AMENDED

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO. A-937-24

BOROUGH OF CALDWELL, Plaintiff, v. COZZARELLI CIRMINIELLO ARCHITECTS, LLC, Defendant,	Docket No. Below/Sat Below: ESX-L-003126-24 Hon. Joshua D. Sanders, J.S.C. CIVIL ACTION

MEMORANDUM OF LAW OF DEFENDANT/APPELLANT COZZARELLI CIRMINIELLO ARCHITECTS, LLC

LAW OFFICE OF MARLO J. HITTMAN
354 Eisenhower Parkway, Plaza II
Livingston, NJ 07039
(973) 751-7000
Marlo J. Hittman, Esq.
Attorney ID#044391991
marlo@hittmanlaw.com
Attorney for Appellant

Of Counsel and the Brief:

Marlo J. Hittman, Esq.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Ordinances

TABLE OF ORDER BEING APPEALED

PRELIMINARY STATEMENT

Defendant-Appellant Cozzarelli Cirminiello Architects, LLC (CCA") appeals, following grant of leave, the denial by the Trial Court of its Motion to Dismiss the Complaint of Plaintiff-Respondent, the Borough of Caldwell ("Caldwell") for failing to state a claim upon which relief may be granted.

Following a municipal election which resulted in a change of political party control of its governing body, Caldwell sought to claw back payments previously made to CCA under a contract for professional architectural services rendered, pursuant to Local Public Contracts Law (N.J.S.A. 40A:11-1, et. seq. and N.J.A.C.5:34) (LPCL"), in 2019-2022.

The services in question involved extensive involvement by various agencies within Caldwell, and multiple changes resulting from unexpected circumstances, such as a flood, change of planned location and change of scope of work.

Before every payment was approved and made, it was audited in accordance the borough manager Caldwell's Ordinance Scheme, Chapter 11 (Da175), and approved by resolution at a public meeting in accordance with the Open Public Meetings Act (N.J.S.A. 10:4-6, et. seq.) ("OPMA"). All approved resolutions regarding CCA payments remain in full force and effect, and no issue regarding its performance or payment has ever been subsequently placed on the agenda of a public meeting.

After reorganization in 2024, it became apparent that Caldwell had exhausted its bonding capacity and was thus unable to build the facilities it had spent so much time, effort and money on the CCA contract. In need of money, and without any *factual* investigation, review by a licensed architect or public notice of any kind, Caldwell commenced this lawsuit, asserting three causes of action against CCA, to recoup funds approved and paid in the aforesaid lawful process. It appears that Caldwell filed the Complaint without any factual investigation whatsoever and failed to consult its employees and former employees with firsthand knowledge. Without public notice, Caldwell retained a CPA auditor (i.e. not a licensed architect) which allegedly "audited" the bills and allegedly found the services performed by CCA to be, inter alia, lacking in quantity and quality.

CCA asserts, and is asking this Court to rule, inter alia, that municipal resolutions that have been passed at open public meetings can only be altered, amended or revoked by complying with the OPMA, including, where appropriate, requiring compliance with N.J.S.A. 10:4-13 for matters alleged to be subject to confidentiality pursuant to N.J.S.A. 10:4-12(7)(b), which confidentiality is denied in this case. The burden must by on Caldwell to meet the statutory criteria, not the public to refute it.

Caldwell asserted that matters were handled in "executive session" (See Transcript of October 3, 2024,1T 21-4 to 22-2. This was the only hearing date). It

did not purport to comply with N.J.S.A. 10:4-12(7)(b), which requires certain formalities of public reporting of a governing body, pursuant to N.J.S.A. 10:4-13 for a municipality asserting such confidentiality. Caldwell failed to follow, or even acknowledge, the governing statute on this issue and there is no such evidence of any such "executive session" having been conducted or documented in accordance with the statute. For this reason, and other reasons as detailed herein, the Trial Court's Order denying dismissal should be reversed, and the Complaint dismissed unless and until Caldwell follows the OPMA.

Further, the Court should apply the motion for summary judgment standard in precluding consideration of allegations on motion to dismiss based upon alleged expert opinions which would be patently inadmissible at trial due to lack of expertise and licensure for professions for which license is required. In this case, the Court should not have considered allegations as true, the "expert" opinion of an accountant as to the quantity and quality of architectural services, particularly in the absence of factual (as opposed to "expert" opinion) allegations.

Additionally, there are Consumer Fraud Act Claim should be dismissed based on the learned professional exception. The unjust enrichment claims should be dismissed for failing to set forth facts sufficient to allege the necessary elements of the cause of action separate and apart from the cause of action for breach of contract.

PROCEDURAL HISTORY

Plaintiff-Respondent, the Borough of Caldwell ("Caldwell"), is a municipal subdivision of the State of New Jersey, and is thus bound, inter alia, by the OPMA (N.J.S.A.10:4-6, et. seq.) and the LPCL (N.J.S.A 40A:11-1, et. seq. and N.J.A.C.5:34), filed a three-count complaint (Da16) against Defendant-Appellant Cozzarelli Cirminiello Architects, LLC ("CCA"), a firm of licensed architects, on May 5, 2024, asserting breach of contract, unjust enrichment, and breach of the Consumer Fraud Act (N.J.S.A. 56:8-1, et. seq.) in connection with services rendered from 2019 to 2022 by CCA to Caldwell for architectural services (Da Da16, 17).

CCA moved to dismiss the Complaint (Da123) for failing to state a claim upon which relief may be granted. Oral argument was conducted on or about October 3, 2024[1]. On October 11, 2024, the trial Court denied the motion (Da1 and Da2). A motion for leave to appeal, in accordance with R. 2:5-6 followed (Da157).

This Court granted the Motion for Leave to Appeal on December 2, 2024 (Da157).

CCA asserts, inter alia, that Caldwell does not have subject matter jurisdiction to bring the claim. Additionally, the contract (and any applicable extensions or amendments thereof) at issue in this case is a public contract

[1] The Transcript of the single hearing, on October 3, 2024, shall be designated as "1T".

(governed by the N.J.S.A. 40A:11-1, et. seq. and N.J.A.C.5:34 (local public contracts law), for which approval must be, and was, memorialized at meetings governed by the N.J.S.A. 10:4-6 (Open Public Meetings Act) (Da17-19)

Further, CCA asserts that the Consumer Fraud Act claim is barred by the learned licensed professional exemption. (Da2). In this case, CCA performed services that required licenses for architectural and planning services, with licensed professionals for all three professions.[2] (Da26,177-178, 189-190,193)

The Trial Court rejected licensed architects as a profession subject to the exemption, despite governing case law to the contrary, declaring, "the court has found no law divining that architects are subject to that exception" (Da2,4-8,12-15).

As such, the Trial Court also improperly rejected the exemption as applying in this case (Da4-8,12-15). CCA asserts that the learned professional exemption protects architects generally in the performance of architectural services, and CCA specifically for the architectural services provided in this case.

CCA professionals also provided included services required to be performed by licensed planners, as is often the case, architects hold licenses in multiple disciplines. The Trial Court did not address this distinction. CCA assets that the

[2] The two briefs filed by CCA are included in the Appendix at Da163 and Da176 respectively for the sole purpose of completeness of the record as to demonstrate the issues raised before the Trial Court. They are not otherwise cited to in this brief.

licensed professional exemption to the CFA also applies to licensed planners providing planning services, and the Court erred in refusing to consider this issue and find an exemption for these licenses as well.

CCA also sought dismissal of the unjust enrichment claim (Da2,9,24-25,175-177) on the basis that the parties have a contractual relationship, and Caldwell did not plead sufficient additional facts to meet each and every required element of an unjust enrichment claim.

The Trial Court rejected this argument (Da2,9), finding that it is acceptable to plead alternative legal theories in the alternative (Da10). In doing so, the Court answered a question that was not asked, and did not address the issue that was raised. Specifically, CCA *did not assert* that pleading in the alternative as to legal theories was precluded, but rather, that each such cause of action so pled required sufficient facts to independently set forth a prima facie case for each such claim, *and that Caldwell failed to allege sufficient facts which would sustain an unjust enrichment claim, even if all allegations were presumed to be true.* The Trial Court did not appear to address this question.

CCA asserts that the unjust enrichment claim is facially defective in that Caldwell failed to allege any retained value, unjust or otherwise, outside the scope of the written contract between the parties, and accordingly, it failed to make allegations regarding each required prong of the unjust enrichment standard.

(Da175-177) CCA acknowledges pleading in the alternative is permitted, so long as each separate cause of action is set forth with sufficient facts to make a prima facie claim so that it could stand alone. The Argument is that pleading in the alternative does not allow a claimant to skip a required element, as the Trial Court permitted Caldwell to do in this case.

Also, at issue in this case is whether the Court can rely upon as true, even in connection with the liberal motion to dismiss standard, allegations which would be patently inadmissible at trial. (Da11, 182-183,186-187, 191) (1T43-11,1T44-8)

Specifically, Caldwell alleged that its CPA auditor opined on the existence or sufficiency of architectural services as based solely on the invoices for such services. It is black letter law that a licensed expert can only opine within the area of his license and expertise, and that a licensed expert is required to opine of licensed professional services within the ambit of said licensure. (Da11) (1T43-11,1T44-8)

In this case, the allegations by Caldwell are that a licensed CPA/accountant/auditor opined on the existence, performance and quality of architectural services based on the review of invoices, not the documents or work product produced as described in the invoices. There is no allegation of review by a licensed architect or planner with respect to any allegation or issue asserted by Caldwell. (Da11, 182-183,186-187, 191) (1T43-11,1T44-8)

At trial, such opinion testimony would be per se inadmissible as impermissible expert testimony (N.J.R.E. 702 and N.J.R.E. 703). (Da11,182-183,186-187, 191) (1T43-11,1T44-8) By way of example, the auditors concluded that certain billed for documents were not produced nor provided. A list and selection of documents alleged by the auditors to have not been provided, and which were in fact provided, are contained at Da148-155. The auditors, perhaps skillful in one area, did not know what they did not know in another, resulting in the conclusion that documents in the possession of Caldwell did not exist.

It is not alleged that the auditors had any personal knowledge as to these documents, nor that they reviewed any files other than invoices. Significantly, the Complaint does not allege a factual investigation of the kind presumed to be required by Counsel as a matter of diligence in accordance with R. 1:4-8, and in fact, it appears that no such factual investigation occurred prior to filing.

Simply there are no allegations in the Complaint of inquiry with the individuals employed or previously employed by Caldwell and having personal knowledge of the various meetings held, assignments given and documents produced.

Accordingly, the Trial Court failed to consider the *admissibility* of the allegations and assumed as true patently inadmissible claims by accountants' opinions as to the quantity and quality of the services performed by architects. As

the Trial Court was adjudicating a motion to dismiss under R. 4:6-2, with additional materials provided for consideration, which thereby automatically converted to a R. 4:46-2 summary judgment motion according to rule.

Under the summary judgment standard, which considers admissibility, the Trial Court should not have relied upon as true allegations which are patently inadmissible as lacking expertise in a licensed profession. This is the standard which should have been used.

The Trial Court thus found the allegation of accounting opinion adequate to set forth a cause of action for issues related to licensed architecture services, for which an entirely different license is required. In the absence of allegations of fact based on the knowledge of individuals with firsthand knowledge, this should not have been considered by the Court below. (Da11)

CCA is asking the Court to rule that on a motion to dismiss, which is automatically converted to a summary judgment motion through the filing materials outside the Complaint, a reviewing Court should be directed to also review issues of admissibility under the same standard applies to motions for summary judgment, and inadmissible allegation should not be permissible to form the basis of a prima facie cause of action.

STATEMENT OF FACTS

This case is, plain and simple, impermissible lawfare. Caldwell, a municipality, is attempting to reverse and claw back payments made to architects with which it contracted, CCA, following a change of majority party on its governing body following the November 2022 election. (Da128,132)

Commencing in 2019, Caldwell retained CCA for several infrastructure projects.(Da18-20,62,88,91,108,118,) CCA, and its principals are licensed architects and licensed planners, and are thus to the rules governing licensed professionals for these two licenses. Architects provide professional services, as that term is defined under N.J.S.A. 40A:11-2(6), and thus, the contracts at issue herein are subject to those standards. As such, as a matter of law, the rules of "bidding", requests for proposals, etc. do not apply in the selection of architects and planners, nor do the repeated changes and additional requests by Plaintiff that occurred over the course of years. (Da62,88,91,108,118)

(N.J.S.A. 40A:11-5(1((a)(i), where professional services are listed as an "exception"). This fact is acknowledged by Caldwell in the resolutions attached to its complaint (Da62, 088, 091, 108, 118).

Significantly, because the proposals that were adopted by Resolution (Da62, 088, 091, 108, 118) have attached to them specific detailed proposals as to the scope of work which includes various facts that were outside the personal

knowledge of the auditors, and technical standards that were outside the knowledge, expertise and licensure, Caldwell had neither factual nor expert allegations which, even if true, would be admissible. Simply, accountants were not qualified to determine whether the tasks described in the various proposals (Da30-57, Da64-74, Da76-86, Da95-106, Da111-116) did or did not occur.

Appellant asserts that it is improper, given the complexity of the services rendered, and the proposals involved, including circumstances where additional charges were permitted based on events as they transpired, (i.e. such as items not included that may nonetheless have been requested and billed in accordance with the proposals (Da33, Da38, Da44, Da50, Da56, Da68, Da80, Da99-100, Da114).

These expressly excluded items, as set forth in the proposals Da33, Da38, Da44, Da50, Da56, Da68, Da80, Da99-100, Da114), would be an extra charge if the services were requested, performed and accepted. An auditor could not know whether these services were performed, and thus billed properly, without a factual investigation which the Complaint does not allege to have occurred.

Simply, knowledge of these processes, including billing for architectural services, is within the scope of a licensed architect, and outside the scope of an accountant. These is simply no way, absent the non-existent factual investigation, and expert review by a licensed architect, that an auditor could conclude what was or what was not performed, and thus what was or was not properly billed. Some of

the services about which Plaintiff complains as paid improperly were actually included as required services in the initial request for proposal for services. (Da125-137)

The auditor simply opined that technical activities beyond the scope of their expertise did not occur, and that documents did not exist, or were double billed, while Caldwell made no factual inquiry as to the work actually performed. The allegations in the complaint are based on this false paradigm, and accordingly, could not be presumed as sufficient to set forth a cause of action. (Da9,23,134)

Simply, the process undertaken by Caldwell was not designed to get to the truth of the matter but designed to have plausible cover to recoup money duly paid for services rendered.

All payments made to CCA by Caldwell were subject to audit and scrutiny. (Da127-130,133-134,156). Not a single payment was made to CCA until the work was reviewed and audited by various Caldwell departments based on their function, and all invoices were reviewed and audited by the Borough's business manager and then submitted to the Council for approval and payment authorization, before payment could be made. (Da127-130,133-134,156). The Complaint is *silent* on this pre-payment audit procedure. It is also *silent* on its own prior compliance with Title 11 of its Ordinance.

Every single payment was well vetted by the proper governmental personnel at the time for both cost and function as appropriate. Accordingly, various parts of the project were reviewed and audited by the Police Department, Library Board, Health on Human Services officials, Community Center Board and Fire Department. (Da127-130,133-134,156). While the work was ongoing, there was an extensive auditing process on a nearly daily basis for performance and payment. (Da127-130,133-134,156).

The business manager at the time was Thomas Banker ("Banker"). He resigned on December 31, 2022 due to the change in governance on election. He audited all services before payment was even submitted to the Council for approval. (Da128-129, 132, 135-136)

Glenn Beckmeyer, P.E., who was then, but is no longer the town engineer, reviewed all the services billed. As of the time of the underlying motion, and although he remained on the Plaintiff's website as engineer, he informed CCA that his employment had concluded. (Da128)

The code official, Paul Milani, the Director of Public Works, Mario Bifalco and the Communications Officer, Raymond Sullivan also reviewed many of the documents as to their particular areas of expertise, but they would not have knowledge about contract compliance or the proper performance of architectural services. (Da128). These individuals were able to confirm to Banker, and in fact

did confirm to Banker at all relevant times, that the scope of work relevant to their disciplines had been performed and performed correctly. Had this confirming information not been provided, Banker would not have approved invoices for submission to the Counsel for approval and payment. (Da128-129).

It does not appear that any of these well-known individuals, comprised of employees and former employees of Caldwell, and clearly available to it for this purpose, were interviewed for the purpose of conducting a factual investigation for the preparation of the Complaint. There are no allegations in the Complaint which purport to be the first-hand knowledge of any of these known named individuals who were personally involved in the oversight process and other contract-related events.

The allegations in the complaint are devoid of allegations from which the Court could conclude that that ordinary due diligence as to an investigation of the factual background of contract was undertaken in this case as would be required by R.1:4-8. The Court below overlooked this complete absence of factual allegations and accepted instead the assumptions that were completely fabricated by the accountants without regard to the architectural facts and standards.

This is one of the reasons why the Appellant is asking the Court to rule that even on motions to dismiss, allegations should have facial admissibility to be considered. In this case, not only did the accounting expert opine on issues outside

the scope of its licensure/expertise (N.J.R.E. 702), but it also fabricated its own assumptions of fact in the absence of factual allegations in the complaint. At trial or summary judgment, an expert would never be allowed to opine on facts not in evidence, i.e. a net opinion (N.J.R.E. 702). (Da11,1T43-11) In this case, the Trial Court should not have assumed as true an expert opinion based on factual allegations that were not made in the complaint, particularly where the expert was not licensed in that discipline, and the party opposing the motion was the employer or former employer of all the relevant factual witnesses on this issue.

As set forth above, CCA followed as required audit procedures, as directed by Banker, in accordance with Ordinance, and Caldwell does not allege to the contrary. Every payment that CCA received was audited at the time by the proper personnel then employed by Plaintiff and approved for payment by the duly elected Council in accordance with its ordinance. (Da127-129)

The work performed was extensive. It was impossible to reproduce as part of this motion, as the record is in the thousands of pages. However, by way of example, the motion record contains, commencing at Da148, a list of documents produced by CCA in furtherance of the contract. Each and every one of these documents, and others, including various drafts and related documents, were provided to the appropriate departments of Plaintiff for review and audit. (da130) They were in the hands of Banker and the Counsel each and every time a voucher

for payment was submitted and each and every time one was approved. (Da130-131). Caldwell's auditors, *with no factual investigation whatsoever*, allege these documents do not exist. This failure of a factual investigation, and concomitant failure of R.1:4-8 diligence is highly prejudicial to CCA.

It is also important to note that while the design project for which CCA was tasked was ongoing, the Plaintiff suffered devastating casualty losses due to Hurricane Ida, which resulted in many changes in the necessary scope of work. Specifically, some of the buildings that were initially slated for renovation had to be rebuilt from scratch. (Da125-137)

These new buildings which were thus needed to be constructed (as opposed to renovation of the destroyed older buildings), required conformity with the current building code which has different standards, and thus greater costs, than a prior building code. Newly constructed buildings must include such things as seismic reinforcement and ADA compliance. This is significantly more expensive and expansive than the cost and effort to retrofit an existing older building that was otherwise serviceable. None of these problems could have been contemplated before Hurricane Ida and could not be avoided after it. (Da95,131,134,)

Additionally, the need to erect a new building, rather than renovating an existing building, invoked a new set of zoning and planning requirements that

could not been contemplated prior to Hurricane Ida, and could not be avoided after it. (Da125-137)

It is unknown whether Caldwell had insurance coverage for the casualty losses, whether a claim was made, and whether it received payment. However, some of the services provided and billed related to rebuilding a structure that was destroyed in the hurricane and could thus not be used through no fault of either party. However, reimbursement for prior payment for these now unusable services are of the kind that would have been included in the reimbursement in an insurance claim.

This would be an architecture question, not an accounting question, as evidence of architecture work and its subsequent mootness, could not be properly performed by an accountant. If such an undisclosed insurance claim was made and paid, it seems that Plaintiff is currently attempting to "double dip" and recovered for services rendered that were effectively reimbursed by insurance claim payments.(Da132) This is another factor as to why the failure to allege a factual investigation, and the Trial Court's acceptance thereof, is a travesty.

This, of course, further begs the question as to how an accounting audit, and the allegations related to an audit, could have properly been conducted when the subject of review was destroyed in a natural disaster. If possible, at all, this type of review could only have been done by an architect.

CCA's relationship with Caldwell was terminated as a result of the partisan turnover in early 2023. CCA was not alleged to have done anything wrong at that time. CCA learned thereafter, through various "grapevine" sources, that Caldwell is now unable to build the structures that were designed because, inter alia, it ran out of money. (Da125-137)

CCA also learned, upon information and belief, that the Caldwell has exhausted its bonding capacity and is thus not able to issue municipal bonds to finance the construction of the buildings as contemplated. (Da132-133) Given the absence of factual investigation, there is ample reason to believe this lawsuit was commenced by a new administration, upon change of political party (Da128), to attempt to void, retroactively, the prior approved and paid policies the prior administration that were implemented and approved in accordance with governing law. CCA, having been retained by the party opposing the one currently in power, is being targeted because of its prior retention by the opposing party. It is not a proper use of the Courts to punish vendors who were paid for services lawfully provided for political punishment and gain. It is certainly not proper to do so without exposing the issue to public scrutiny under the OPMA.

An incoming political administration should not be permitted to claw back payments duly made for services rendered and audited and approved in accordance with governing law because the political landscape has changed. This case is,

plain and simple, a political claw back effort because Caldwell can't construct the planned buildings. The body of work which CCA produced is essentially a stranded asset that can't be used for its intended purpose due solely to the mismanagement of Caldwell. Caldwell is seeking to have CCA essentially indemnify it for its own prior mismanagement.

CCA expressly rejected the claim that there was double billing (Da134). There were multiple renditions of buildings as necessitated by the requested changes in the scope of work. For every drawing that was done and reviewed prior to Hurricane Ida, it had to be redone and reviewed a second (or in some cases a third) time due to the change in the scope of work necessitated by the natural disaster. There was no double billing; there was substantial additional work requested and performed. (Da125-137) Had Caldwell done even a rudimentary factual investigation, it would have known this.

The Caldwell employees on the ground at the time were aware of this and that is why the charges were approved at the time they were audited and approved. They are no allegations to the contrary. Caldwell should not have been excused by the Trial Court, as it was, from making factual allegations based on a diligent investigation of, at the very least, its own employees. Reliance on inadmissible "expert" opinion allegations, where an expect is opining on subject matter in which they are not competent, in the complete absence of allegations as to factual

diligence should not be considered adequate notice pleading sufficient to defeat a motion to dismiss.

By way of example as to the confusion that this prejudicial standard caused, there is an allegation of $25,000 of services related to bid services of other vendors, those services were provided by CCA but alleged not to have been provided. (Da20,22,24,67) It appears that Caldwell and its auditor do not understand the process and existing language in the resolution. (Da67,098,122,134,135)

The concept of "assisting" in the review of bid packages submitted by other proposed contractors related to construction is a common service provided by architects and is in fact a term of art. Architects are generally paid by the hour at the agreed upon rate for this service. An architect would know this; an accountant would not. However, in this instance, CCA was paid a fixed amount of $25,000.00 for this service at the request of Banker. The $25,000 was for Phase II of the Municipal Bldg. contract. (Da098,134,135) This was for bidding and negotiation services of the kind generally performed by architects. An architect would know this; an accountant would not.

Banker asked for only lump-sum fees. (Da134-135) The only time hourly rates would have been used would first have had to been approved by the Council and Banker. Schedule A was there for that purpose. (Da135) A rudimentary factual

investigation of Caldwell's own employees and prior employees, of the kind required by R.1:4-8, would have revealed this fundamental historical process contained in its own records.

Banker continually praised CCA for its work, its work ethic and he acknowledged the amount of time CCA provided and its dedication to the projects. Additionally, Banker did make CCA aware of the amount of money that Caldwell had for all of the projects. He told all of the professionals this and he reviewed all fee requests. He informed CCA that he would object if they were not consistent with the work product provided. (Da135)

Had Caldwell investigated its own records, as R.1:4-8 imposes a requirement to do, it would have been discovered that if CCA had invoiced hourly the fees for the Phase II work, the hourly charges would have vastly exceeded the lump sum payment. CCA tracked all of its hours. Banker essentially negotiated a discount for the benefit of Caldwell, which it received, which charges should have been substantially higher. (Da135)

Caldwell underpaid CCA. Caldwell received more than the reasonable value of its services. Banker knew this. (Da136) None of the services were performed and paid outside the scope of the contract; and every service performed, and voucher submitted and approved for payment were inside the scope of the added scope of work provided for in the contract. (Da136) Not only did CCA not perform less

work than it was paid for, but it actually performed more. It has a claim for invoices in the amount of $148,500.00 that were issued and remain unpaid.(Da125-137) These services were provided, and the invoices are due, owing, and unpaid from Caldwell to CCA for services rendered before discharge.(Da136-137)

All payments were made to CCA, after audit and public resolution. None of the resolutions have been revoked or altered. There is no allegation in the complaint that audit process compelled by ordinance was incomplete, improper or otherwise defective. There has been no public exposure of the issues set forth in the complaint to claw back payment.

Caldwell's Counsel alleged at oral argument, *for the first time*, that this litigation was allegedly authorized by the executive(s) of the governing body in private. 1T21-22-1T22-2. It is not alleged to have been subject to an executive session in the complaint or the opposing motion papers. No allegations or evidence in this record support such a meeting having occurred in accordance with governing law.

While it is acknowledged that certain matters which could be subject to attorney client privilege are permitted, under certain circumstances, to be conducted in private in accordance with N.J.S.A.10:4-12(7)(b)7, in order to advantage itself of that statutory exception, a governing body must first pass a resolution, in accordance with N.J.S.A.10:4-13 authorizing the private session under the

conditions set forth in the statute, and keeping minutes of the meeting thereafter conducted in accordance with the terms of N.J.S.A.10:4-14. There is no evidence that any such meeting, private or otherwise actually took place, nor that meeting minutes authorizing any such action as required by statute actually exist.[3]

CCA asserted in its motion that that which was done by resolution/ordinance can only be undone in a similar fashion, and that absent a resolution, authorized at a public meeting, there is no subject matter jurisdiction for the current lawsuit.(Da172-175;1T4-24 to 6-25; 1T8-18 to 9-13;1T10-1 to 10-23;1T12-19 to13-9) It is further respectfully submitted as CCA's position in this case that for a prior approved resolution to be reversed, or investigated to be reversed, even at private session, the foregoing statutory procedure would have to occur. Further, it is CCA's position that a Complaint would have to recite factual allegations of appropriate compliance with the OPMA in order to confer jurisdiction to pursue litigation that would reverse, in whole or in part, a prior resolution.

There are no such allegations in the Complaint in this case, and no such information that would support such factual allegations to allow the pleading to be amended or corrected. All information available at this time is that Caldwell simply did not adhere to its statutory mandate in commencing this case.

[3] The OPMA also permits financial penalties against municipalities for breaches of the OPMA pursuant N.J.S.A. 10:4-17. CCA is not suggesting such a financial penalty is warranted in this case; this information is only offered to demonstrate how serious and diligent the legislature intended compliance to be performed.

Further, no person involved in the underlying events has yet been identified, either in the Complaint or informally, that supports the allegations in the Complaint on a factual basis based upon firsthand knowledge. A public meeting, even to the limited extent required by N.J.S.A. 10:4-13, would have flushed out these issues- exactly as the Legislature intended.

Further, it is also submitted that there needs to be time limitations on the alterations of payments to contractors made by resolution, and that the time in which to bring such a case should be limited either by the 45 days which govern actions in lieu of prerogative writs, or the passage of an election after which a new governing body is constituted. (Da174-175); Where a municipality following its own auditing law, followed by a resolution authorizing payment, a new governing body should not be permitted to balance its budget on the backs of contracts duly performed and paid at the direction of the other political party while in power.

The moral hazard of a change in government allowing a new governing body to punish the prior administration's contractors by attempting to claw back contract payments for services long ago rendered should be beyond the pale of a new municipal administration: so long as ordinances governing audit and payment have

been followed, as they were in this case, they should be final after a reasonable period after payment.[4]

Caldwell has also asserted a claim under the Consumer Fraud Act (N.J.S.A. 56:8-1, et. seq.) against CCA, an LLC comprised solely of licensed architects. (Da26) The Court below failed to acknowledge the existence of learned exemption for licensed professionals for architects which provide architectural services (Da2,4-9,12-14). In fact, the Trial Court expressly rejected architects as learned professionals covered by the exemption. (Da12-14) CCA is seeking to have this Court determine that licensed architects, licensed planners, and to the extent CCA employed licensed engineers as subcontracts, licensed engineers, are all learned professionals covered by the exemption in the performance of such services for which a license is required.

The Court below also rejected CCA's request to dismiss Caldwell's unjust enrichment claim (Da24-25) on the basis that Caldwell had not pled facts adequate and sufficient to make a prima facie case for unjust enrichment(Da175-177). The Court rejected the motion on this issue, ruling that it is permissible to plead in the alternative (Da10). CCA does not suggest that pleading in the legal alternative is not permitted. Rather, CCA is suggesting that when pleading in the alternative a

[4] CCA is not suggesting that non-contract type claims, i.e. professional malpractice, which is not alleged in this case, and for which insurance coverage would exist if it were, should be excluded from future claims. In fact, the absence of a malpractice claim, which would clearly require Caldwell to engage in a review by a licensed architect and a licensed planner is very telling as to the bona fides, or absence thereof, of the factual and legal basis of the claims.

party, and this a pleading, must set forth sufficient facts necessary to satisfy each required element of each alternatively pled claim.

CCA asserted, and the Trial Court did not address or recognize, that the allegations in the Complaint, which were based largely in the disputed accountant's report, did not set forth any facts from which the Court could glean that there was remuneration outside the scope of a contract, as required by case law (Da175-177). See Point IV , infra. Caldwell theoretically could have asserted such necessary facts, but it did not. It was incorrect for the Trial Court to excuse Caldwell from pleading, from a *factual* standpoint, all necessary elements of a claim, even where pleading in the alternative was permitted.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY FAILED TO GRANT THE MOTION TO DISMISS THE COMPLAINT. (Da1,2-4,8,10-12)

This motion to dismiss below was governed by R.4:6-2(e) , which provides in pertinent part:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs:…. (e) failure to state a claim upon which relief can be granted….. If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion. Special appearances are superseded. If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

In this particular case, the motion papers contained materials outside the pleading, triggering the automatic conversion to a motion for summary judgment.

Our Supreme Court has stated:

> The standard traditionally utilized by courts to determine whether to dismiss a pleading for failure to state a claim on which relief may be granted is a generous one. As we have explained, "[i]n reviewing a complaint dismissed under Rule 4:6-2, our inquiry is limited to examining the legal sufficiency

> of the facts alleged on the face of the complaint." Printing Mart-Morristown, supra, 116 N.J. at 746, 563 A.2d 31. The essential test is simply "whether a cause of action is 'suggested' by the facts." Ibid. (quoting Valentzas v. Colgate-Palmolive Co., 109 N.J. 189, 192, 536 A.2d 237 (1988)).
>
> In exercising this important function, "a reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (internal quotation marks and citation omitted).
>
> Moreover, "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[,]" rather, "plaintiffs are entitled to every reasonable inference of fact." Ibid. As we have stressed, "[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

Green v. Morgan Properties, 215 N.J. 431, 451-452 (2013)

In the matter at bar, this Court is asked, on leave to appeal granted, to reverse the denial of the Court of a motion to dismiss for failing to state a claim and dismiss the complaint for the reasons set forth herein. The review by this court is de novo, with no special deference granted to the trial court. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Further, even when a Court exercises discretion, it may not stand if based on a mistake or misapprehension of law. See Summit Plaza Assocs. v. Kolta, 462 N.J.Super. 401, 409 (App. Div. 2020); See also Alves v. Rosenberg, 400 N.J. Super. 553, 563 (App. Div. 2008).

Given the foregoing legal standard on a motion dismiss, and the foregoing standard of review, the Complaint should have been dismissed by the Court below, even with the most indulgent treatment afforded in such motions.

In this particular case, the Court's ruling endorsed an impermissible violation of the OPMA, failed to acknowledge the existence of the learned exception for, inter alia, architects, and failed to require all elements of a cause of action be factually pled on the unjust enrichment cause of action.

Further, the Trial Court below failed to consider the credentials and admissibility of the "expert" opinion that was pled, in violation of N.J.R.E. 702 (regarding the credentials of an expert) and N.J.R.E. 703, regarding "net opinions". The Trial Court thereby erred in determining that a cause of action regarding licensed architect was pled based upon the net opinion of an accounting. Had the Court properly considered admissibility standard on summary judgment, the allegations based on an accounting report regarding architectural services would not be admissible at trial. See O'Brien v. Telcordia Techs., Inc., 420 N.J. Super. 256 (App. Div. 2011). There is simply no way the accounting information can morph into architectural information sufficient to meet admissibility standards under N.J.R.E. 702 to qualify the accountants to give an opinion on issues outside their licensed discipline. The Court should not have considered such allegations sufficient on the motion to dismiss and dismissed the entire complaint for this

reason alone. This is particularly true where, as here, Caldwell failed to conduct even the most basic diligence as required by R.1:4-8.

The failed to properly apply the requisite legal standard to the motion below, and the case should be dismissed.

POINT II

THE ENTIRE CASE, INCLUDING THE CAUSE OF ACTION FOR BREACH OF CONTRACT, SHOULD HAVE BEEN DISMISSED. (Da1,2-4,10-11)

It is well-settled that a party bringing a claim has the burden of establishing all elements of a cause of action, including jurisdiction, and the Court may not hear a case in the absence of subject matter jurisdiction. See Citibank, N.A. v. Estate of Simpson, 290 N.J. Super. 519 (App. Div. 1996); See also Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55 (1978). CCA asserts that subject matter jurisdiction in this case is precluded by an Ordinance and resolution structure, and the subsequent failure to follow the OPMA.

It is undisputed that the payments previously made to CCA were made by resolutions in accordance with the OPMA before the governing body in compliance with the OPMA. Prior to said resolutions, Caldwell ordinances were followed as required. Under the Ordinance voucher system in Caldwell, Sec. 11-2 provides:

> A voucher shall have the certificate of an officer or employee of the borough having knowledge thereof that the work has been performed or the goods and materials have been received or the services rendered as stated.

The Township Manager performs these services as required before payment was considered and submitted to the treasurer of the borough such information as required. It is undisputed that prior to the payments to CCA, Banker did in fact perform these services.

The Caldwell treasurer then audited the approval by Banker, in accordance with Sec. 11-3, which provides:

> It shall be the duty of the Borough Treasurer to audit and approve each voucher.

Then, before payment was approved the following occurred in accordance with Sec.11-4:

> Each voucher shall then be presented to the Chairman of the Council Committee having jurisdiction over the work, goods or material or services for which the claim is made (or, in the absence of the Chairman, by another member of the Committee), who shall recommend payment of the claim. After such approval, the vouchers shall be presented to the Finance Committee for its approval, and thereafter the Clerk shall present the schedule of bills to the Council for formal approval and payment by resolution at the next regular meeting of the Mayor and Council. A record of all claims ordered paid shall be incorporated in the minutes of the regular meeting.

As a result of this ordinance scheme, each and every payment made to CCA over the years was approved and tendered as a result of a municipal resolution. Not

a single one of those resolutions has been reversed, vacated or otherwise altered. The resolutions remain of record. *The breach of contract claim is effectively asking this Court to reverse previously fulfilled public resolutions of a municipal governing body issued in accordance with its ordinance scheme.*

The last section of the ordinance scheme (Sec. 11-5) provides for the signature and transmission of payment process after public resolution of the governing body approves such payment. Significantly, there is nothing in the ordinance that expressly allows a payment or resolution for payment to be revoked or reversed after it is made.

So long as the ordinance process is followed to facilitate payment, as it was, and the appropriate resolutions issued, there is no vehicle for any payments made in compliance of the ordinance to be reversed merely by a subsequent lawsuit. In fact, the reverse is true. The payments made by resolution are governed by New Jersey law regarding objections to properly passed resolutions.

It is further undisputed that there were no subsequent OPMA proceedings in which issues related to CCA, or payments made to it, were on the agenda either publicly or privately. It is further undisputed that there is no allegation or external evidence that Caldwell attempted to alter, amend or revoke and prior resolution through open resolution. CCA asserts a Court has no subject matter jurisdiction to hear Caldwell's claim unless and until it flows the OPMA, which should be

deemed a necessary prerequisite for all such claims. See Sitkowski v. Zoning Bd. of Adjustment of Borough of Lavallette, 238 N.J. Super. 255 (App. Div. 1990); Saddle River Tp. v. Pub. Serv. Elec. & Gas Co., 110 N.J.L. 433 (1933); Najduch v. Twp. of Indep. Planning Bd., 411 N.J. Super. 268 (App. Div. 2009)

N.J.S.A. 10:4-7 declares the public policy of this state as follows:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
>
> The Legislature further declares it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.
>
> The Legislature, therefore, declares that it is the understanding and the intention of the Legislature that in order to be covered by the provisions of this act a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect persons' rights; that, therefore, informal or purely advisory bodies with no effective authority are not covered, nor are groupings composed of a

> public official with subordinates or advisors, who are not empowered to act by vote such as a mayor or the Governor meeting with department heads or cabinet members, that specific exemptions are provided for the Judiciary, parole bodies, the State Commission of Investigation, the Apportionment Commission and political party organization; that to be covered by the provisions of this act a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business; and therefore, typical partisan caucus meetings and chance encounters of members of public bodies are neither covered by the provisions of this act, nor are they intended to be so covered.

There is no dispute that with respect to any effort to undermine the previously passed resolutions, there was no public meeting. N.J.S.A. 10-4-11 declares it a violation of the act to fail to invite the public as required to a meeting. It should be self-evident that Caldwell failed to invite the public to a required meeting.

Nor may Caldwell seek refuge in the claim that certain matters were handled in private or executive session: the OPMA has an answer for that defense as well. N.J.S.A. 10:4-12(7)(b)7 permits private sessions under certain circumstances and for certain reasons. Caldwell did not follow the requisite procedure for such a confidential meeting. Clearly, the burden must be on the burden seeking confidentiality to establish statutory compliance.

Further, N.J.S.A.10:4-13 requires:

> No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public

> body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject to be discussed; and
> b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

Lastly, N.J.S.A. 10:4-14 requires minutes be kept and available to the public, to the extent possible, with appropriate redaction for the limited issues permitted by subsection 7(b), above only.

In this particular case, there is no such resolution authorizing private meetings, no minutes of meetings which are alleged to have taken place, and no evidence as to who, and how many members of the governing body authorized this lawsuit. In fact, there is no evidence that a majority of the governing body authorized such a suit or current town manager authorized such a suit. While the parameters of this case are far beyond a detailed examination of the Faulkner Act (N.J.S.A. 40:69A-31, et. seq.), absent a public meeting with minutes, or appropriate meeting of a resolution lawfully approving a confidential meeting as set forth above, it is impossible to determine from this record that Caldwell actually followed the Faulkner Act in commencing this lawsuit. There is no evidence that the Council voted for approval of a resolution to commence a lawsuit, nor that such a vote was by the required majority. In fact, on this record, it cannot be confirmed that any single council-member even knew of the lawsuit

before its commencement, nor knows of it now. There is certainly no resolution in this record authorizing the appointment of an auditor[5], the report of which allegedly forms the basis of the complaint.

The existing resolutions prior resolutions authorizing payment to CCA must govern. This case, which required compliance with OPMA, even for matters considered to be confidential, must be dismissed as lacking subject matter jurisdiction. Caldwell must be held to account to comply with the OPMA and may not be rewarded with a case for its failure to do so.

Further, this Court should rule that in the absence of a resolution, procured in compliance with the OPMA, the auditor's report may not be considered and may not be presumed valid under the standard for a motion to dismiss.

Lastly, with respect to the motion to dismiss standard, the Court should clarify that in future cases, a reviewing trial Court may not presume as true allegations made by an expert on issues of expert opinion (as opposed to facts on personal knowledge) outside the scope of said licensed expertise where a license is otherwise required.

Had there been a viable dispute at the time of the resolutions on this issue as to payments authorized by resolution at public meetings, the remedy would have

[5] Par. 22 of the Complaint (Da20) describes the auditor as having been retained by Caldwell, will no mention of a resolution. While LPCL permits Caldwell to select its own approved auditor, it would still require a resolution to retain them, as CCA was retained by Resolution. Accordingly, it cannot be presumed that the auditor is lawfully retained, in addition to the other defects its report presents.

been to commence an action in lieu of prerogative writs brought within 45 days of the resolution(s) (See N.J.S.A. 10-4-15), all of which occurred in 2022 and before.

This case, which commenced in 2024, is long past that statute of limitations. CCA did not know that Caldwell was attempting to take action against these prior resolutions until it was already a Defendant in this, which resulted in the motion to dismiss below, and this Appeal, on leave granted.

In this case, this lawsuit is a political effort by a newly elected administration to nullify and reverse the conduct of the prior governing body *without revoking the resolutions*, which they are unable to do because they were passed in accordance with an ordinance scheme; efforts of reversal would be a violation of that scheme because ordinances trump resolutions, and municipal executives can't act in a manner that is adverse to a resolution without a new corrective resolution. Caldwell is attempting to collaterally attack its own resolution in this lawsuit because it appears to lack the ability to revoke it. At the very least, it appears to want to avoid exposing the dispute to the public and has assiduously avoided its own internal investigation. Putting any of these related matters on the OPMA agenda would expose its improper scheme.

Certainly the new executive, even where acting by committee in a private executive session, should not have the authority to unilaterally, secretly and privately, to subvert the publicly passed resolutions of the municipality without at

the very least, passing a new public resolution, and exposing the issue to public comment in an open and public meeting, with notice to the public and all interest parties that the issue is on the agenda.

Leave to appeal should be granted and the Court's Order denying dismissal of the complaint should be reversed. On leave to appeal, the entire complaint should be dismissed for this reason. This lack of subject matter jurisdiction should defeat all causes of action.

POINT III

THE COURT BELOW FAILED TO APPLY THE LICENSED PROFESSIONAL EXEMPTION TO THE CONSUMER FRAUD ACT. (Da1,2-4-9)

The complaint at issue purports to set forth a cause of action under the Consumer Fraud Act ("CFA"), for the provision of architectural and planning services, but fails to do so, as the allegations, in addition to being untrue, lacking in the specificity required for pleading causes of action for fraud, are also shielded by the "learned profession" exception:

> To violate the Act, a person must commit an "unlawful practice" as defined in the legislation. Unlawful practices fall into three general categories: affirmative acts, knowing omissions, and regulation violations. The first two are found in the language of *N.J.S.A.* 56:8-2, and the third is based on regulations enacted under *N.J.S.A.* 56:8-4.

Cox v. Sears Roebuck & Co., 138 N.J. 2, 17, 647 A.2d 454, 462 (1994).

However, not every sale of "services" is governed by the CFA. When such services are governed by another licensed regulatory scheme, they are not:

> The rationale underlying the learned professionals exception is that uniform regulation of an occupation, where such regulation exists, could conflict with regulation under the CFA. *See Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 272, 390 A.2d 566 (1978)

Lee v. First Union Nat'l Bank, 199 N.J. 251, 264 (2009)

It is respectfully submitted that CCA is entitled to the "learned professional" exemption under the CFA. See Macedo v. Dello Russo, 178 N.J. 340 (2004), as it was performing services as licensed architects and planners, and no other services. See also Crisitello v. St. Theresa Sch., 255 N.J. 200 (2023); Sun Chem. Corp. v. Fike Corp., 243 N.J. 319 (2020). It is the nature of the services, not the nature of the claim, which governs this issue.

It is submitted that the Consumer Fraud Act cannot be applied in this situation, where the services rendered are the result of a professional licenses regulated through the architectural and planner licensing schemes.

It is noteworthy that the Court below completely ignored the case of Blatterfein v. Larken Assocs., 323 N.J. Super. 167 (App. Div. 1999). Blatterfein considered the "learned exception" for architects, and generally approved of the same, but did not apply it in that case because the CFA claims related to additional services not related to the provision of architectural services. Thus, in a compound

task case, an architect can be held liable for such tasks as providing services in realty sales or a construction contractor, but not architectural services. In this case, the only services provided by CCA were as licensed architect and licensed planner. There were also services provided by licensed engineers as subcontractors. There were no realty sales nor construction contracting services, the exceptions noted in Blatterfein. Simply, there were no services provided in this case that fall outside the scope of licensed professions, and none is alleged by Caldwell.

The ruling in Blatterfein would imply that proper architectural services, such as the kind in this case, are in fact exempt, and the Court below failed to follow this existing case law. Such a ruling would be consistent with this Court's prior commentary interpreting Blatterfein as follows:

> As we noted in that case "[w]here the question is solely one concerning the quality of those professional [architectural] services, there may be no adequate basis for asserting liability [against an architect] under the Consumer Fraud Act." *Ibid*[6].

Ramapo Brae Condo. Ass'n, Inc. v. Bergen Cty. Hous. Auth., 328 N.J. Super. 561, 581 (App. Div. 2000)

As a point of clarity, mixed services requiring multiple licenses held by professionals should also be exempt. In this case, the Court should clarity that licensed planners and licensed engineers should also be deemed exempt.

[6] Blatterfein v. Larken Assocs., 323 N.J. Super. 167 (App. Div. 1999)

It is submitted that the Consumer Fraud Act cannot be applied in this situation, where the services rendered are the result of a professional licenses regulated through the architectural and planner licensing schemes. The case law is clear that for licensed professionals providing services *within their area of licenses, they are not subject to the CFA.*

This is a jurisdictional and separation of powers issue: authority to govern and license architects was granted by the Legislature to a licensing board pursuant to an enabling statute. New Jersey Title 45 addresses all licensed professionals. Chapter 3 of that Title addresses the law governing architects and architectural licenses. It has 46 numbered parts. N.J.S.A. 45:3-3 states in pertinent part: "The board may also adopt rules and regulations for the examination and registration of applicants desiring to practice architecture in accordance with the provisions of this chapter…:

The section of the New Jersey Administrative Code governing architects is contained at Title 13 thereof (Law and Public Safety), Chapter 27, with nine subchapters. Subchapter 5 thereof is an entire section on the Rules of Professional Conduct. Other sections contain licensing requirements, continuing education and other regulatory matters. They incorporate by reference in some cases various other bodies of laws and rules, such as building and municipal codes, etc.

The trial Court does not have the authority to evaluate the nature of architectural regulation and find it lacking vis-à-vis, the CFA, and allow a case to go forward. There is a broad and deep licensing scheme sanctioned by the legislature for architects, and architects are entitled to the licensed professional exemption where, as here, they provided architectural services.

Further, the Complaint made no review of the architectural services, as opposed to the bills for architectural services. It alleges only an accounting review. A mere forensic accountant, no matter how talented in municipal matters, has no way of interpreting, understanding, valuing, or evaluating the services rendered by an architect. The allegations of the forensic accountant must be disregarded as clearly not admissible to evaluate the quantity and quality of architectural services. Simply, Caldwell needs a different expert. This is, in many ways, a disguised malpractice case except Caldwell is not complaining about the quality of the services, but merely the expense of the services.

Once it is determined that a licensing law exists, and the licensed professional was providing such licensed services, there can be no Consumer Fraud Act claim for such services.

Once the Court determines such a regulatory scheme exists, it may not interpose its own judgment in lieu thereof where architectural services are at issue.

The Court below erred in failed to find the existence of this licensed professional exemption.

POINT IV

THE CAUSE OF ACTION FOR UNJUST ENRICHMENT WAS NOT ADEQUATELY PLED AND SHOULD BE DISMISSED. (Da1,2,9)

Plaintiff has attempted to assert a cause of action for unjust enrichment at Count 2, but the complaint is so devoid of facts on this issue, that it must fail.

> To establish unjust enrichment as a basis for quasi-contractual liability, "a plaintiff must show both that defendant received a benefit and that retention of the benefit would be unjust." *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519, 526 (1994). Such liability will be imposed only if "plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred." *Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 109, 219 A.2d 332, 334-35 (App.Div.1966).

Castro v. NYT Television, 370 N.J. Super 282, 299 (App. Div. 2004).

Further, unjust enrichment cannot apply where there is an existing contract, and there is no claim for remuneration outside the scope of the contract. Caputo v. Nice-Pak Prods., Inc., 300 N.J. Super. 498, 693 A.2d 494 (Super. Ct. App. Div. 1997) The complaint alleges no extra-contractual goods, services or consideration allegedly retained.

The complaint filed by Caldwell is silent on this extra consideration issue, and the trial Court below failed to require it to articulate any such facts, ruling that

pleading in the alternative is permitted. (Da10). However, that was not the argument. CCA never disputed the ability to plead differing legal theories in the alternative. However, when pleading in the alternative, a part can't plead alternative facts and must nonetheless still provide sufficient factual allegations for each required element of the alternative cause of action.

This unjust enrichment claim is a thinly veiled effort to claw back the services that were rendered under contract, approved by the Council in accordance with law, and were in fact, contractual obligations of Plaintiff for services requested, rendered and received. Simply, it cannot be unjust enrichment for a party to retain the rights bargained for and received under a written contract.

> Furthermore, our Supreme Court has held that "a court of equity will follow the legislative and common-law regulations of rights, and also obligations of contract." *Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp.*, 100 N.J. 166, 183, 495 A.2d 66 (1985).

Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 561, 935 A.2d 808, 813 (Super. Ct. App. Div. 2007).

A party can't use an unjust enrichment claim as a substitute for having made a contract they don't like. The complaint is simply devoid of sufficient facts from which the unjust enrichment claim can be gleaned. The legal circumstances of the contract preclude the claim.

CONCLUSION

Based on the foregoing, leave to appeal should be granted and the complaint should be dismissed in its entirety for the reasons set forth above.

Respectfully,

/s/ *Marlo J. Hittman*

Marlo J. Hittman
MJH/mh
cc: Craig Bossong, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appellate Division Docket No. A-000937-24

BOROUGH OF CALDWELL	:	ON APPEAL FROM:
	:	
	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff-Respondent	:	LAW DIVISION—ESSEX COUNTY
	:	DOCKET NO. ESX-L-3126-24
v.	:	Hon. Joshua D. Sanders, JSC
	:	
COZZARELLI-CIRMINIELLO	:	FROM:
ARCHITECTS, LLC	:	THE OCTOBER 11, 2024 ORDER
	:	OF THE TRIAL COURT DENYING
	:	DEFENDANT'S MOTION TO
Defendant-Appellant	:	DISMISS
	:	

BRIEF IN OPPOSITION FOR PLAINTIFF-RESPONDENT BOROUGH OF CALDWELL

FLORIO PERRUCCI STEINHARDT
CAPPELLI & TIPTON, LLC
1010 Kings Highway South,
Bldg. 1, 2nd Floor
Cherry Hill, New Jersey 08034
(856) 853-5530
Attorneys for Plaintiff,
Borough of Caldwell

On the brief:

Craig P. Bossong, Esquire (0023002003)
Michael A. Ierino, Esquire (440292023)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

PRELIMINARY STATEMENT

Defendant-Appellant Cozzarelli Cirminiello Architects, LLC ("CCA") brought this appeal challenging the trial court's Order dated October 11, 2024 wherein the trial court denied CCA's Motion to Dismiss the Plaintiff-Respondent's, Borough of Caldwell (the "Borough"), Complaint. The Borough opposes CCA's appeal and submits to this Honorable Court that the decision of the Honorable Joshua D. Sanders, J.S.C. was well-reasoned and is supported by the record.

CCA brought this appeal under the notion that a change in the electoral makeup of the Borough caused the Borough to bring this lawsuit against CCA. This is nothing more than a bald assertion by CCA in an attempt to try and cover the truth, namely, that CCA failed to abide by the terms of the professional services contracts entered with the Borough. Having conducted an investigation into the "services" allegedly rendered by CCA, the Borough reached the conclusion that CCA had breached the professional services contracts in question

and that the Borough had sustained damages which led to the lawsuit that is the basis of this appeal.

CCA attempts to argue that the Borough is seeking to amend and/or revoke municipal resolutions in violation of the Open Public Meetings Act ("OPMA"). However, this is a mischaracterization of the Borough's case. The Borough is not attempting to revoke or amend any resolutions that were previously passed. This case is a simple matter of the Borough having discovered irregularities surrounding CCA's involvement with the Borough and the Borough now attempting to recoup monies that were paid based on CCA's breach of its professional services contracts.

An investigation of the Borough records by forensic municipal accountant Lerch, Vinci, & Bliss, LLP revealed to the Borough that CCA breached the professional services contracts and the Borough is justified in having brought suit on that basis. The Borough has followed all appropriate procedures in having brought this suit against CCA. CCA attempts to claim that this suit was

authorized in secret. To the contrary, all proper procedure was complied with under OPMA for the purposes of bringing this lawsuit and the Borough made any such information available to the public as required.

The Borough has every right to bring this suit and maintain it including the claims for Unjust Enrichment and violations of the New Jersey Consumer Fraud Act ("CFA"). The Borough has sufficiently pled allegations which support the claims of Unjust Enrichment and violations of the CFA. Moreover, CCA's repeated pleas for application of the learned profession exception under the CFA are without merit. Neither the statute nor applicable case law warrant the application of the learned profession exception to CCA.

Therefore, the Borough respectfully requests that this Honorable Court affirm the decision of the trial court and dismiss CCA's appeal in its entirety.

PROCEDURAL HISTORY

On May 7, 2024, the Borough filed the underlying complaint against CCA for Breach of Contract, Unjust Enrichment and violation of the CFA arising out of municipal projects on which CCA bid and was awarded professional services contracts(Da16). On July 8, 2024, CCA filed a Motion to Dismiss the Complaint (Da123, Da125,and Da169). On August 6, 2024, the Borough filed its opposition to CCA's Motion to Dismiss. On August 13, 2024, CCA filed its Reply Brief (Da182). After oral argument on the motion was held on October 3, 2024,[1] the trial court entered an order denying the motion along with a statement of reasons (Da01 and Da02).

On October 31, 2024, CCA filed Motion for Leave to Appeal which was subsequently amended and filed November 13, 2024. CCA and the Borough both filed briefs. On December 2, 2024, this Court granted CCA's Motion for Leave to Appeal (Da157).

[1] The transcript of oral argument held on October 3, 2024 shall be designated as "1T."

COUNTER STATEMENT OF FACTUAL HISTORY

The Borough prefaces the following factual recitation with a categorical denial of any claims by CCA that this lawsuit has any relation to the fact that there was a shift in the governing body in November of 2022. The Borough would note that the underlying lawsuit was not filed until May 7, 2024 which was a year and a half after changes in the governing body.

On February 17, 2021, CCA submitted multiple proposals to provide both professional and architectural services related to the rehabilitation and construction of various public facilities consistent with the Borough's Redevelopment Plan (Da30, Da35, Da41, Da47, and Da53). CCA was to provide services for rehabilitation and construction of the Health and Human Services Building, Community Renovation/Alteration/Repair, Mixed-Use Development & Parking Deck Developer Bid Package and Borough Municipal Complex which included the Borough Hall, Police Department, and Public Library (Da30, Da35, Da41, Da47, and Da53).

On February 23, 2021, the Borough adopted Resolution No. 2-72 which authorized the entry of a professional services contract with CCA in an amount not to exceed $225,000.00 (Da62). On July 9, 2021, CCA submitted a proposal for Phase II Design Development, Construction Documents, Bidding, and Construction Administration for the Borough Hall (Da64). On July 12, 2021, CCA submitted an additional proposal for Phase II Design Development, Construction Documents, Bidding, and Construction Administration for the Health and Human Services Building (Da76).

On September 9, 2021, the Borough adopted Resolution No. 90-195 which authorized entry of a professional services contract with CCA not to exceed $750,000.00 for professional architectural and engineering services related to the continuation of the design and construction of the new Borough Hall and Police Department (Da88). The Borough also adopted Resolution No. 9-196 which authorized the entry of a professional services contract with CCA not to exceed $175,000.00 for

professional architectural and engineering services related to the continuation of the design and rehabilitation of the Health and Human Services Building (Da91).

On December 8, 2021, CCA submitted an additional proposal to amend services to be provided as it related to the Borough Hall and Police Department (Da95). Specifically, the proposal was to expand services to develop the Borough Municipal Complex, which would include the Borough Hall and the Police Department as well as a suitable facility for a Public Library (Da95). On January 11, 2022, the Borough adopted Resolution No. 1-33 which increased the available budget of $750,000.00 under Resolution No. 9-195 to $925,00.00 to accommodate the development of the Public Library (Da108).

On November 11, 2022, CCA submitted a proposal to amend services to be provided as it related to Phase II design and construction/renovation of the Caldwell Community Center (Da111). On December 6, 2022, the Borough adopted Resolution No. 12-267 which increased the

available budget of $50,000.00 (Phase I), utilized for schematic design services, to $700,000.00 (including Phase II) for the remainder of the building design, construction documents, oversight of public bidding, and supervision of construction, including reimbursable expenses related thereto. (Da118).

On November 14, 2022, CCA submitted an invoice to the Borough regarding the Borough Hall project (Da122). The invoice indicated that the Borough had been billed, to date, $845,940.24, which was nearly the entire agreed upon amount for Phase II under the proposal approved by Resolution No. 1-33. (Da122). Notwithstanding the fact that this invoice was almost the entire agreed upon amount, the Borough had not even settled on a design for the Borough Municipal Complex, received any construction documents for the Borough Municipal Complex or even put the project out to public bid. In light of potential financial discrepancies, the Borough retained the services of a forensic auditor, namely, Lerch, Vinci, & Bliss, LLP, certified public accountants and registered

municipal accountants, to conduct an investigation into CCA, their proposals, and their invoicing/billing practices as it related to the Borough's project. Lerch, Vinci, & Bliss, LLP was retained pursuant to resolution of the Borough (1T27:12-29:9).

The investigation revealed that $325,000.00 out of the $845,940.24 that had been billed to the Borough and subsequently paid was for Phase II Construction Documents and Specifications for the Borough Municipal Complex pursuant to the proposal approved by Resolution No. 1-33 (Da122). Despite having been paid by the Borough, no construction documents have been received to date. The investigation also revealed that the Borough paid $125,000.00 for construction administration as it related to Phase II of the Borough Municipal Complex despite the fact that construction for this project had not even begun (Da122).

Pursuant to the proposal approved by Resolution No. 2-72, services related to Phase I for the Borough Hall and Police Department totaled $75,000.00. The

investigation revealed that the Borough was billed twice for these services by CCA. According to Schedule A, which accompanied the proposal approved by Resolution No. 2-72, any additional architectural or engineering services provided by CCA that went beyond the terms of the agreement would be billed at an hourly rate. Despite these terms, records revealed that the Borough was actually billed a lump sum of $25,000.00 rather than on an hourly basis as agreed.

In an effort to avoid litigation, the Borough requested that CCA produce any and all documents that would explain the discrepancies uncovered by the investigation by Lerch, Vinci, & Bliss, LLP. When it was clear that cooperation would not be forthcoming, the Borough was left with no choice but to file suit.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Rule 4:6-2(e) motions to dismiss should be granted in "only the rarest [of] instances." Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79,

(1993)(quoting Printing Mart–Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989)). Trial courts are cautioned to search the complaint

> in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation [a] [c]ourt [should not be] concerned with the ability of plaintiffs to prove the allegation contained in the complaint.... [P]laintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

[Printing Mart, supra, 116 N.J. at 746, (internal quotations and citations omitted).]

See also Glass, Molders, Pottery, Plastics, & Allied Workers Int'l Union v. Wickes Cos., 243 N.J.Super. 44, 46 (Law Div.1990) ("The test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts."). Obviously, if the complaint states no

basis for relief and discovery would not provide one, dismissal is the appropriate remedy. Pressler, Current N.J. Court Rules, comment 4.1 on R. 4:6-2 (2005) (citing Camden County Energy Recovery Assocs. v. N.J. Dep't of Envtl. Prot., 320 N.J.Super. 59, 64 (App.Div.1999), aff'd o.b., 170 N.J. 246 (2001)). In ruling, courts must "assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988).

A dismissal for failure to state a claim pursuant to Rule 4:6-2(e) is reviewed de novo, following the same standard as the trial court. Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016). In this context, the Court accepts as true the complaint's factual assertions. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165-66, 183-84 (2005). "The court may not consider anything other than whether the complaint states a cognizable cause of action." Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). "It

is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue." Banco Popular N. Am., 184 N.J. at 183.

II. THE BOROUGH SUFFICIENTLY PLED THEIR CAUSES OF ACTION AND CCA'S MOTION TO DISMISS WAS PROPERLY DENIED BY THE TRIAL COURT (Da01 and Da02).

Applying the de novo standard of review, this Court must review the Borough's Complaint with liberality and give all deference to the facts set forth therein. If a cause of action can be gleaned from the facts, the Court must rule that CCA's motion to dismiss was properly denied. The Borough asserted three (3) causes of action in the Complaint: Count I—Breach of Contract; Count II—Unjust Enrichment (Pled Alternatively); and Count III—Violation of the New Jersey Consumer Fraud Act (Da16).

To establish a claim for breach of contract, a plaintiff must provide proof of "a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and a breach causing the claimant to sustain[ ]

damages." EnviroFinance Grp., LLC v. Envtl. Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015) (citing Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007)).

The Borough entered professional services contracts with CCA based upon proposals submitted by CCA. As alleged in the Complaint,

- The Borough was invoiced and paid $325,000.00 for construction documents and specifications but never received said documents (Da21).
- The Borough was invoiced and paid $25,000.00 for bidding and negotiation work done by CCA but this work could not have been completed as the project had never gone out to bid in the first place (Da22).
- The Borough was invoiced and paid $125,000.00 for construction administration services but since the project had not gone out to bid, administration services could not have been provided (Da22).

- The Borough was double billed for services and billed at lump sums for work that was supposed to be billed at an hourly rate (Da23).

Assuming these factual allegations to be true under the motion to dismiss standard, the Borough has made out a viable cause of action for breach of contract. Withholding of construction documents that were paid for, billing for services not provided, double billing, and incorrect billing are all violations of the professional services contracts that caused damage to the Borough. This is clearly a viable cause of action for breach of contract.

In the alternative, the Borough pled a cause of action for Unjust Enrichment. CCA argues that the Borough failed to sufficiently plead facts for this cause of action to survive a motion to dismiss. CCA's argument misinterprets the rule of pleading in the alternative.

It has long been recognized "that the existence of an express contract excludes the awarding of relief regarding the same subject matter based on quantum

meruit." Kas Oriental Rugs v. Ellman, 394 N.J.Super. 278, 286 (App. Div. 2007). "An implied contract cannot exist when there is an existing express contract about the identical subject. The parties are bound by their agreement, and there is no ground for implying a promise." E. Paralyzed Veterans Assoc. v. City of Camden, 111 N.J. 389, 410 (1988). A party may plead and pursue alternative, and even inconsistent, theories, Kas, supra, 394 N.J.Super. at 287, a party is not entitled to recover on inconsistent theories. Ibid (emphasis added).

CCA tries to argue that the Borough was required to plead facts demonstrating that the Borough was enriched beyond the items in which there was an express contract. However, this is not the point of pleading in the alternative. The purpose of pleading in the alternative is to allot the trier of fact separate distinct theories to determine the basis of recovery. While unjust enrichment and breach of contract may be inconsistent theories of relief, the trier of fact can hear both. It

is left to the trier of fact to determine whether an express contract existed or not which will ultimately determine the basis for the Borough's relief. The only prohibition is that the trier of fact cannot award relief under both theories based on the elements of each claim.

As to the claim of unjust enrichment, the Borough pled the following:

- The Borough paid CCA $325,000.00 for construction documents which the Borough never received (Da24).
- The Borough paid CCA $25,000.00 for bidding and negotiation services for a project that never went out to bid so such services were never rendered (Da24).
- The Borough paid CCA $125,000.00 for construction administration services even though the project had not gone out to bid let alone had construction started (Da25).
- The Borough was double billed for services (Da25).

- The Borough was charged a lump sum of $25,000.00 by CCA for additional services rather than at an hourly rate (Da25).

These pleadings sufficiently allege facts which justify a cause of action for unjust enrichment. CCA was conferred the benefit of payment without being entitled to such payment and it would be unjust for them to retain the benefit of payment to the detriment of the Borough. This is not a substituted claim for breach of contract. This is a claim in the alternative which the Borough is permitted to plead and have considered by the trier of fact in case it would be found no express contract existed for any reason. Should a determination be made that no express contract existed for whatever reason, there is clearly a viable cause of action for unjust enrichment.

The Borough has also brought a claim for violation of the CFA. The CFA is intended to protect consumers of all kinds in line with the following:

> Courts have emphasized that like most remedial legislation, the Act should be construed liberally in favor of consumers. Although initially designed

> to combat sharp practices and dealings that victimized consumers by luring them into purchases through fraudulent or deceptive means, the Act is no longer aimed solely at shifty, fast-talking and deceptive merchant[s] but reaches nonsoliciting artisans as well. Thus, the Act is designed to protect the public even when a merchant acts in good faith. Moreover, we are mindful that the Act's provision authorizing consumers to bring their own private actions is integral to fulfilling the legislative purposes, and that those purposes are advanced as well by courts' affording the Attorney General "the broadest kind of power to act in the interest of the consumer public.

Cox v. Sears Roebuck & Co., 138 N.J. 2,15-16 (1994)(citations omitted).

To violate the CFA, a person must commit an "unlawful practice" as defined in the legislation. Unlawful practices fall into three general categories: affirmative acts, knowing omissions, and regulation violations. The first two are found in the language of N.J.S.A. 56:8-2, and the third is based on regulations enacted under N.J.S.A. 56:8-4. A practice can be unlawful even if no person was in fact misled or deceived thereby. D'Ercole Sales, Inc. v. Fruehauf

Corp., 206 N.J.Super. 11, 22 (App. Div. 1985); Skeer v. EMK Motors, Inc., 187 N.J.Super. 465, 470 (App.Div.1982)) The capacity to mislead is the prime ingredient of all types of consumer fraud. Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 378 (1977). When the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act. Chattin v. Cape May Greene, Inc., 124 N.J. 520, 522 (1991) (Stein, J. concurring).

In respect of what constitutes an "unconscionable commercial practice," the Court explained in Kugler v. Romain, 58 N.J. 522 (1971), that unconscionability is "an amorphous concept obviously designed to establish a broad business ethic." Id. at 543. The standard of conduct that the term "unconscionable" implies is lack of "good faith, honesty in fact and observance of fair dealing." Id. at 544. However, "a breach of warranty, or any breach of contract, is not per se unfair or unconscionable * * * and a breach of warranty alone does

not violate a consumer protection statute." D'Ercole Sales, supra, 206 N.J.Super. at 25. Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach. DiNicola v. Watchung Furniture's Country Manor, 232 N.J.Super. 69, 72 (App.Div.) (finding that breach of warranty in supplying defective furniture and denying that defect existed was not unconscionable), certif.denied, 117 N.J. 126(1989); D'E rcole Sales, supra, 206 N.J.Super. at 31 (holding that breach of warranty for malfunctioning tow truck and refusal to repair was not unconscionable practice).

In pleading the CFA claim, the Borough cites to the fact that they were billed and paid for construction documents that were never received, they were billed and

paid for services that were never rendered, they were double billed for services, and they were incorrectly billed for services. All of these actions constitute affirmative acts by CCA which are violations of the CFA. The violations are even more egregious when considering that the Borough is a public entity that serves the taxpayers of the Borough. Committing unconscionable commercial practices against the Borough has a rippling effect on the taxpayers. The facts as pled by the Borough support a viable cause of action for violation of the CFA.

Despite the clear viability of all the Borough's claims, CCA attempts to use a nonsensical argument that the trial court does not have subject matter jurisdiction to hear the Borough's claims. CCA's basis for this argument is based on the misguided notion that because payment to CCA was authorized via resolution of the Borough based on the Borough's ordinance scheme, those payments cannot be undone by a lawsuit. If CCA's argument was to stand true, the logical conclusion to such

argument would mean that a municipality would never be permitted to pursue any form of civil action simply because it was ratified by the municipality through an ordinance and/or resolution. This flies in the face of public policy. The fact that an approval for payment was passed by the Borough does not mean that it cannot pursue a civil cause of action when facts warrant such action.

CCA is merely attempting to conflate a simple breach of contract case with municipal procedural rules. Quite simply, CCA is misstating how municipal entities operate and trying to frame it as an issue involving the subject matter jurisdiction of the trial court. The Borough does not have to pass a resolution to undo prior resolutions in order to pursue a lawsuit when the Borough has been wronged. The Borough retained a forensic municipal accountant who did a thorough audit which discovered significant discrepancies in the bills related to the services allegedly rendered by CCA. The Borough had been wronged by CCA to the tune of more than $500,000. The

only proper way to rectify that wrong was the filing of the lawsuit underlying this appeal.

CCA attempts to buttress this subject matter jurisdiction claim by arguing that the Borough violated the New Jersey Open Public Meetings Act ("OPMA").

OPMA requires that "all meetings ... be open to the public at all times." S. Jersey Publ'g Co. Inc. v. New Jersey Expressway Auth., 124 N.J. 478, 490 (1991) (quoting N.J.S.A. 10:4-12(a)). However, OPMA does allow for executive, closed session meetings in a limited number of circumstances, including negotiations concerning pending or anticipated litigation or any matters "falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12(b)(7).

Prior to any such closed session meeting, a resolution must be adopted stating both the subject that will be discussed at the meeting and when the information will be available to the public. N.J.S.A. 10:4-13. If the

public body meets in a private session under OPMA, the minutes of such meeting will generally be made promptly available for the public, N.J.S.A. 10:4-14, unless disclosure of any materials would "subvert the purpose of [a] particular exception," such as the attorney-client privilege. Payton v. New Jersey Tpk. Transit Auth., 148 N.J. 524, 557 (1997). In Payton, the Supreme Court noted that if disclosure subverts the purpose of an exemption then the court must balance the subversion against the applicant's desire for the information. Ibid. The court will then determine whether total suppression of the information is necessary or the mere redaction of certain information will suffice. Ibid. However, "the public body legitimately may meet with its attorney in closed session ... [and] the minutes, part or all of which may constitute work-product, ... may be appropriately suppressed or redacted." Id. at 558.

The Borough vehemently denies that it violated OPMA. The Borough took all necessary steps to comply with OPMA

regarding the holding of executive sessions to discuss the filing of this lawsuit. OPMA specifically carves out an exception for holding executive sessions to protect attorney-client privilege. The Borough had every right to hold executive sessions to discuss this litigation as part of the attorney-client privilege afforded to the Borough. (1T21:22-22:11, 1T23:19-2411). The steps taken by the Borough in this matter are a matter of public record and the public record supports the fact that the Borough did not violate OPMA.

CCA attempts to further convolute this matter by alleging that the Borough failed to properly retain Lerch, Vinci, & Bliss, LLP, as its forensic accountant. Again, if CCA would have bothered to do even a cursory review of the public record, they would have found that the Borough did pass a resolution to appoint Lerch, Vinci, & Bliss, LLP. The fact that Lerch, Vinci, & Bliss, LLP was retained by resolution was set forth by the Borough before the trial court leaving ample opportunity for CCA to investigate that fact (1T27:12-29:9). All of

CCA's claims that the Borough violated OPMA are baseless and have been firmly disproved herein.

CCA's last ditch effort to try and persuade this Court into believing this matter should have been dismissed is arguing that the proper course of action would have been for the Borough to file a complaint in lieu of prerogative writs within forty-five (45) days of the resolutions in question being passed. The procedural requirements of actions in lieu of prerogative writs are contained in Rule 4:69. "Thus R. 4:69 governs challenges to municipal action." Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:69 (2012). Generally, "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review...." R. 4:69-6(a). This temporal limitation is "aimed at those who slumber on their rights," Schack v. Trimble, 28 N.J. 40, 49, (1958), "and is designed to give an essential measure of repose to actions taken against public bodies." Wash. Twp. Zoning Bd. of Adjustment v. Wash. Twp. Planning

Bd., 217 N.J.Super. 215, 225 (App.Div.), certif. denied, 108 N.J. 218 (1987).

The purpose of a complaint in lieu of prerogative writs is to challenge municipal actions whether those actions are taken by the Council, the Planning Board, Zoning Board of Adjustment, etc. CCA's argument in this regard flies in the face of logic. The resolutions that CCA is arguing should have been challenged by the Borough Council were passed by the Borough Council. CCA is arguing that the Borough Council should sue itself via a complaint in lieu of prerogative writ.

CCA's entire argument for dismissal is one misbegotten attempt after another to try and misshape municipal law in an effort to get this lawsuit dismissed. The Borough Council does not need to revoke the prior resolutions to enforce its rights. The Borough Council does not need to sue itself via complaint in lieu of prerogative writ. The Borough was wronged by CCA committing blatant violations of the professional services contracts and the Borough is entitled to bring

suit on that basis. CCA should not be permitted to interpret municipal law as they see fit in an effort to deprive the Borough of its rights especially when the exercising of those rights is an effort to protect the monies of the taxpayers.

III. THE TRIAL COURT CORRECTLY INTERPRETED THE LAW AS TO THE LEARNED PROFESSION EXCEPTION OF THE NEW JERSEY CONSUMER FRAUD ACT AND DETERMINED IT DOES NOT APPLY TO CCA

It was correctly determined by the trial court that the learned profession exception of the New Jersey Consumer Fraud Act does not apply to CCA and therefore, the decision should not be disturbed.

In the case of Shaw v. Shand, the Court addressed the learned profession exception declaring the following:

> Considering the CFA's remedial purpose and applying well-established canons of statutory construction, we conclude that the judicially created learned professional exception must be narrowly construed to exempt CFA liability only as to those professionals who have historically been recognized as "learned" based on the requirement of extensive learning or erudition. To the extent our prior decisions, including Plemmons v. Blue Chip Insurance Services, Inc., 387 N.J. Super. 551 (App. Div. 2006), have applied the learned professional exception to "semi-

> professionals" who are regulated by a separate regulatory scheme, we are constrained, upon further review, to depart from that reasoning as inconsistent with the Supreme Court's decision in Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255 (1997). As the Court explicitly held in Lemelledo, the existence of a separate regulatory scheme will "overcome the presumption that the CFA applies to a covered activity" only when "a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes." 150 N.J. at 270.

460 N.J. Super. 592, 599 (2019).

As clearly espoused in the Court's decision in Shaw, the learned profession exception is intended to apply only to those professions which have historically been recognized as "learned" such as lawyers, doctors, accountants, and the like. There is no case law which proclaims that architects are intended to be exempt from violations of the New Jersey Consumer Fraud Act. This fact was declared by the trial court (See Da12) ("As for the Consumer Fraud Act learned professional exception, the court has found no law divining that architects are subject to that exception).

CCA's reliance on the case of Blatterfein v. Larken Assocs., 323 N.J. Super. 167 (1999) is misplaced. In CCA's brief at Page 39, CCA argues, "Blatterfein considered the 'learned exception' for architects, and generally approved of the same, but did not apply it in that case because the CFA claims related to additional services not related to the provision of architectural services." CCA is misinterpreting the decision of the Court and fails to note significant language from said decision. "Without deciding the more abstract question whether architectural services in general are covered by the Consumer Fraud Act, we conclude that plaintiffs have made a *prima facie* showing, sufficient to survive a motion for summary judgment...." Blatterfein, supra, at 182 (emphasis added). The decision in Blatterfein does not support the conclusion that architects are entitled to protection from liability under the CFA. To the contrary, the Court specified that they were not deciding that particular question and found other grounds to find defendant could be liable under the CFA.

CCA then attempts to support their misguided interpretation of Blatterfein with Ramapo Brae Condo. Ass'n, Inc. v. Bergen Cty. Hous. Auth., 328 N.J. Super. 561. Commenting on Blatterfein, the Court stated

> As we noted in that case "[w]here the question is solely one concerning the quality of those professional [architectural] services, there may be no adequate basis for asserting liability [against an architect] under the Consumer Fraud Act."

Id. at 581 (emphasis added). Ramapo is not supportive of CCA's position. The decision solely stands for the proposition that a CFA claim cannot stand against an architect when the claim is solely about the quality of the architect's work. It does not mean that a CFA claim is not applicable when an architect has committed an unconscionable commercial practice. CCA misconstrues the decisions in Blatterfein and Ramapo in an attempt to convince this Court that precedent exists declaring architects are covered by the learned profession exception to the CFA.

Despite CCA's efforts, there is no case law or other material which even suggests that architects are considered a historically designated professional service which is entitled to the learned profession exception. As such, the proper approach to make a determination of whether CCA is immune to liability under the CFA is the standard as set forth in the trial court's decision. As set forth by the Court in Lemelledo, the Supreme Court of New Jersey held:

> In order to overcome the presumption that the CFA applies to a covered activity, a court must be satisfied,..., that a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes. We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility. If the hurdle for rebutting the basic assumption of applicability of the CFA to covered conduct is too easily overcome, the statute's remedial measures may be rendered impotent as primary weapons in combatting clear forms of fraud simply because those fraudulent practices happen also to be covered by some other statute or regulation.

Lemelledo, supra, at 270.

While there is no disputing that architects are indeed covered by a specific regulatory scheme, this, in and of itself, is insufficient to find that they are not liable under the CFA. Even if there is a specific regulatory scheme which governs architects, the standard requires that there be a "patent and sharp" conflict between the regulatory scheme and the CFA.

As noted by the trial court, CCA made no attempt in their motion to demonstrate any sort of conflict between the regulatory scheme for architects and the CFA. CCA attempts to merely rely on the fact that there is a separate licensing scheme for architects and that this should exclude CCA from liability under the CFA. This argument does not fall in line with Lemelledo and must fail.

However, for argument's sake, if the Court were to find that the learned profession exception does apply to architectural services. There is still a valid claim for violation of the CFA in this case. The services provided

by CCA were not solely architectural. This was not a situation where CCA provided architectural designs and drawings and that was the end of their involvement with the project. CCA was responsible for construction management services. Construction management services are an entirely separate category of services from architectural services. Thus, in light of the decision in Blatterfein, CCA can be held in violation of the CFA as they committed unconscionable commercial practices as it relates to construction management services. CCA's involvement with this project was not purely architectural and therefore, they cannot hide behind the learned profession exception to avoid liability under the CFA.

Additionally, CCA further argues that the trial court's reliance on the findings of the Borough's forensic accountant was improper. CCA believes the Borough should have been required to engage the services of an architect to evaluate the services allegedly rendered by CCA. However, the forensic accountant's

findings were properly considered by the trial court. The forensic accountant's findings do not go to the quantity or quality of CCA's work as argued by CCA. The forensic accountant's findings go to the billing practices implemented by CCA, namely, double billing of the Borough, billing for services that were not rendered, and incorrect billing. A forensic accountant is more than qualified to audit the bills of the Borough and determine whether they were billed for something or not. This has nothing to do with the quality or quantity of the work completed by CCA. If CCA takes exception to the opinions of the forensic accountant, they can raise them through discovery, not a motion to dismiss.

IV. CONCLUSION

Based on the reasons set forth herein, the Borough respectfully requests that this Honorable Court affirm the decision of the trial court and deny CCA's appeal.

Respectfully Submitted,

FLORIO PERRUCCI STEINHARDT
CAPPELLI & TIPTON, LLC

By: */s/ Michael A. Ierino*
Michael A. Ierino, Esquire

Dated: May 12, 2025

AMENDED

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO. A-937-24

BOROUGH OF CALDWELL, Plaintiff, v. COZZARELLI CIRMINIELLO ARCHITECTS, LLC, Defendant,	Docket No. Below/Sat Below: ESX-L-003126-24 Hon. Joshua D. Sanders, J.S.C. CIVIL ACTION

REPLY MEMORANDUM OF LAW OF DEFENDANT/APPELLANT COZZARELLI CIRMINIELLO ARCHITECTS, LLC

LAW OFFICE OF MARLO J. HITTMAN
354 Eisenhower Parkway, Plaza II
Livingston, NJ 07039
(973) 751-7000
Marlo J. Hittman, Esq.
Attorney ID#044391991
marlo@hittmanlaw.com
Attorney for Appellant

Of Counsel and the Brief:

Marlo J. Hittman, Esq.

AMENDED

TABLE OF CONTENTS

INDEX TO APPENDIX

INDEX TO SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

AMENDED

PRELIMINARY STATEMENT

Defendant-Appellant Cozzarelli Cirminiello Architects, LLC (CCA") submits this Reply Memorandum of Law in opposition brief and appendix filed by Plaintiff-Respondent Borough of Caldwell ("Caldwell").

SUPPLEMENTAL PROCEDURAL HISTORY

Since the filing of CCA's initial merits brief, Caldwell filed a non-conforming brief and appendix containing materials outside the record, which were not submitted to the Trial Court, but could have been. CCA will refrain from commenting on the particulars of the proposed documents other than to state they contained information in Caldwell's possession prior to the filing of its response to the motion papers before the Trial Court, and do not contain any document described herein as "not known to exist".

CCA moved to strike the non-conforming appendix. Caldwell opposed the motion but did not cross-move to supplement the record.

By Order of April 25, 2025 (Da195), this Court granted the motion and ordered:

> The motion to strike respondent's brief and appendix is granted. Respondent shall file a conforming brief and appendix *that does not describe or include reference to documents and events outside the record below by May 14, 2025.* (Da195) (emphasis added) (Da195)

CCA asserts that Caldwell's opposition brief does in fact reference, in broad and general terms, conclusions which it sought to have the Court infer from the records which have been stricken.

SUPPLEMENTAL STATEMENT OF FACTS

While the Statement of Facts contained in CCA's initial brief is comprehensive, it is necessary to address some additional issues.

It is the position of CCA, that the Open Public Meetings Act ("OPMA"), (N.J.S.A.§ 10:4-6 et. seq., as more fully briefed in Caldwell's initial brief) required that, prior to commencing a suit against CCA, a meeting of the Caldwell governing body was required, followed by a vote by the governing body, and the passage, by a majority, of a resolution authorizing the commencement of a lawsuit.

Not only is Caldwell's brief silent on the issue of such a meeting and vote, but Caldwell's brief also does not cite to the Faulkner Act, N.J.S.A.§ 40:69A-31, et. seq., *nor any facts supporting compliance therewith*. The commencement of this lawsuit appears to have been unilaterally spearheaded by a newly elected mayor, but even that has not been confirmed. There is no evidence that the entire Caldwell governing body even had knowledge of the suit before its commencement.

Further, there is no allegations that the auditors hired by Caldwell actually audited the "services" of CCA. Rather, the claim in the complaint, and all the statements and allegations since the complaint, is that the auditors reviewed the

"invoices" as to the services performed; they did not review the actual services themselves. The auditors were not licensed architects, but they nonetheless offered an opinion as to the quantity and quality of services performed by licensed architects based on the invoices without an investigation of the underlying events described therein.

There are also no allegations in this record that Caldwell or its auditors *actually audited Caldwell's employees with respect to Caldwell's compliance with its own ordinances*. In fact, while CCA cited Caldwell's ordinance structure (Da156), and explained its application to the matter at bar, Caldwell does not cite its own ordinances in its brief: not a single time. The Ordinances (Da156) appear to have been enacted in compliance with the governing body's "control function", as required by N.J.S.A.§ 40:69A-48, part of the Faulkner Act.

For Caldwell's case to succeed on the claims as presented, these essential control and audit functions, embodied by statute and ordinance, and thereafter confirmed by multiple resolutions would have had to have been defective in their implementation in some manner at the outset. There is no claim by Caldwell that its ordinance-based audit function failed in any way.

Caldwell followed the Faulkner Act when it passed ordinances regarding payment to vendors generally (Da156, 172-173), and then followed the ordinances when it caused resolutions to be passed authorizing payment to CCA. Those

resolutions authorizing payment to CCA have not been altered, amended or challenged by subsequent resolution of the governing body *to this day*. They remain binding. (1T5-9 to 15)

Caldwell's auditor, which is alleged to specialize in municipal finance, nonetheless failed and refused to consider these municipal finance laws as part of its audit. The auditor cannot authorize Caldwell to repudiate and ignore statutes, ordinances and resolutions.

In fact, the only reference to ordinances by Caldwell in its brief (without citation thereto) (Caldwell Brief, p22,28) is to "straw man" CCA's argument by projecting onto CCA a position different from which it actually asserts, so that Caldwell may then refute a fabricated argument. Caldwell accuses CCA of arguing that once payment is made under the Ordinances, followed by a resolution, it cannot be clawed back for any reason. That is not the argument asserted.

The actual position of CCA on this issue was set forth at oral argument on the record and is contained in the transcript (1T8-17 to 9-1) as follows:

> Hittman: Your Honor, they would still have to have another resolution saying subsequent information has caused us to learn that there are problems for A reason, B reason, or C reason and we are now passing a resolution that authorizes a lawsuit, and they have to do it at a public meeting and they have to get people who are cur -- some people who are currently on the counsel to say, I made a mistake in authorizing the prior resolution and now I'm authorizing a new resolution to review or redo this issue…

The Transcript also provides further commentary by the undersigned Attorney Hittman (1T12-15 to 13-9) with respect to this issue:

> … because you have a situation where they had prior action by the Borough of Caldwell which was authorized. They had -- they had an ordinance. They at least facially followed the ordinance with their audit process. They put it on a public meeting agenda. They passed resolutions at the public meeting agenda. And then they followed the process to issue checks in accordance with the ordinance, the resolution, the public meeting standard, et cetera. In order to undo the prior compliance with the ordinance and the prior resolution they have to go back and they have to put it on the public meeting and say, "We made a mistake. We believe that this prior event where all of this was approved was incorrect for reason A, reason B, or reason C." They have to have public comment and then they have to pass a resolution authorizing the lawsuit to recoup whatever they believe the error was based on the prior resolution or resolution approval and until the [sic] pass a resolution it is not right.

It is thus the position of CCA that a resolution, properly passed, in accordance with the Ordinance scheme, the Faulkner Act and the OPMA, cannot be altered or amended in secret without also the following of the Faulker Act and the OPMA, and the public articulation of a legal or factual basis *as to why the original ordinance implementation and resolution authorizing the same was improper or defective in some way*. There must be a factual reason that is publicly articulated; it cannot be altered for political reasons on the advice of an auditor, or in the discretion of a new governing body following an election years later. This record is wholly devoid of information that adequate processes were lawfully followed at any time and in any capacity on this issue.

Further, there is no allegation in this record that Caldwell conducted any *factual* investigation of any kind prior to commencing suit. Even after briefing, Caldwell does not point to any materials in the record except the auditor's report, essentially, an "expert" report that is outside the scope of the expertise of the "expert" proffering the opinion, without knowledge or investigation of the underlying facts. An expert opinion can opine on existing facts; it can't create them or ignore them to reach a predetermined result.

Caldwell was required to interview and investigate the case with its own people before commencing suit; it apparently didn't. Caldwell's brief and its underlying complaint only speak to review of "records". There is no evidence that a single person was interviewed, something that would have had to occur if Ordinance compliance was reviewed. The "records" that it reviewed were incomplete, as has been detailed in this case.

Thus, another glaring omission in Caldwell's brief, raised by CCA, is Caldwell's apparent non-compliance with R.1:4-8. Caldwell had a duty to interview, at the very least, its own fact witnesses prior to filing suit. It appears not to have done so. Caldwell does not address the issue or cite the rule even once. It appears, by omission, to concede the issue.

Additionally, Caldwell makes conclusory statements (Caldwell brief, p25-26) that it complied with OPMA requirements *without citation to the record*. If

Caldwell actually had complied with the OPMA, there would be materials in the record demonstrating such compliance, i.e. resolutions authorizing a lawsuit, minute meetings, etc., and Caldwell would have cited to them instead of offering the "trust us" argument.

There are no such documents in this record, and none are known to exist outside the record on this issue[1]. Further, these broad and conclusory statements come perilously close to violating the Court's order of April 25, 2025 (Da195) as to stricken materials, as these conclusory statements appear to reference other stricken materials, i.e. not minutes or evidence of a vote authorizing suit.

It is perhaps dispositive that this record does not contain any minutes, redacted or otherwise, indicating that a meeting of governing body was held in executive session, that a vote was taken on an issue related to CCA and that the vote passed the requisite majority authorizing any activity, let alone a lawsuit, with respect to CCA.

[1] While CCA does not comment on the specific contents of the stricken documents, they did not contain evidence of a meeting and/or vote authorizing a lawsuit against CCA. It is presumed by CCA that had this critical piece of information been presented to this Court by Caldwell, even in violation of the rules governing the record below, this Court had the discretion, even absent a cross-motion to expand the record, to relax the rules, sua sponte, to order inclusion of this critical piece of evidence, if it existed, in the interest of truth, accuracy and fairness.

LEGAL ARGUMENT

POINT I

CALDWELL'S FAILURE TO FOLLLOW THE OPMA AND THE FAULKNER ACT BARS ITS COMPLAINT.

It should be readily apparent, from the absences in the record that Caldwell failed to follow the OPMA, and specifically, N.J.S.A.§10:4-13, which requires:

> No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> ***a. Stating the general nature of the subject to be discussed; and b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.***(emphasis added)

There should have been a resolution in the record which is compliant with the above requirements, and there isn't. Further, it is insufficient under statute to have a pro forma generic statement in the minutes of every public meeting generically authorizing executive sessions, without more, as such a statement is not compliant with the express terms of statute. Caldwell can't merely opine on its own compliance; it must point to the part of the record where it exists.

It is acknowledged that N.J.S.A. § 10:4-12(7)(b) contains certain exceptions as to matters that can remain confidential and can be addressed in confidential

executive sessions, and it is conceded that attorney-client privilege is a valid reason, *while the privilege remains intact*. However, N.J.S.A. §10:4-14 also requires certain procedural formalities be followed for such confidential sessions, i.e. that minutes be kept, and made available to the public, to the extent possible, with appropriate redaction for the limited issues permitted by subsection 7(b), above only. Votes must be taken; records of votes must be kept.

When the reason for the confidentiality ends, i.e. when privilege is waived (at least as to the content of a Complaint) by the actual filing of a suit, the minutes of the alleged executive session must then be released to the public. They weren't.

There are simply no "minutes" in this record compliant with N.J.S.A.§ 10:4-14, even in redacted form, to show that there was an Executive Session at which a vote authorizing this lawsuit, actually occurred. Caldwell's hypothetical language that a meeting and vote *could have occurred* is not sufficient to meet the statutory threshold to avail Caldwell of this exception; it still must implement the actions dictated by statute *and demonstrate that it did so*.

In order for this lawsuit to have lawfully commenced, a majority vote of the governing body would have to have occurred, been documented and reported to the public under the OPMA. See N.J.S.A. § 40:69A-120 (as to the governing authority of the entire Council on this issue, and not merely the Mayor.)

It is respectfully submitted that in addition to reversing the Trial Court's denial of the motion to dismiss, this Court should clearly rule that in order to overcome a motion to dismiss for failing to state a claim upon which relief may be granted where the Plaintiff is a municipality, the municipality, in this case, Caldwell, must affirmatively recite allegations in its pleading demonstrating its compliance with the Faulkner Act and the OPMA, to the extent each factually applies to the case, in order to sufficiently allege subject matter jurisdiction.

POINT II

THE COURT BELOW FAILED TO APPLY THE LICENSED PROFESSIONAL EXEMPTION TO THE CONSUMER FRAUD ACT. (Da1,2-4-9)

Caldwell asserted a Consumer Fraud Act ("CFA")(N.J.S.A. §56:8-1, et. seq.) claim in its complaint. CCA has asserted that architectural services is not "merchandise" (N.J.S.A.§ 56:8-1(c)) under the CFA, and that CCA is entitled to the protection of the "learned professional" exception to the CFA. CCA asserts that it applies to architects; Caldwell and the Trial Court disagreed.

In support of its position, Caldwell and the Court below (Da009) relied largely upon Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019), which concerned a "licensed home inspector", and which also came before this Court on leave to appeal following a motion to dismiss. In Shaw, the CFA cause of action

was dismissed at the trial level and reinstated by the Appellate Division, the reverse of the result sought herein.

Significantly, the Shaw Court evaluated the issue of regulatory preemption and determined that there was no conflict between the statutory scheme governing licensed home inspectors and the CFA. The Shaw Court thus did not apply the home learned exception to the home inspector therein, referring to him as a "semi-professional". The limits of what constitutes a professional or a semiprofessional was not clearly defined in Shaw. Shaw did not mention architects nor any other type of licensure. It should be noted that Shaw observed that a licensed home inspector has hours and hours of required training. It should be undisputed that a licensed architect has years and years of required training, as do attorneys, accountants and engineers.

The Court below also acknowledged that engineering services were not "merchandise" under the CFA (See R.J. Longo Constr. Co. v. Transit Am., 921 F. Supp. 1295, 1312 (D.N.J. 1996) (Da008), and thus exempted therefrom, but refused to apply the exemption to licensed architectural services. The Court below also acknowledged the exclusion of doctors, lawyers, accountants and ambulance services.

CCA submits that there is no valid legal reason for treating engineering and architectural services differently under the CFA when they are treated identically in every statute identified where they are both mentioned.

CCA submits that upon a review of statutes that classify special rights and responsibilities for professions, such as *inter alia*, doctors, lawyers, accountants and engineers (which the Court below found worthy of the learned professional exception), this Court can observe that such statutes uniformly include architects in this class of professionals. Additionally, two further statutes treat engineers and architects identically.

N.J.S.A. § 2A:53A-26, The Affidavit of Merit Statute, defines seventeen professional licenses for which an affidavit of merit is required. They include doctors, attorneys, accountants, engineers, health care facilities and, of course, architects. They do not include ”licensed home inspector”, such as in Shaw. It is noteworthy that health care facilities are regulated thereunder pursuant to N.J.S.A. § 26:2H-2, the very statute cited by Atlantic Ambulance Corp. v. Cullum, 451 N.J. Super. 247 (App. Div. 2017), which the Court below relied upon (Da008) to acknowledge the existence of a learned professional exception for ambulances.

Thus, of all the learned professionals for which an Affidavit of Merit is required under statute that were also considered by the Court below with respect to

the learned professional exception, only licensed architectural services were excluded from the learned professional exception by the Court below.

Similarly, the statute governing the definition of professional services under the Professional Services Corporation Act, N.J.S.A. § 14A:17-3 provides the following definition:

> (1) "Professional service" shall mean any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this act and by reason of law could not be performed by a corporation. By way of example and without limiting the generality thereof, the personal services which come within the provisions of this act are the personal services rendered by certified public accountants, architects, optometrists, ophthalmic dispensers and technicians, professional engineers, land surveyors, land planners, chiropractors, physical therapists, registered professional nurses, psychologists, dentists, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, veterinarians and, subject to the Rules of the Supreme Court, attorneys-at-law

As in the Affidavit of Merit Statute, architects are considered professions on a level with attorneys, accountants, doctors and licensed professional engineers. Licensed home inspectors, like in Shaw, are also not on this list. When given the opportunity, the Legislature has repeatedly treated architects like doctors, lawyers, accountants and engineers; again, only the Court below has differed by considering

architects differently than the other similarly situated professions which it reviewed.

Further, N.J.S.A. § 59:3-15 creates immunity from liability under the New Jersey Tort Claims Act for licensed architects and licensed professional engineers, *and no other professions under this statute*, under certain factual conditions related to assisting the government during times of emergency.

Further, N.J.S.A. § 52:34-9.2, which addresses the contracting of State Agencies for certain professional services uses the following definitions to define who qualifies as a profession:

> "Professional firm" means any individual, firm, partnership, corporation, association or other legal entity permitted by law to provide professional **architectural**, engineering, or land surveying[2] services in this State;
>
> "Professional architectural, engineering and land surveying services" means those services, including planning, environmental, and construction inspection services required for the development and construction of projects, within the scope of the practice of architecture, professional engineering or professional land surveying as defined by the laws of this State or those performed by an **architect**, professional engineer or professional land surveyor in connection with his professional employment practice. (emphasis added)

[2] Although not at issue in this case, land surveying is another profession that is included in both the Professional Corporations Act and the Affidavit of Merit Statute and presumably would also have a learned professional exception.

At every opportunity, the Legislature treated architects and engineers identically, and treated architects similarly with all other acknowledged learned professions. Only the Court below saw fit to impose disparate treatment. This was improper.

It is respectfully submitted that while not intending to be limited, at a minimum, the professions cited in the Affidavit of Merit statute and/or the Professional Corporation Statute should indicate which "professions" are considered "learned" for the purpose of the CFA. The decision of the Court below should be reversed on this issue.

CONCLUSION

Based on the foregoing, the complaint should be dismissed in its entirety for the reasons set forth above.

Respectfully,

/s/ *Marlo J. Hittman*

Marlo J. Hittman
MJH/mh