Superior Court of New Jersey
Appellate Division
Docket No. A-000611-24

EDWARD CARLSON,	CIVIL ACTION
Plaintiff-Respondent,	ON APPEAL FROM
v.	SUPERIOR COURT, LAW DIVISION MONMOUTH COUNTY
GARY WEBER and ACCUPOINT SOLUTIONS, LLC,	HONORABLE LINDA G. JONES, J.S.C.
Defendants-Appellants.	HONORABLE KATHLEEN A. SHEEDY, J.S.C. Sat below

BRIEF
FOR
APPELLANTS GARY WEBER and ACCUPOINT SOLUTIONS, LLC

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INTRODUCTION

This appeal involves a simple and straightforward issue that the trial court erred twice in deciding. First, the trial court erred by denying Defendants-Appellants Gary Weber and AccuPoint Solutions, LLC's (hereinafter collectively the "Defendants") cross-motion for partial summary judgment which sought to limit Plaintiff-Respondent Edward Carlson's ("Plaintiff") damages to those wages earned within the six-year period prior to the filing of his Complaint which alleged claims for breach of contract and violation of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq. ("WPL"), both of which carry a six-year statute of limitations. Second, the trial court erred by denying Defendants' motion for a directed verdict which again sought to limit Plaintiff's damages to those wages earned within the six-year period prior

to the filing of his Complaint based on the same six-year statutes of limitations.

Based on the statutes of limitations, it was error to allow Plaintiff to recover on amounts earned beyond the six-year statute of limitations as any promise to pay, acknowledgment of wages owed to Plaintiff, or partial payment was expressly conditioned at all times on Defendants' available cash flow as a startup company. The facts and evidence do not warrant application of equitable tolling principles to extend the six-year statutes of limitations. Defendants never made any unconditional acknowledgements of the debt owed to Plaintiff or unconditional promises to pay Plaintiff. Defendants also never represented that Plaintiff's accrued wages were available on demand. Accordingly, the trial court was without proper legal authority to extend the limitations period beyond the six years prior to the filing of the Complaint. For

the reasons discussed herein, this Court should affirmatively find that the trial court committed reversible error as a matter of law by denying Defendants' Cross-Motion for Partial Summary Judgment and Motion for a Directed Verdict on statute of limitations grounds. The September 27, 2024 Final Judgment must be reversed and remanded for modification.

STATEMENT OF FACTS

Mr. Weber is the founder and majority owner of AccuPoint Solutions, LLC (hereinafter "AccuPoint" or the "Company"), which is a startup company in the business of collecting and selling data to financial services companies. (Da265). On or about September 25, 2015, shortly after AccuPoint was formed, Messrs. Weber and Carlson met. (Da265). They verbally agreed that Mr. Carlson would provide services related to the creation of AccuPoint's databases and would be paid $12,000 per month subject to AccuPoint's available cash flow. (Da265-Da266). However, Mr. Carlson insisted that he not be paid for his services for the first six (6) months of his employment, from September 2015 through March 2016, and requested that his earnings accrue to be paid at a later date. (Da266). This arrangement was later reduced to writing in July 2016, which again expressly conditioned Mr. Carlson's wages

upon AccuPoint's available cash flow as a new startup company. (Da125-Da131). Mr. Carlson unequivocally agreed to this arrangement. (Da125-Da131). Mr. Carlson resigned from AccuPoint effective January 31, 2018. (2T60:18[1]).

While it was undisputed that Mr. Carlson was not paid for most of the services he provided to the Company, the parties disagreed on how much he was paid and how much he was owed. (Da267). As a result, Mr. Carlson commenced suit through the filing of a Complaint on October 7, 2022, which included claims for breach of contract and violation of the WPL. (Da17-Da25). With respect to damages, Plaintiff sought wages earned from September 25, 2015 through January 31, 2018, despite not filing the Complaint until October

[1] 1T references the transcript of summary judgment oral argument held on August 2, 2024. 2T references Volume 1 of the trial transcript of September 17, 2024. 3T references Volume 2 of the trial transcript of September 17, 2024. 4T references Volume 3 of the trial transcript of September 18, 2024.

7, 2022. (Da17-Da25; 4T80:24-81:6).

Following the close of discovery, Mr. Carlson moved for summary judgment and Defendants cross-moved for partial summary judgment. (Da37-Da38; Da260-Da261). Relevant to this appeal, Defendants sought to limit Plaintiff's damages to wages earned after October 7, 2016, based on the six-year statutes of limitations applicable to breach of contract and WPL claims. (Da260-Da261). By Order dated August 2, 2024, the Honorable Linda G. Jones, J.S.C. denied Defendants' cross-motion for partial summary judgment and ordered that the statute of limitations issue be decided at trial. (Da302-Da303).

Accordingly, at the close of Plaintiff's case-in-chief Defendants moved for a directed verdict on statute of limitations grounds, again arguing that Plaintiff's damages should be limited to wages earned after October 7, 2016 based on the date the Complaint

was filed and the evidence in the trial record. (2T186:5-189:8). Specifically, the following relevant exhibits were introduced into evidence during Plaintiff's case-in-chief, all of which are representative of conditional promises to pay, conditional acknowledgements of wages owed to Plaintiff, and conditional partial payments made by Defendants. (Da48; Da135; Da304-Da348).

1) Exhibit P-6 is an email from Mr. Weber to Mr. Carlson dated November 3, 2017, wherein Mr. Weber promises to pay Plaintiff $10,000 by year's end, which did in fact occur, and elaborates on AccuPoint's cash flow problems that prevented him from paying Plaintiff the remainder of his accrued wages at that time. (Da135-Da137).

2) Exhibit P-22 includes a duplicate of Mr. Weber's November 3, 2017 email to Mr. Carlson as described above as well as a subsequent email from Mr.

Weber to Plaintiff's wife, Evelyn Carlson, dated November 6, 2017. Therein, Mr. Weber states he "believes" that AccuPoint "will pay us all nicely in the not too distant future." Mr. Weber further promised to "do what [he] can". (Da315-Da322).

3) Exhibit P-36 includes an email from Mr. Weber to Mr. Carlson dated December 31, 2018, wherein Mr. Weber explains AccuPoint's cash flow problems preventing him from paying the remainder of Plaintiff's accrued wages and, for that reason, offers to pay Plaintiff $3,000 from his personal account. Mr. Weber further references a partial cash payment made to Plaintiff several weeks earlier, again from his personal account, in light of AccuPoint's persistent cash flow problems. A subsequent email from Mr. Weber to Plaintiff dated January 8, 2019 reads "Ed, [i]f I had it[,] you would have it." Mr. Weber yet again offers to make a partial payment of $2,500 from his

personal account in light of AccuPoint's cash flow issues. (Da334-Da336).

4) Exhibit P-41 contains a series of emails by and between Mr. Weber, Mr. Carlson and Ms. Carlson. Relevant here is Mr. Weber's email of February 11, 2020, wherein he agrees to send Plaintiff partial payment in the amount of $4,000 only due to cash flow problems. Mr. Weber further stated "we are still not at a point where we can make steady payments without risking the business" and confirmed AccuPoint could not make consistent payments for Plaintiff's accrued wages at that time. Mr. Weber further elaborated that there "were no guarantees" as to whether he could make future payments to Plaintiff on his accrued wages. Mr. Weber stated "I am committed to paying you [but] the timing must be right". Mr. Weber next wrote to Plaintiff and his wife on February 24, 2020, wherein he stated "I cannot commit to a plan [for] payments to [Plaintiff]

until the current stage [of AccuPoint's business plan] is executed." Mr. Weber further warned that he would not "promise something [he could not] promise at [that] time." (Da337-Da348).

In addition, the trial testimony of both parties was consistent with the documentary evidence set forth above confirming Defendants only made representations of conditional promises to pay, conditional acknowledgements of wages owed to Plaintiff, and conditional partial payments. (2T41:20-92:11; 3T229:2-227:20). The relevant trial testimony includes:

a) Plaintiff agreed his wages of $12,000 per month would "be paid as the business [AccuPoint] could support such payment." (2T41:20-42:5).

b) Plaintiff agreed his accrued wages would be deferred from the outset as AccuPoint had "no money that I knew of upfront" and Plaintiff understood AccuPoint, as a startup, was "not going to have revenue"

for a while. (2T43:3-15).

c) Plaintiff expected his accrued wages would be paid "as [AccuPoint's] revenue was coming in." (2T58:24-25).

d) Plaintiff admitted that, when inquiring about payment for his accrued wages, Mr. Weber consistently advised that Defendants "d[idn't] have the money." (2T59:10-13).

e) Plaintiff recognized Mr. Weber's acknowledgment and apology that AccuPoint's "money isn't coming in sooner" as the continued basis for the delayed nonpayment of Plaintiff's accrued wages. (2T84:19-20).

f) Plaintiff acknowledged Mr. Weber's plea that he "cannot control when people pay" as the continued basis for the delayed nonpayment of Plaintiff's accrued wages but nonetheless rendered a partial payment to Plaintiff "out of [his] own pocket." (2T91:12-14).

g) Plaintiff recognized Mr. Weber's reiteration that "if I had it I would give it – you would have it. Can't do anything about how people pay. As soon as I have extra, I will give it to you" as the continued basis for the delayed nonpayment of Plaintiff's accrued wages. (2T92:9-11).

h) Mr. Weber confirmed that the arrangement with Plaintiff was that he would be paid "about 12,000 per month [but] that none of that money was guaranteed." (3T229:2-7).

i) Mr. Weber confirmed Plaintiff was to get paid "when the company [could] pay [him] out." (3T233:16-21).

j) Mr. Weber again confirmed Plaintiff's monthly wages were always conditioned upon "appropriate cash flow" as set forth in the parties' written agreement. (3T234:15-18).

k) Mr. Weber confirmed Plaintiff was aware that

"compensation in any one month [was] not guaranteed" as set forth in the parties' written agreement and prior verbal agreement. (3T235:10-23).

l) Mr. Weber confirmed the parties' agreement provided that "unpaid compensation w[ould] accrue month to month and be paid as the business c[ould] support such payment." (3T236:10-25).

m) When asked why Plaintiff was still not paid in full at the time of trial, Mr. Weber confirmed "[w]e don't have the money. We still don't have the money. We didn't have the money then." (3T253:21-23).

n) Mr. Weber confirmed that in those instances where he paid Plaintiff from his personal account, he actually took those funds out of his wife's account because he "didn't have any extra money." (3T272:9-12).

o) At the time of trial, Mr. Weber provided that AccuPoint's current financial situation was "[n]ot great" as he was "still putting money into the business.

. . . there is no money sitting in the bank that is just sitting there [as] extra". (3T277:15-20).

Accordingly, despite the relevant evidence and testimony in the record, and without consideration of the applicable law, the trial judge, the Honorable Kathleen A. Sheedy, J.S.C., denied Defendants' motion for a directed verdict on the statute of limitations issue, stating:

> [T]here was clearly, based upon the evidence presented, a continuing promise to pay. Accordingly, I am not going to dismiss any claims with regard to the statute of limitations since it is clear to me that the defendant, through the testimony that I have heard so far, has throughout this matter promise to make good on his word, make payments to the plaintiff.
>
> [(3T206:22-207:5)].

Thus, following a jury verdict for Plaintiff, on September 27, 2024, the trial court entered Final Judgment for Plaintiff in the amount of $206,515.00,

which included wages earned beginning in September 2015, more than six years prior to the filing of the Complaint. (Da349-Da351).

PROCEDURAL HISTORY

On October 7, 2022, Plaintiff filed the Complaint in the Superior Court of New Jersey, Law Division, Monmouth County. (Da17-Da25). On February 10, 2023, Defendants filed an Answer and Separate Defenses. (Da26-Da32). Defendants' responsive pleading included an Affirmative Defense alleging that "Plaintiff's claims are barred, in whole or in part, by the . . . applicable statute of limitations." (Da31). Notably, Plaintiff never formally responded to the aforementioned Affirmative Defense and thereby did not provide notice of any intention to toll the applicable statute of limitations period.

On June 12, 2024, in response to a motion for summary judgment filed by Plaintiff, Defendants cross-moved for partial summary judgment. (Da37-Da38; Da260-Da261). Relevant to this appeal, Defendants sought to limit Plaintiff's damages to those wages earned after

October 7, 2016, based on the applicable six-year statute of limitations for breach of contract and WPL claims. (Da260-Da261). On August 2, 2024, the trial court denied Defendants' cross-motion for partial summary judgment on the statute of limitations issue, ruling that the issue should be reserved for the trial judge based on the evidence in the trial record. (Da302-Da303).

A jury trial was held in this matter from September 16, 2024 through September 18, 2024. (Da349-Da351). On September 17, 2024, at the close of Plaintiff's case-in-chief, Defendants moved for a directed verdict on the statute of limitations, arguing that Plaintiff should be barred from recovering wages earned more than six years prior to the filing of the Complaint, which was denied. (2T186:5-189:8).

On September 18, 2024, the jury returned a verdict for Plaintiff. (Da349-Da351). On September 27, 2024,

the trial court entered Final Judgment for Plaintiff in the amount of $206,515.00, which included wages earned more than six (6) years prior to the filing of the Complaint. (Da349-Da351).

On or about November 6, 2024, Defendants filed a Notice of Appeal and Case Information Statement. (Da1-Da15).

On December 18, 2024, Defendants filed a motion to stay the trial court's September 27, 2024 Final Judgment pending appeal. (Da352-Da359). On January 24, 2025, the trial court entered an Order granting Defendants' motion for a stay pending appeal subject to a security deposit with the court. (Da352-Da359). On February 6, 2025, Defendants transferred the funds securing the stay pending appeal to the Superior Court Trust Fund in Trenton in accordance with the trial court's January 24, 2025 Order. (Da352-Da359).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' DIRECTED VERDICT MOTION ON STATUTE OF LIMITATIONS GROUNDS, THEREBY PERMITTING PLAINTIFF TO RECOVER WAGES EARNED MORE THAN SIX YEARS PRIOR TO THE FILING OF THE COMPLAINT. (DA302-DA303; DA349-DA351).

The trial court erred in allowing Plaintiff to recover wages earned beyond the six-year statute of limitations. (Da349-Da351). In doing so, the trial court failed to acknowledge, consider, and apply well-established law on equitable tolling, thereby reaching its decision to extend the statute of limitations without proper legal authority. The evidence in the trial record, in consideration of binding legal precedent, does not support the trial court's decision to permit Plaintiff to recover wages earned more than six years prior to filing the Complaint. Accordingly, the trial court committed reversible error.

Under New Jersey law, the statute of limitations for breach of contract claims and claims brought under the WPL is six years. *See N.J.S.A.* 2A:14-1(a); *N.J.S.A.* 34:11-4.1 *et seq.*; *Meyers v. Heffernan*, No. 12-cv-2434, 2014 WL 3343803 at *8 (D.N.J. July 7, 2014) (Da360-Da370). In an action at law, courts are bound by the literalism of the statute of limitations period, which begins to run when "the party seeking to bring the action [has] an enforceable right." *Fox v. Millman*, 210 N.J. 401, 419 (2012); *Metromedia Co. v. Hartz Mountain Assocs.*, 139 N.J. 532, 535 (1995).

Under the WPL, an employer must pay the full amount of wages due to its *bona fide* executive employees at a minimum of once per month, or semi-monthly for non-executive employees. N.J.S.A. 34:11-4.2. Thus, in the case of a *bona fide* executive employee such as Plaintiff, a separate cause of action for unpaid wages accrues each and every month the employee goes unpaid.

See Burlington County Country Club v. Midlantic Nat. Bank South, 223 N.J. Super. 227, 231 (Ch. Div. 1987)(a cause of action begins to run when the debt becomes due).

The equitable tolling statute, N.J.S.A. 2A:14-24, governs whether the statute of limitations for contract-based claims may be extended. It is rather specific despite its broad application by the trial court. To that end, N.J.S.A. 2A:14-24 provides:

> In actions at law grounded on any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract, so as to take any case out of the operation of this chapter, or to deprive any person of the benefit thereof, unless such acknowledgement or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby.

New Jersey courts have interpreted this statutory provision to toll the statute of limitations on a contract action only where the acknowledgement of a

debt or promise to pay is (1) in writing; and (2) is unconditional, meaning the implication is that the debt is payable immediately or on demand. *Denville Amusement Co. v. Fogelson*, 84 N.J. Super. 164, 170 (App. Div. 1964). If an acknowledgment of a debt is coupled with a promise that is *qualified or conditional*, neither the promise nor acknowledgment will suffice to remove the bar of the statute of limitations unless said condition is satisfied. *Bassett v. Christensen,* 127 N.J.L. 259, 261 (E. & A. 1941); *Burlington Cnty Country Club,* 223 N.J. Super. at 235-36. The "current tendency is in favor of the statute of limitations and against the construction of a statement as an acknowledgment or promise which will avoid its operation." *Evers v. Jacobsen*, 129 N.J.L. 89, 91 (E. & A. 1942).

Here, in consideration of the above-stated law and the evidence submitted at trial, it is clear each and

every promise to pay, acknowledgement of the debt owed to Plaintiff, and/or partial payment made by Defendants was expressly conditioned upon Defendants' financial health and cash flow. (Da48; Da135; Da304-Da348). This is further exemplified by the parties' July 2016 contractual agreement, which again expressly conditioned Plaintiff's wages upon AccuPoint's available cash flow as a new startup company. (Da125-Da131). Moreover, each and every communication in the trial record shows that Defendants' acknowledgments, promises to pay, and partial payments of Plaintiff's accrued wages were unequivocally conditional. (Da48; Da135; Da304-Da348).

Faced with the evidence in the record, it was unreasonable and erroneous for the trial court to suggest Plaintiff was unaware of the conditional payment arrangement he struck with Defendants since the very outset of their relationship. Nor could the trial

court reasonably find the condition precedent satisfied at the time any promise to pay, acknowledgment of the debt, or partial payment was made by Defendants based on the aforesaid evidence in the record. (Da48; Da135; Da304-Da348).

It is also meaningful that Plaintiff never formally responded to Defendants' statute of limitations Affirmative Defense asserted in their Answer, which the trial court also erred by failing to acknowledge. (Da26-Da32). Plaintiff never provided notice of his intention to assert equitable tolling, which is required under the law. *See* Ladies' *Auxiliary Asbury Park Lodge No. 128, B.P.O.E. v. Asbury Park Lodge, No. 128, B.P.O.E., of U.S.A.*, 129 N.J.L. 364, 365 (1943). Thus, the necessary notice requirements were not even met to allow the trial court to equitably toll the limitations period, further confirming the trial court's reversible error.

In this action, Plaintiff did not articulate, and the trial court did not provide, any legitimate basis warranting an 11-month enlargement of the applicable statute of limitations. Instead, the trial court simply concluded that enlargement was warranted because Defendants allegedly made "continuing promises to pay" and promises to "make good on his word." (3T206:22-207:5). Those conclusions (even if true) do not warrant enlargement of the statute of limitations without more. Under the circumstances, where all promises, acknowledgment, and partial payments of Plaintiff's wages were conditioned upon AccuPoint's cash flow and financial health, enlargement of the statute of limitations – which is not routinely granted– was not warranted.

In the event this Court agrees with Defendants and finds the trial court committed reversible error, which it should, this case should be remanded to the trial

court for additional proceedings. It is unclear how the jury decided the issue of how much Plaintiff was paid to date and the parties have differing opinions on this essential fact. Therefore, this matter should be reversed as to the subject statute of limitations issue and remanded to the trial court for modification of the final judgment.

CONCLUSION

For the foregoing reasons, Defendants Gary Weber and AccuPoint Solutions, LLC respectfully request that this Court reverse the trial court's decision to toll the statute of limitations and remand this matter to the trial court for modification of the September 27, 2024 Final Judgment.

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Attorneys for
Defendants/Appellants
Gary Weber and AccuPoint
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By:*/s/ Damian Christian Shammas*
Damian Christian Shammas
Erica Joy Goldring

DATED: April 3, 2025

EDWARD CARLSON Plaintiff-Respondent, v. GARY WEBER and ACCUPOINT SOLUTIONS, LLC Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-611-24 CIVIL ACTION On Appeal From Superior Court, Law Division, Monmouth County Sat Below: Hon. Linda G. Jones, J.S.C. Hon. Kathleen A. Sheedy, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT IN OPPOSITION TO DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Respondent, Edward Carlson, respectfully submits his Brief in opposition to Appellants' appeal. As shown herein, Plaintiff was repeatedly told – orally and in writing – to continue working for Defendants and that his accruing unpaid compensation would be given to him. Indeed, after being sued for both breach of contract (for non-payment) and for fraud (alleging Defendants never intended to pay), the Defendants took the stand and once again confirmed that they owed Plaintiff his wages (subject only to a dispute as to the amount owed, not the existence of the debt), and confirming that they repeatedly promised to pay Plaintiff. After hearing all of this testimony, the jury returned a verdict in Plaintiff's favor on the contract claim, but ruled in favor of Defendants on the fraud claim.

As explained herein, the trial court had before her sufficient evidence to deny the motion for directed verdict.

PROCEDURAL HISTORY

Respondent is satisfied with Appellants' recitation of the procedural history.

STATEMENT OF FACTS

Ed Carlson is a 75 year old retired Navy veteran. In September of 2015, Ed Carlson was hired to work as an employe for Defendant AccuPoint Solutions, LLC. AccuPoint, through its Manager, Defendant Gary Weber promised to pay Mr. Carlson a salary of $12,000 per month. This agreement was memorialized in a

written Employment Agreement dated July 19, 2016.

Ed Carlson worked for AccuPoint from late September of 2015 until his retirement in January of 2018. During his employment, Ed Carlson (a former auditor) maintained a Quickbook database tracking the payments that he received from AccuPoint.

AccuPoint admits that it never paid Ed Carlson his entire monthly salary of $12,000 at any point in time. Ed Carlson was supposed to be paid $337,840 ($12,000 per month for 28 months of employment from October 1, 2015 through January 31, 2018, plus a pro rata payment of $1,840 for Carlson's work in late days of September of 2015). However, Ed Carlson only received $57,500 from AccuPoint.

AccuPoint and Weber admit that they owe Ed Carlson money. They admit that they did not pay Ed Carlson all the unpaid salary that he was owed after he retired. They admit that they did not pay Ed Carlson his full monthly salary at any time during his employment. They admit that Ed Carlson repeatedly asked them for payments – at least ten times - yet he still has not been paid in full.

Defendants' argument fails given the fact that they repeatedly recognized the legitimacy of the debts owed to Mr. Carlson from September of 2015 onward, continually provided partial payments towards that outstanding indebtedness, and affirmed their intention to repay the amounts owed.

LEGAL ARGUMENT

POINT ONE

A. Defendants Are Estopped From Arguing The Statute Of Limitations As They Raised A Completely Opposite Argument To Defeat The Fraud Claim.

Weber defeated a fraud claim against AccuPoint, and himself personally, by testifying ad nauseum that AccuPoint never had sufficient cash flow to pay Carlson – but reaffimed that Carlson would be paid in the future and that the indebtedness was due and owing. For example:

> Q In your own words, can you tell me -- can you tell the Court and the jury, what were you offering Mr. Carlson when you presented him with this letter?
>
> A Sure. It was a pay of 12,000 dollars a month and Ed clearly understood that we did not have the money at the time, and so it was basically to say, Ed, you are worth this amount of money, **we are going to pay you**, we are going to pay you at my discretion, we are going to pay you when the company can pay you out.

(3T233:13-21)(emphasis added).

> Q Okay. Reading down the line, is it true that you conditioned your payment of the 12,000 dollars per month payment upon appropriate cash flow each month?
>
> A That is correct, yes.

(3T234:15-18)

> Q Is it fair sitting here today that you agreed

that for eighteen months you owed Ed Carlson 12,000 dollars per month?

A That is correct, yes.

Q And you admit that freely to the jury here today?

A I do. It has never been an issue.

Q Have you ever disputed that to Ed?

A Never. Never disputed to anybody.

(3T239:12-20)(emphasis added).

Q As we sit here today, does Accupoint owe money to Mr. Carlson?

A Yes. Absolutely.

Q Why wasn't Mr. Carlson paid in full?

A We don't have the money. We still don't have the money. We didn't have the money then. It is -- we need to keep the business running. When Ed started with the firm we did the bare bone minimums to be able to compete.

***

Q Was it always your intention to pay Mr. Carlson in full?

A Always.

(3T253:18 to 256:7)(emphasis added).

For each calendar year, Mr. Weber asserted that AccuPoint was unable to pay Mr. Carlson because "the money just wasn't there". (See e.g., 3T255:15-21; 256:5-14;257:18 to 258:2).

> Q And why is it then Mr. Carlson has not been paid in full to date?
>
> A Because we just have not had the money, and we need -- if we move any money around or do anything, the business is going to go under.
> There is absolutely nothing we can do, and we are still borrowing money and still deferring taxes and doing things we shouldn't be doing in order to make sure that I could get everybody and Ed paid over time.
> **And Ed -- if this lawsuit didn't come up, Ed would have been paid eventually**.

(3T279:18 to 280:3)(emphasis added).

> Q Is there an answer to that question, Mr. Weber? Has the time come to repay Mr. Carlson? You were just answering that question.
>
> A Yeah. I think, again, the timing is when the business is not going to be at risk.
> We still are at risk because I still have people in jobs that were getting paid well below what they should be getting paid, I still have expenses that we have to pay, we still have growth that we have to go through. My whole intent of everything that we do, is, how do we get people paid, how do we continue to get this business, keep the doors open, keep the lights on and make sure it doesn't fail.
>
> Without it, Ed doesn't get paid anything. There is nothing there to pay him.

So, yes, Ed is still -- you know, still deserves to get paid. These are very tough decisions.

(4T67:15 to 68:7)

Q I think everyone is wondering, what is your intention here, Mr. Weber?
Are you intentionally desiring to pay all of your other employees and not Mr. Carlson?

A No, not at all. I have told Ed -- as a matter of fact, I would not have put things in writing saying
that, you know, here is what we are working on, here is what we are doing.

I know better than to do that if my intention was not to pay Ed.

My intention has always been to pay Ed. Ed would have been paid, and would have been paid over time unless he filed this lawsuit. I mean, it is where we were going.

Q And your promises to pay Ed, were they misrepresentations?

A No, not at all.

Q Were they lies?

A No, not at all.

Q Did you intend to cause any detriment to Ed in telling him you were promising to pay him when the money came in when the time was right?

A No. What I was doing, was telling Ed here is what we have and here is what I think is coming in, and some of that came in, some of it

> didn't come in, and it was just letting Ed know, my intention is to pay you.
> It was never my intention not to pay Ed. Not once.

(4T69:6 to 70:8).

At close, Mr. Weber's counsel argued, "We submit to you it was never false. Mr. Weber always intended and still to this day intends to make good on what he is owed -- what he owes Mr. Carlson."

At trial, Mr. Weber repeatedly stated that he owed Mr. Carlson money. He repeatedly said Mr. Carlson deserves to be paid. He repeatedly claimed that the only reason Mr. Carlson was not paid in full was due to the annual cash flow problems facing AccuPoint. Mr. Weber justified his non-payment by relying on terms in the contract stating that Mr. Carlson's right to payment was dependent upon sufficiency of cash flow and that there was never (and still was not) sufficient cash flow to make the payments.

Mr. Weber avoided a fraud judgment with the argument that: (A) the contract gave him the right to determine <u>when</u> AccuPoint had to pay Mr. Carlson based on its cash flow; (B) he determined that AccuPoint did not have the cash flow to pay him; and therefore (C) Mr. Carlson was not entitled to payment at this time.

The purpose of the judicial estoppel doctrine is to protect "the integrity of the judicial process." <u>Cummings v. Bahr</u>, 295 N.J.Super. 374, 387 (App.Div.1996). A

threat to the integrity of the judicial system sufficient to invoke the judicial estoppel doctrine arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding. Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div. 2000).

Because Defendants prevailed in the fraud claim by contending that they were not (yet) obligated to pay Mr. Carlson, they cannot now contend on appeal that Mr. Carlson had a right to payment earlier on.

In a similar vein, the Supreme Court refused to bar a claim under statute of limitations grounds where doing so would violate public policy:

While the statute is one of repose, intended to protect honest debtors from the payment of **444 stale claims, where the evidence to refute them may be supposed to be lost or destroyed, it is not to be used to defeat an admittedly honest claim, where the debtor, knowing of its existence, admits the claim to be correct, pays sums of money on account and repeatedly promises in writing to make additional payments thereon.'

The judgment under review will be affirmed, for the reasons stated by the judge at circuit.

Trenton Banking Co. v. Rittenhouse, 96 N.J.L. 450, 453 (1921).

B. The Evidence Before The Jury Was Sufficient To Find A Tolling Of The Statute Of Limitations.

The Trial Court did not err in denying a directed verdict motion on the Statute of Limitations issue. The Trial Court ruled:

> With regard to the statute of limitations, there was clearly, based upon the evidence presented, a continuing promise to pay.
> Accordingly, I am not going to dismiss any claims with regard to the statute of limitations since it is clear to me that the defendant, through the testimony that I have heard so far, has throughout this matter promised to make good on his word, make payments to the plaintiff.

Accordingly, I am going to deny that portion of the motion.

(3T206:22 to 207:7).

The Trial Court had before it ample evidence to support its ruling that the defendant "has throughout this matter promised to make good on his word, make payments to plaintiff."

First, there was the record of payments themselves (2T50:5-53:8, Exhibit P-4 – Carlson's ledger; P-9 66:24 to 67:6 checks paid).

Second, there were Mr. Carlson's repeated testimony of promised payments (See, e.g., 2T59:10 to 60:15).

Third, there were a litany of e-mails between Carlson and Weber. (See, e.g., 2T61:4 to 65:6 (**P-5 and P-6** November 2 and 3, 2017 e-mail); 2T135:13 to 140:8 (P-41 February 29, 2020; and February 11, 2020 E-mail); and 2T82:24 to 85:2 (P-22 November 2 and 3, 2017 e-mail); 2T89:20 to 92:20 (P-36)).

Fourth, there were Mr. Weber's own statements during the course of his deposition and in answers to interrogatories. (2T164:5 to P-7 Answers Interrogatories incl. no. 15), (2T165:21 to 166:6). (2T168:17 to (deposition passages)

The question of whether sufficient evidence exists to support equitable tolling is a question of fact for the jury. See, e.g.,

Renault v. L. N. Renault & Sons, 188 F.2d 317 (3d Cir. 1951)(applying New Jersey law):

> A part payment is held to toll the statute of limitations on the theory that the law implies from partial payment a promise to pay the entire obligation. Of course, a mere payment of money by a debtor to his creditor does not, in itself, constitute proof that the money was intended as partial payment on a particular obligation barred by the statute of limitations. Romaine v. Corlies, 1885, 47 N.J.L. 108; McPhilomy v. Lister, 1941, 341 Pa. 250, 19 A.2d 143, 142 A.L.R. 385. The fact that the first check was issued very soon after D'Agostino's alleged promise and the further fact that the checks coincided in amounts and dates with that promise are sufficient evidence from which the jury might find that the checks were intended as part payments on the note. We hold that the jury should have been permitted to decide whether the alleged promise of John D'Agostino was within the scope of his implied authority and whether the checks issued by defendant corporation were intended to be partial payments on the note in question.

Renault v. L. N. Renault & Sons, 188 F.2d 317 at 320–21.

Defendants claim that Plaintiff cannot recover for balances owed prior to October 7, 2016 due to a six-year statute of limitations. Defendants' argument fails given the fact that they repeatedly recognized the legitimacy of the debts owed to

Mr. Carlson from September of 2015 onward, continually provided partial payments towards that outstanding indebtedness, and affirmed their intention to repay the amounts owed.

"Our courts, interpreting the statutes, have held that a statute of limitations which applies to a presently existing contractual debt or obligation may be tolled by an acknowledgment or a promise to pay. Howell v. Wallace, 18 N.J.Misc. 48, 51 (Cir.Ct.1939).

Likewise, if such acknowledgment or promise to pay is made after the statute has run, it will act to revive the debt for the statutory period. Trenton Banking Co. v. Rittenhouse, 96 N.J.L. 450, 452 (E. & A.1921)." Burlington Cnty. Country Club v. Midlantic Nat. Bank S., 223 N.J. Super. 227, 234 (Ch. Div. 1987).

"Payment of or on account of a debt or obligation may also toll or revive the statute of limitations, thereby extending it for the statutory period from the time of such payment." Id. citing Van Dike v. Adm'rs. of Van Dike, 15 N.J.L. 289, 296–297 (Sup.Ct.1836).

On a motion for a directed verdict, the Court should deny such relief:

> [I]f accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced

> therefrom, reasonable minds could differ, the motion must be denied. Bozza v. Vornado, Inc., 42 N.J. 355, 200 A.2d 777 (1964); Bell v. Eastern Beef Co., 42 N.J. 126, 199 A.2d 646 (1964); Franklin Discount Co. v. Ford, 27 N.J. 473, 490, 143 A.2d 161, 73 A.L.R.2d 1316 (1958). The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with *6 its existence, viewed most favorably to the party opposing the motion.

Dolson v. Anastasia, 55 N.J. 2, 5–6 (1969).

The evidence proffered at trial satisfied this standard.

This case is also similar to Santiago v. Villoresi, No. A-6063-05T2, 2007 WL 1790740, at *1 (App. Div. June 22, 2007) where a borrower repeatedly asked his lenders for more time to repay due to his financial constraints. The borrower first wrote, "I have not forgotten my debt to you and only ask that you give me some time to get my feet on the ground.... Please give me 6 [months] to get going." Id. at *1. Once the six months passed without payment, the borrower then wrote:

> I know I've made promises before which all washed out due to my 5 yrs. of horror but I am putting my life back together and should be able to start sending some money this spring.

> I will write you in 30 days with a progress report. I do not intend to hurt any friend.

Id.

When the borrower never paid, he then raised the statute of limitations as a defense. The trial court denied the borrower summary judgment and this Court affirmed. In doing so, this Court held rejected arguments similar to those raised by Defendants here, First, this Court recognized the language of N.J.S.A. 2A:14-24 requires a writing acknowledging the debt and "an implication of a promise to pay the debt immediately or on demand." Id. at 3. This Court thus concluded that "whether the bar of limitation has been lifted depends not on whether a defendant "unequivocally promised to pay" as Villoresi contends, but rather on "whether [the acknowledgement of the debt], when considered in [ ] context ... can justly support an inference of a new promise to pay the debt on demand". Id. at 171.

This Court then reasoned:

> Applying these principles to the facts at hand, the June 12, 2000 correspondence from Villoresi to plaintiffs is in writing and signed by him. Moreover, its language, in our view, "fairly supports an implication of a promise to pay the debt immediately or on demand", in that Villoresi recognized that plaintiffs were entitled to immediately demand payment and requested that they instead delay that demand for six months.
>
> . . .
>
> We have long recognized that for a new conditional debt to be created, the acknowledgement must be "positively inconsistent on

> [its] face with an unconditional promise to pay at once". Denville Amusement Co., Inc., supra, 84 N.J.Super. at 171 (emphasis added). The language of Villoresi's writing not only fairly implies that plaintiffs have the right and the power to demand payment immediately and that Villoresi is requesting six month's forbearance, but contains no language, such as "I will pay you when I have the money", that could be reasonably interpreted as "positively inconsistent" with a finding that payment could be demanded immediately if plaintiffs did not agree to wait six months to make that demand.
>
> Taken in context, the language of the June 12, 2000 note does not condition payment upon Villoresi's financial recovery, as defendants assert, but merely explains the reasons for requesting an extension of time, in an attempt to persuade plaintiffs to wait six more months before demanding payment.

Id. at*2–4.

C. The Payments Received Are Credited To The Earliest Debts

Defendants erroneously contend that the entire "balance" owed to Mr. Carlson as of September 30, 2016 should be barred by the statute of limitations. Defendants are wrong because the balance as of September 30, 2016 was reduced by payments Mr. Carlson received after September 30, 2016.

Mr. Carlson testified that by the end of September 30, 2016, he had earned at total of $145,840. Defendants contended that the total payments received by Mr. Carlson during his employment was $68,500 (4T81:14 to 81:17) which reduces the balance owed as of September 30, 2016 to $77,340.

Payments are attributable to the oldest outstanding debt absent an express designation by the debtor to the contrary. Defendants have presented no evidence of a contrary designation herein. "As a general proposition, a creditor who is owed more than one debt by a debtor may apply the payments to the debtor's account in any manner it chooses so long as the debtor has not issued specific directions to the contrary. That is known as the payment application rule." Craft v. Stevenson Lumber Yard, Inc., 179 N.J. 56, 72 (2004), citing United Orient Bank v. Lee, 208 N.J.Super. 69, 72 n. 1 (App. Div. 1986) ("Where ... the obligor has made no direction, the creditor may with certain exceptions apply the payment as he wishes.").

CONCLUSION

For the foregoing reasons, it is respectfuly requested that this Court affirm the rulings below.

Respectfully submitted,

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Michael J. Connolly, Esq.

Dated: May 5, 2025

Superior Court of New Jersey
Appellate Division
Docket No. A-000611-24

EDWARD CARLSON,	CIVIL ACTION
Plaintiff-Respondent,	ON APPEAL FROM
v.	SUPERIOR COURT, LAW DIVISION MONMOUTH COUNTY
GARY WEBER and ACCUPOINT SOLUTIONS, LLC,	HONORABLE LINDA G. JONES, J.S.C.
Defendants-Appellants.	HONORABLE KATHLEEN A. SHEEDY, J.S.C. Sat below

REPLY BRIEF OF DEFENDANTS-APPELLANTS GARY WEBER and ACCUPOINT SOLUTIONS, LLC

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PRELIMINARY STATEMENT

Plaintiff's response to Defendants' statute of limitations issue on appeal consists of two flawed arguments. First, Plaintiff contends Defendants are equitably estopped from raising the statute of limitations issue because, in defending against the fraud claim at the time of trial, Defendants claimed they lacked sufficient cash flow to pay Plaintiff and, therefore, they cannot now argue that Plaintiff should have commenced suit earlier. Aside from it being speculative as to why the jury found for Defendants on the fraud claim, this argument is meritless as Plaintiff has not identified any evidence that he relied on Defendants' representations about lack of cash flow in deciding to commence this suit nearly seven years after his wages became due.

Second, Plaintiff claims the trial court had sufficient legal basis to equitably toll the statute of limitations. Again, this argument lacks support as the evidence in the record unequivocally confirms that each

and every partial payment and/or promise to pay Plaintiff was conditional. For these reasons, the September 27, 2024 Final Judgment should be reversed and remanded to the trial court for modification based on Plaintiff's failure to bring his claims within the applicable six-year statutes of limitations.

PROCEDURAL HISTORY

Defendants rely upon the Procedural History set forth in their Opening Brief.

STATEMENT OF FACTS

Defendants rely upon the Statement of Facts set forth in their Opening Brief.

ARGUMENT

I. Plaintiff's Reliance on the Doctrine of Equitable Estoppel Should Be Rejected.

Plaintiff maintains that Defendants should be equitably estopped from relying on the statute of limitations "[b]ecause Defendants prevailed in the fraud claim by contending that they were not (yet) obligated to pay Mr. Carlson, [and] they cannot now contend on appeal that Mr. Carlson had a right to payment earlier on." (Pb7-8) This position is meritless.

As an initial matter, none of the parties know why the jury returned a verdict for Defendants on the fraud claim. Only the jury knows why it ruled in Defendants' favor. The Court should not accept Plaintiff's invitation to engage in speculation.

"Equitable estoppel has been defined as 'the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed ... as against another person, ***who has in good faith relied upon such conduct, and has been led thereby***

to change his position for the worse ...'" *Joe D'Egidio Landscaping, Inc. v. Apicella*, 337 N.J. Super. 252, 258 (App. Div. 2001) (citing *Heuer v. Heuer*, 152 N.J. 226, 237 (1998)) (emphasis added). Plaintiff cites to no evidence in the record that he held off on commencing his claims against Defendants based on their representations. This is not an oversight because there is no such evidence in the record.

Although Defendants' final payment to Plaintiff was made in January 2018 and the parties' last communications were in February 2020, Plaintiff nevertheless waited until October 7, 2022 to commence the underlying lawsuit, well beyond the time when a significant portion of his wages became due under the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq. ("WPL") (statutorily requiring wages be paid least once per month for bona fide executives). (Da139; 2T78:19-22). To collect on the entirety of his accrued wages, Plaintiff would have had to commence the underlying lawsuit by October 2021 as he began earning wages from AccuPoint in late

September 2015, and the WPL requires those wages to be paid monthly. N.J.S.A. 34:11-4.2 (Da265-266). *See Fox v. Millman*, 210 N.J. 401, 419 (2012) (holding the statute of limitations begins to run when "the party seeking to bring the action [has] an enforceable right."). (Db20). Plaintiff slept on his rights through no fault of Defendants.

Plaintiff's reliance on *Trenton Banking Co. v. Rittenhouse*, 96 N.J.L. 450(1921) is misplaced. (Pb8). In that case, the court addressed whether the six-year statute of limitations barred the plaintiff's claim to recover on a book account for groceries. *Id.* at 451. Specifically, the court considered whether the lower court erred in finding partial payments on the book account, coupled with acknowledgment of the debt, renewed the statute of limitations and thereby revived the claim for collection. *Id.* at 453. Significantly, the case was decided under the framework of 1921 common law on debt collection, not the WPL.

The Court of Errors and Appeals affirmed the lower court's finding that the statute of limitations was renewed when it was clear the debtor knew of the existence of the debt, paid sums of money towards the balance, and made repeated promises in writing to make additional payments. *Trenton Banking Co.*, 96 N.J.L. at 454. However, unlike the case at bar, the partial payments and promises to pay were not conditioned upon the defendant's cash flow and business judgment. In this case, all of Defendants' partial payments and promises to pay were conditioned upon AccuPoint's cash flow position. (*See* Db7-14) (showing all of Defendants' partial payments and/or promises to pay were unequivocally conditional).

Plaintiff has failed to demonstrate any connection between Defendants' representations and his decision to delay commencing suit until after the applicable statute of limitations. Consequently, his attempt to invoke the doctrine of equitable estoppel must be rejected.

II. The Trial Court Did Not Have Sufficient Evidence to Equitably Toll the Six-Year Statute of Limitations.

Plaintiff's opposition offers little to refute the argument that the lower court erred in equitably tolling the statute of limitations. Again, all of Defendants' partial payments and/or promises to pay Plaintiff were conditional. (See Db7-14).

Plaintiff mischaracterizes the holding in *Renault v. L.N. Renault & Sons*, 188 F.2d 317 (3d Cir. 1951), upon which he relies. In *Renault*, the plaintiff was the executrix of the decedent's estate, which included a 1921 demand note executed by the defendant to the decedent. *Id.* at 318. Following the decedent's death, the defendant gave the plaintiff approximately 32 checks between 1946 and 1947. *Id.* at 318-319. Each check was made payable to the plaintiff without any notation regarding the payment. *Ibid.* The defendant later argued that these checks were not issued to plaintiff as decedent's executrix with respect to the note but rather as payment to the plaintiff personally for promotional

work she had done for defendant's company. *Id.* at 319. The plaintiff refuted the defendant's explanation for the payments, instead arguing the defendant promised to make good on the demand note and that the checks constituted partial payments towards the note, thereby renewing the statute of limitations on the defendant's obligation to discharge its obligation. *Ibid.*

After a jury failed to agree on a verdict the district court entered judgment as a matter of law in favor of the defendant. *Id.* at 318. The Court of Appeals concluded that this was improper and reversed and remanded the matter for a new trial, concluding the plaintiff was entitled to have the jury determine the truth of her assertions and decide on the factual questions of what the payments were for based on the parties' credibility as well as whether the issuer of the checks had the authority to make payments on behalf of the defendant-corporation. *Id.* at 319, 321. The Court further noted that "mere payment of money by a debtor to his creditor does not, in itself, constitute proof that

the money was intended as partial payment on a particular obligation barred by the statute of limitations." *Id.* at 320. Rather, a factual analysis and determinations by the jury as to whether the partial payments were even related to the note, thereby implicating potential renewal of the statute of limitations under the equitable tolling statute, N.J.S.A. 2A:14-21, were required.

Here, there are no fact issues for the jury concerning Defendants' partial payment of Plaintiff's accrued wages. Rather, the issue is a legal determination as to whether the partial and conditional payments made by Defendants fit within the equitable tolling statute, N.J.S.A. 2A:14-21. They unequivocally do not.

Plaintiff also relies upon *Santiago v. Villoresi*, No. A-6063-05, 2007 WL 1790740 (App. Div. June 22, 2007) in support of his position that the statute of limitations was equitably tolled. (Pa12). In *Santiago*, plaintiffs made a $50,000 loan to the defendant, which required repayment within ten days and with 10% interest. *Id.* at *1. The defendant issued two checks, both of

which were dishonored, and subsequent attempts at collection were unsuccessful. *Ibid.* Five years later, the defendant wrote to the plaintiff stating he did not forget the debt and requested another six months to satisfy his obligations. *Ibid.* After six months elapsed without payment, the defendant wrote to the plaintiffs again promising to give them an update as to his ability to make payment within 30 days. *Ibid.* The defendant made various additional promises to pay over the next several years. *Ibid.*

Having received no payments, the plaintiffs eventually commenced suit for repayment of the debt. *Ibid.* Defendant moved to dismiss the suit based on the applicable statute of limitations. *Id.* at *1-2. Following a bench trial, the trial court found in favor of the plaintiffs. *Id.* at *1. The Appellate Division affirmed, acknowledging that the defendant's writing fairly implied that the plaintiffs had "the right and the power to demand payment immediately" and that the defendant was merely requesting a forbearance. *Id.* at *3.

To that end, as the defendant did not specifically state the basis for the forbearance request such as lack of available money, the court found the defendant's acknowledgement of his debt was not "positively inconsistent on [its] face with an unconditional promise to pay at once." *Ibid.* (citing *Denville Amusement Co., Inc. v. Fogelson*, 84 N.J. Super. 164, 171 (App. Div. 1964)).

The court's holding in *Santiago* actually supports Defendants' position in this appeal. Unlike the *Santiago* defendant who merely requested a forbearance while acknowledging the full amount of the debt was due and owing, Defendants conditioned each and every promise to pay and/or partial payment upon their financial position and Mr. Weber's business discretion, which is "positively inconsistent on [its] face with an unconditional promise to pay at once." *Denville Amusement Co., Inc.* 84 N.J. Super. at 171. Accordingly, Defendants' conditional partial payments and conditional promises to pay remove this case from the bounds of the equitable tolling

statute, N.J.S.A. 2A:14-21, and require strict enforcement of the six-year statute of limitations.

III. The Payment Application Rule Applies.

Defendants agree with Plaintiff that the Payment Application Rule applies. However, the matter nevertheless must be reversed and remanded to the trial court for modification of the jury's award.

CONCLUSION

For the foregoing reasons as well as those set forth in their moving brief, Defendants Gary Weber and AccuPoint Solutions, LLC respectfully request that the trial court's decision to toll the six-year statute of limitations be reversed and that the case be remanded to the trial court for modification of the September 27, 2024 Final Judgment.

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DATED: May 19, 2025