
7. The Defendant was confronted with the arbitration award (Pa 781).
8. The Defendant was confronted with the Trial De Novo request (Pa 782 page 86, lines 12-22).

The above-mentioned list completely debunks the Defendant's false narrative that he thought the box of documents was warranties, etc. Nowhere in any documentation or in his deposition was Defendant questioned regarding a warranty.

Defendant was only confronted with documents which demonstrated his knowledge of ongoing water issues which he illegally did not disclose.

Furthermore, and more importantly, it does not matter whether the Defendant left the documents intentionally or by accident. (However, at his deposition he did state under oath anything left behind was purposeful). Likewise, it does not matter what receptacle the Defendant left the documents in or where the Plaintiff found them. The item of significance is these documents demonstrate the Defendant had knowledge of an ongoing water issue at his house and he failed to disclose it. This is precisely and expressly what Judge Paolone opined (Pa 299-300).

The Defendants created a new and irrelevant narrative at trial as a diversion as if it mattered what box Defendant was referring to and by ridiculously claiming the Defendant had no knowledge of such documents concerning his primary residence, his over $400,000.00 dollar claim for damages, the denial of the claim, his Complaint in Superior Court, and his testimony under oath. It is obvious the Trial Court did not read or understand Judge Paolone's Decision. If Judge Paolone's Decision was read and it was comprehended, this trial would have never preceded in the "trial by side bar" which occurred in June of 2024.

The Defendant never appealed Judge Paolone's Decision. If there was two boxes or there was a mistake of fact, the Defendant could have easily filed an appeal, however; he did nothing. Instead, Defendant waited until trial, had an "epiphany"

that there was two boxes which just so happened to coincide with the appearance of a new Judge. "Under the law-of-the-case doctrine, 'where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.' *"Bahrle* v. *Exxon Corp.,* 279 *N.J Super.* 5, 21 (App.Div.1995) (quoting *Slowinski v. Valley Nat'l Bank,* 264 *N.J. Super.* 172, 179 (App.Div.1993)), *affd,* 145 *N.J.* 144 (1996). For that reason, the decision "should be respected by all other lower or equal courts during the pendency of that case." *Lanzet* v. *Greenberg,* 126 *N.J.* 168, 192 (1991) (citing *State* v. *Reldan,* 100 *N.J.* 187, 203 (1985)). Thus, if the doctrine applies, it prohibits "a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling." *Hart* v. *City of Jersey City,* 308 *N.J. Super.* 487, 497, (App.Div.1998).

Judge Paolone had Defendant's deposition transcript, and he had the documentation presented to the Defendant at his 2021 deposition. After failing to appeal Paolone's Decision, the Defendant seized the opportunity to alter his narrative at trial as if it mattered where or how the subject documents were discovered. Apparently, Defendant's changing testimony under oath is a modus operandi. One only needs to review Defendant's 2014 deposition describing Hurricane Sandy damage to Lloyds attorney (Pa 409-431) and compare it to his 2021 Deposition (Pa 769, page 36 lines 17-20) to reach the conclusion that Defendant will provide

whatever testimony he deems appropriate for the occasion regardless of the truth or his oath.

II. DEFENSE COUNSEL PRESENTED IMPROPER LEGAL CONCLUSIONS TO THE JURY DURING CLOSING (T6 p. 9-18)

The Defense counsel was permitted to argue that somehow the Plaintiff breached a duty to the Defendant in the transfer of the subject property. (T5, p.170 L.19-25; p.177 L.17-15, p.200 L.ll-15, p.201 L.12-17). Defendant's counsel argued that Plaintiff breached her duties and obligations under the contract by not "following up" on Plaintiff's property inspector's suggestions.

The Defense counsel argued to the jury:

1. Not getting a masonry inspector, isn't that a breach of contract. She had a right to an inspection but **didn't** have the **right** to ignore what he said. **That's not complying with all her obligations under the contract.** (T6-10-24, pl70 L19-25)

2. Did the Plaintiff do everything she was required to do under the contract, if the answer is no, the case is over (T6-10-24 p. 177 L 7-15).

3. Has the Plaintiff Rosemary Brody proved by a ponderance of the evidence that she performed substantially all of her obligations under the contract of August 23, 2016? That's the purchase agreement. And you check yes or no. There we think you should check no because that contract says its being sold as

is. No representations were making it. You have the right to all the inspections you want. You have the right to all the time periods set forth in the contract. **You did your inspections and then you ignore all of the advice in the inspections. And we don't believe that's carrying forward with all of her duties and obligations. And we think that's where it ends. If you check no on that, you, that's it. (T** 6-10-24 p 201 L. 12-17).

After one day of deliberations the jury came back with five questions. Three of the questions were as follows:

1. If we find **both** parties breached the contract do we need to proceed? (Pa382).

2. Is the Plaintiff in breach of the contract by not following up on inspection recommendations? (Pa384)

3. If we find both the Plaintiff and Defendant at fault can we award the Plaintiff 50% of the money? (Pa384)

The Court's allowing the Defendant to improperly "create law" and instruct the jury on this fabricated obligation/duty was beyond prejudicial.

III. THE DEFENDANT'S COUNSEL VIOLATED RPC 3.3 (T6, p. _ MS)

Plaintiff specifically refers to RPC 3.3. The Defendant had a duty of candor to abide by the "law of the case" doctrine. The Defendant knew of Judge Paolone's ruling because, it was in response to his own Motion. Defense counsel

did not appeal or file a Motion for Reconsideration of these decisions. The Plaintiff proceeded to prepare for trial based upon Judge Paolone's ruling. The Defendant on the other hand, waited for the transfer to a new trial Judge and fabricated new facts to relitigate the Motion in Limine. Again, if Defendant thought Judge Paolone got the law or facts wrong, he had an obligation to file a Motion, not create new facts.

The Defendant's tactics violated RPC 3.3 in a very meaningful manner. If Defendant believed Paolone misinterpreted facts he could and should have filed an appeal. Instead, Defendant waited until a new Judge took over, fabricated facts as if they were meaningful and wrongfully sought to overturn Paolone's Decision based off contrived and meaningless facts. A "motion in limine is '[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial.'" (quoting Jeter v. Sam's Club, 250 N.J. 240, 250, 271 A.3d 317 (2022)) Conforti v. Cnty. of Ocean, 255 N.J. 142, 170, reconsideration denied sub nom. Conforti v. Ocean Cnty. Bd. of Chosen Freeholders, 255 N.J. 280, 300 A.3d 268 (2023).

In addition to ignoring the "law of the case doctrine", Defense counsel intentionally misled the jury by "creating" a duty of the Buyer and then instructed the jury on the breach of this fictious duty. Defense counsel's tactics violated his duty of candor.

Appellate courts 'will not disturb a trial [judge's] ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice.'" State v. Smith, 224 N.J. 36, 47 (App Div 2020) (quoting State v. Jackson, 211 N.J. 394, 407). A cursory review of the water and mold at the subject property caused by Defendant's "cover up" are the result of a manifest injustice fueled by Defendant's fraud and deceit which the Trial Court's Decision aided and abbetted.

LAW OFFICE OF
DANIEL J. GALLAGHER, ESQUIRE

DATE: 4-3-25

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