SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

RELL CONCRETE CORP, Plaintiff, vs. NATIONAL WINTER ACTIVITY CENTER, D/B/A WINTER4KIDS, Defendant. _____ NATIONAL WINTER ACTIVITY CENTER, D/B/A WINTER4KIDS, Defendant/Third-Party Plaintiff, vs. KENT EXCAVATING AND BUILDING LLC, AQM ANALYTICAL QUALITY AND MONITORING SERVICES, INC., CONCKLIN ELECTRIC & CONSTRUCTION LLC, XCEL PLUMBING & HEATING, INC., WILSON MANAGEMENT SERVICES and JOHN DOES 1-10, and ABC CORPORATIONS 1-10 (fictitious names/entities) Third-Party Defendants.	Civil Action **DOCKET NO. A-001430-24** On appeal from: Judgment of the Law Division, Civil Part, Bergen County Docket No. BER-L-002913-22 Sat below: Hon. Gregg A. Padovano, J.S.C.

BRIEF IN SUPPORT OF NWAC'S REQUEST FOR RELIEF

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[1] 1T = Transcript of August 2, 2024
[2] 2T = Transcript of November 14, 2024
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PRELIMINARY STATEMENT

National Winter Activity Center D/B/A Winter4Kids, ("NWAC"), is the Defendant and Third-Party Plaintiff in this matter. NWAC is a non-profit corporation organized under Title 15 of R.S. of N.J., and a 501(c)(3) non-profit organization. Its stated charitable purpose is, "to improve the lives, health and fitness of youth by providing access to continuous, progressive instruction and meals in an outdoor environment for winter activities." This matter involves the construction of a lodge addition for NWAC, and the contractors involved in that project.

The claims of NWAC were dismissed without prejudice as part of orders granting the Summary Judgment Motions made by the Plaintiff, Rell Concrete Corp. ("Rell"), and Third-Party Defendants Wilson Management Services ("Wilson"), Conklin Electric & Construction LLC. ("Conklin"), and Xcel Plumbing & Heating Inc. ("Xcel"). The trial court granted said motions based on NWAC's failure to provide an expert to substantiate its claims.

NWAC continues to argue that Summary Judgement is inappropriate based on particular facts this matter. Although an expert witness can testify in court to help the trier of fact understand evidence or determine facts, an expert is not required where the evidence and facts are within the realm of the experiences of a reasonable person.

In this matter, some instances of defects include missing electrical outlets, light switches, electricity exposed to water, exposed rebar, concrete visibly off angle, etc. An expert is not required where these and other construction defects are within the realm of the experiences of a reasonable person. Additionally, NWAC has hundreds of pages of supportive documentation of the defects provided in records made in the ordinary course of business by the architect who would provide testimony as to accuracy of the reports. The accuracy of said reports has never been challenged.

With immense respect to the trial court, the court did not make any specific findings regarding which of NWAC's specific instances of harm would fall outside the purview of ordinary experience and instead dismissed all NWAC's claims. NWAC respectfully requests this matter remanded with a finding that expert testimony is not required for the defects in this matter.

TABLE OF PROCEDURAL HISTORY

DATE	EVENT	FILED BY	RESULT	APPENDIX PAGE NUMBER/TRANSCRIPT
05/31/2022	Complaint	Rell- Plaintiff		Da0001
06/02/2022	Answer and Third-Party Complaint	NWAC-Defendant		Da0012
06/02/2022	Amended Answer and Third-Party Complaint	NWAC-Defendant		Da0028

7/6/2022	Answer to Counterclaims	Rell-Plaintiff		Da0042
10/6/2022	Second Amended Answer and Third-Party Complaint	NWAC – Defendant		Da0058
11/28/2022	Answer to Second Amended Answer and Third-Party Complaint	Kent – Third Party Defendant		Da0081
11/20/2022	Answer to Third Party Complaint	Xcel – Third Party Defendant		Da0121
12/1/2022	Answer to all Crossclaims	NWAC - Defendant		Da0149
12/2/2022	Answer to Third Party Complaint	Xcel – Third Party Defendant		Da0151
1/2/2023	Answer to all crossclaims	Rell - Plaintiff		Da0179
1/17/2023	Answer to Third Party Complaint	Conklin – Third Party Defendant		Da0185
3/17/2023	Second Amended Answer	NWAC - Defendant		Da0201
3/17/2023	Answer to the Amended Third Party Complaint	Xcel – Third Party Defendant		Da0227
3/24/2023	Amended Answer to Third party Complaint	Kent – Third Party Defendant		Da0257

4/6/2023	Amended Answer to Counterclaims and Cross Claims	Rell- Plaintiff		Da0293
7/17/2023	Answer to Amended Third-Party Complaint	Wilson-Third party Defendant		Da0313
7/18/2023	Answer to Amended Third Party Complaint	Conklin – Third Party Defendant		Da0341
4/18/2024	Partial Dismissal	Kent- Third-Party Defendant		Da356
5/21/2024	Motion for Summary Judgment	Plaintiff	Granted in Part	Da0365, Da1722, 1T
6/10/2024	Cross Motion Summary Judgment	Defendant	Denied	Da0426, Da1722, 1T
7/17/2024	Motion to Bar	Wilson-Third Party	Granted	Da4222, Da1849
7/25/24	Motion to Bar	Xcel Third party Defendant	Granted	Da1801, Da1851
7/31/2024	Motion to Bar	Conklin-Third Party Defendant	Granted	Da1834, Da1854
09/27/2024	Motion for Summary Judgment	Wilson-Third Party Defendant	Granted	Da1857, Da4253, 2T
10/8/2024	Motion for Summary Judgment	Conklin-Third Party Defendant	Granted	Da1891, Da4253, 2T
10/22/2024	Cross Motion for Summary Judgment	Xcel Third party Defendant	Granted	Da1928, Da4253, 2T

10/24/2024	Cross Motions for Summary Judgment	Defendant	Denied	Da2008, Da2677, Da3413, Da4253, 2T
12/17/2024	Motion to Reconsider	Rell-Plaintiff	Granted	Da2665; 2717, 3T
1/10/2025	Stipulation of Dismissal	Rell-Plaintiff		Da0360
1/10/2025	Stipulation of Dismissal	Xcel-Third-Party Defendant		Da0362
2/28/2025	Dismissal against AQM Analytical and Monitoring Services	NWAC-Defendant		Da0364

STATEMENT OF FACTS

Facts specific to Rell Concrete Corporation, ("Rell"):

1. Rell has a place of business at 106 Ackerman Ave, Emerson, NJ 07630 and is owned by Nuno Perriera. Da0001.
2. Rell was hired by NWAC to perform work on the Lodge Addition being constructed on the property owned by NWAC. Da1924.
3. On September 15, 2017, Rell and NWAC entered into a Contract which incorporated additional Schedules that were created including provisions for damages, holdbacks for retainage, submittals, and requirements for acceptance of work. Da1924
4. The quality of the concrete work performed by Rell materially differed from

the required specifications. Da.1924, Da2073, Da2145, Da2199, Da2204, Da2213, Da2234, Da2073, Da2119, Da2145, Da2170.

5. HHA generated field reports of the non-conforming items detailing the inadequacy of the work. Da2073, Da2145, Da2199, Da2204, Da2213, Da2234, Da2145.
6. HHA gave Rell the reports and had meetings with Rell and NWAC's structural engineer, giving Rell the opportunity to make corrections, however, Rell's solutions to issues were deemed more non-conforming and were also rejected. Rell dis not have the requisite understanding of the project. Id., Da2145
7. On September 26, 2019, HHA noted the following in their meeting minutes item number 6:

> The global issue of the lack of awareness and requirements outlined in the drawings and the required phasing was discussed. Site team to review the contract document package (drawings and specs) to confirm the entirety of the scope is understood and to ask any questions that they may have. Da2145.

8. Nuno Perriera admitted that he believes that the owner is entitled to work completed as per the plans and specifications and that the plans and specifications are not identical. Da1737, Da1890.
9. The specifications contain additional information not found in the plans. Specifications documents provide information regarding acceptable

tolerances, the specific inspections required, the quality and finish of the project, documentation required to be submitted, and what materials to use. Id.

10. Nuno Perriera stated that Rell is responsible for completing work according to specifications and plans, and that he was supervising Rell's work; Id.
11. Nuno Perriera admitted on several occasions that he did not read the specifications, which was confirmed by the minute meetings of HHA. Id., Da2145, Da1924.
12. If Nuno Perriera had read the plans and specifications, he would have known that some of the elements required aesthetically exposed concrete. Id.
13. Nuno Perriera provided the definition of "square" and "plumb". Id.
14. He stated that if the Addition did not meet the definition of "square" or "plumb" that he would be responsible for that deficiency. Id.
15. The reports of HHA state the lodge addition does not meet the definition of "square" or "plumb" as per the specifications and the tolerances of the specifications of the plans and specifications. Da2073, Da2145, Da2199, Da2204, Da2213, Da2234.
16. The Addition underwent a Façade Survey – 8017002-Scan Report to determine if the building was square and plumb. Exterior cladding cannot be installed on a structure that is not square and plumb. According to the

legend, the only appropriate color for within tolerance is “green”, any other color, “red” or “blue” indicates that the surface is out of tolerance. The color “red” indicates the area most out of tolerance. Da2119.

17. There were emails with Rell alerting the company that the entry slab was poured six inches short, which is noncompliant with the ACI. Da2119.
18. Nuno Perriera admitted that there would be delay in installing additional products that would be caused if the building were not square or plumb. Da1890, Da1737.
19. The definition of “level”; (Exhibit A - “Transcript of Nuno Perriera Summary”. Da1890, Da1737.
20. A Flatness Report was required to be completed by Rell as part of the requirements of the specifications. When Rell did not perform, HHA performed it. The report showed that the slab on the third floor is out of tolerance for flatness. Da2071
21. Nuno Perriera admitted that “tolerance” for “square”, “plumb” and “level” were as described in the earlier testimony were the standard and as such his testimony as to deviation and responsibility were made accordingly. Da1890, Da1737.
22. Nuno Perriera admitted that vertical is a 90-degree angle. Id.
23. Nuno Perriera admitted the following for completeness (Id):

a. Is defined as being in conformance with the plans and specifications;
b. Is defined as compliance with the definitions painstakingly provided in the testimony;
c. The definitions can be proven with math;
d. If work is not completed NWAC should not have to pay for same;
e. And Rell never signed off on the forms for Final Certification of Construction, which in pertinent part states, "I have been in responsible charge of the construction operations for the above-named Project and that the construction of the structural concrete has been completed in accordance with the Contract Documents for this Project."
f. Additionally, Rell never signed the Concrete Placement Contractor Signoff Form, which provides that the "Concrete Contractor certify that they have inspected all work related to the above referenced area of the structural framing and certify that all work is in conformance with the requirements of the Contract Documents." Da.1924
g. The specifications additionally provided that Rell was to obtain final municipal approval of Rell's. This approval was not completed by Rell. Da.1924.

24. There is incomplete or inadequately completed work by Rell. Da2073, Da2145, Da2199, Da2204, Da2213, Da2234, Da1890, Da1737, Da.1924.

25. There is no document that provides Rell with any ability to cure any defect, however, during the time Rell was on the project, it received continuous feedback as to corrections that needed to be made. Rell was unable to resolve these issues. Da1890, Da1737, Da.1924.

26. NWAC has suffered damages from Rell's actions. Da2159, Da1734

27. Rell did not complete its scope of work. Items that were not complete include retaining walls, concrete patios, footings for the deck posts, grouting of base plates, a significant number of sidewalks, and the housekeeping pads. Da2170, RELL

Facts specific to Xcel Plumbing and Heating, Inc. ("Xcel"):

28. According to the contract documents and schedules Xcel was responsible for completing the HVAC and plumbing work on NWAC's Lodge addition. Da.1924.

29. Xcel did not install the sub-slab piping for hydronic heating system as contracted for under its agreement with NWAC. Da0892.

30. Xcel did not install did not install correct sleeves for exterior penetrations as contracted for under its agreement with NWAC. Da0892, Da.1924.

31. Xcel, without approval in writing as required installed materials that were rejected by NWAC. Those materials are lower quality, and of a type not shown on the drawings. Da0892.

32. Because Xcel had not properly followed the architect's drawings, there are many items that were encompassed in the schedules that are non-conforming Da3129.

33. Because Xcel utilized substandard, rejected materials, and the quality of its work was substantially lacking, NWAC suffered damages and was forced to terminate its agreement with Xcel and begin work to remediate the issues.

34. If the work was completed, Xcel could have scheduled an inspection. It was not complete and was not done properly. There were no inspections. Da0892.

35. Xcel was meetings with HHA, as shown in the minutes and would have known about the items that were non-conforming or missing. Da0892

Facts specific to Conklin Electrical and Construction LLC ("Conklin")

36. Conklin had a written agreement with NWAC to provide the materials and labor for the electrical work to be performed on the NWAC lodge addition. Da.1924

37. NWAC has paid for 100% of all the electrical material Conklin requested.

38. Conklin installed many electrical elements out of order in a building that was open to dangerous weather conditions including water including but not limited to a transformer, lighting, outlets, conduits, and burglar system. Da2276, Da0892.

39. HHA expressed their concerns verbally in meetings/calls and in writing with the equipment and infrastructure installed being open to the elements. These observations included times where; it was raining inside the building (wind driven); water diverted directly into the electrical equipment (inverter cabinet, etc); wiring plans were not followed; equipment is showing visible signs of rust, including the transformer; improperly installed electrical equipment and wiring, not rated for damp/wet conditions, ("dry listed); and electrical equipment was energized and live, with standing water present in the building. Da0892, Da0892, Da1609.
40. An extensive list of items remains incomplete and missing fixtures. Da0892.
41. Via change order, the following scope was removed from the job and no credit was issued to the client: two sets of automatic sliding doors and fire alarm devices in Basement. There are no other change orders. Da0892.
42. Conklin's failure to provide adequate work caused damage to NWAC. Da0887, Da1609.

Facts specific to Wilson Management Services ("Wilson")

43. WMS was responsible for the materials and labor for the following: All framing (interior and exterior), exterior sheathing, insulation (interior and exterior), roofing, opening preparation on exterior (windows and doors) and sheetrock on interior. Da.1924

44. Wilson did not install/use materials specified by the project documents. Da1643, Da1663, Da0892.

45. Wilson did not correct deficiencies in their work product to bring its work into compliance. Da1663.

46. Wilson installed unfaced batting in a building open to the environment, which invalidated its product warranty and may have caused mold. Da1643, Da1663, Da0892.

47. Wilson used incorrect shielding and used interior caulking. As a result, the correct fireproofing could not be installed, and the sheathing warranty was invalidated. Id.

48. WMS failed to install materials and assemblies as specified in the Contract Documents and identified in the reports created in the ordinary course of business by HHA. At various locations, materials or systems were used that were not in line with Contract Documents, or industry standards as detailed by the reports provided HHA. Id.

49. Wilson's failure to provide adequate work caused delays and damage to NWAC. Da1643, Da1663, Da1635.

COMMON TO RELL, WILSON, CONKLIN, AND XCEL

50. HHA kept meticulous and continuous records as part of their ordinary course of business that were always available to Rell, Wilson, Conklin, and Xcel. Da0892, Da2073, Da2145, Da2199, Da2204, Da2213, Da2234, Da0892.
51. Rell, Wilson, Conklin, and Xcel never contested the accuracy of any of the reports or findings made by HHA, or any other submission made by NWAC.
52. Rell, Wilson, Conklin, and Xcel never provided any photographic evidence, reports, or submittals of any kind to contradict the findings provided by NWAC.

STANDARD OF REVIEW

Rule 4:46-2(c) provides that a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. "To decide whether a genuine issue of material fact exists, the trial court must 'draw all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016). See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman, supra, 242 N.J. at 472 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

Appellate courts review the trial court's grant or denial of a motion for summary judgment is *de novo*. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Christian Mission John 3:16 v. 63 Passaic City, 243 N.J. 175, 184 (2020); Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

When reviewing a grant of summary judgment, the appellate court applies the same standard as the motion judge and considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). See Rozenblit v. Lyles, 245 N.J. 105, 121 (2021); Christian Mission John 3:16 v. Passaic City, 243 N.J. 175, 184 (2020); Friedman, supra, 242 N.J. at 472; Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020); Globe Motor Co., supra, 225 N.J. at 479.

ARGUMENT

I) The Trial Court Erred in Granting Plaintiff and Third-Party Defendants' Motions for Summary Judgment on December 16, 2024, and Motion for Reconsideration of January 9, 2025, as to National Winter Activity Center's

Claims Against Said Defendants for Failure to Provide Expert Testimony. (Da2624 Da2717, 1T, 2T, 3T)

NWAC has demonstrated extensively through the reports of HHA, the architects on the project, that the work performed by Rell, Conklin, Xcel, and Wilson was incomplete, not performed, or performed incorrectly. There was never any argument from these parties that the reports provided by HHA are inaccurate or deficient in any way. The reports are thorough, include photography, and are complete. The reports make it clear, even fora lay person to understand, whether the materials specified in the contract documents, plans, and specifications were installed or was missing. NWAC will not be calling HHA as an "expert", it may be calling representatives of HHA to testify as witness(es). HHA may testify to the contents of their documents produced in the ordinary course of business. The Court may then apply whatever weight it chooses to any statements made by HHA. The Court is always able to use the "reasonable person" standard and judicial notice to determine what is or is not within the realm of ordinary understanding.

It is noteworthy that although Rell, Conklin, Xcel, and Wilson were required to make submittals documenting their progress, they did not. As such, they do not have any proof of completion of work. Cite to record

i. NWAC's claims are substantiated by ample reports and records made in the ordinary course of business and these reports do not require expert testimony.

Typically, construction falls outside of the ordinary purview of the "reasonable person". Here, some of the construction issues in this matter would be understandable to most reasonable people who have experience with home repairs, or any person who has played with blocks. Doors and windows should be at right angles to each other, walls should be "straight", electricity and water do not mix…

In its brief in support of its Motion for Summary Judgment WMS cited the following caselaw:

> "to pursue a negligence claim based upon defective work, which here is apparently couched as a contribution claim, a claimant must prove: (1) the defendant owed a duty of care; (2) the defendant breached that duty of care; (3) the defendant's breach of that duty of care was the proximate cause of the claimant's damages; and (4) the claimant sustained actual damages. See Weinberg v. Dinger, I 06 N.J. 496, 484 (1987). A claimant bears the burden of establishing those elements "by some competent proof." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395,406 (2014). Proximate cause is "**any cause which in the natural and continuous sequence, unbroken by an efficient**

> **intervening cause, produces the result complained of and without which the result would not have occurred**." Conklin v. Hannoch Weisman, 145 N.J. 395,418 (1996). The issue of proximate cause is ordinarily left to the factfinder but may be removed from the factfinder in cases "in which reasonable minds could not differ on whether that issue has been established." Fleuhr v. City of Cape May. 159 N.J. 532, 543 (1999). [“Emphasis added.]

To further substantiate WMS’ claims, it cited a few unpublished decisions. WMS cited to, Enclave Condominium Association v. Lime Contracting. Inc., 2021 WL 3120864 (App.Div. 2021). WMS put particular emphasis on the finding that "construction litigation relies on expert opinion because judges, jurors and lawyers are unfamiliar with construction methods, terms, purposes and standards." Id. at 12 (emphasis added). There were only contracts and specifications, but no reports along the way that showed deviations, standards, and what was missing. In that case, the, “[the court] conclude[ed] that aside from Scheerer's personal opinion, he does not offer any factual basis to support this opinion.” The court continued that, “Scheerer has only supplied his observations and opinions as to the breach of contract by Lime, without identifying any contractual obligation of Lime linking its performance with the alleged defective work.”

Here, unlike in Enclave, NWAC argues that many of its claims do not require an expert and instead can be proven, in part, by documents made during the ordinary course of business and witness testimony from HHA that the Court is free to put wight on as it chooses. It is noteworthy that the documents of HHA that have been submitted continuously to this Court have never been challenged for their accuracy.

ii. Because NWAC's claims are within the realm of personal experience, a reasonable person can understand causation in this matter.

There are occasions in seemingly "complex" cases, in which an ordinary and reasonable person can understand a "cause which in the natural and continuous sequence". Additionally, anyone can understand that if a contract says, "X brand" was to be installed at "Y location" and instead "Q brand" was installed at "Z location" without any proof of authorization that it is not correct. There is no advanced degree or qualification necessary. NWAC contends that the Court can take notice that in very complicated matters of personal injury and other ordinary negligence, "*res ipsares ipsa loquitur*" ("the thing speaks for itself) can be correctly applied as to the causation of damages. "Ordinarily, negligence is . . . 'a fact which must be proved and which will never be presumed, ... [but] [t]he doctrine of *res ipsares ipsa loquitur*, where applicable, is a method of

circumstantially proving the existence of negligence." Myrlak v. Port Auth. of N.Y. & N.J., 157 N.J. 84, 95 (1999) (quoting Meny v. Carlson, 6 N.J. 82, 91 (1950)). "*Res ipsaRes ipsa loquitur* is not a theory of liability; rather it is an evidentiary rule that governs the adequacy of evidence in some negligence cases." Ibid. "*Res ipsaRes ipsa loquitur* is not a theory of liability; rather it is an evidentiary rule that governs the adequacy of evidence in some negligence cases." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 400 (2005) (citation omitted). In order to present a case of *res ipsares ipsa loquitur*, the proponent must show "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect." Khan v. Singh, 200 N.J. 82, 91 (2009) (citation omitted).

The finding of negligence "depends on the balance of probabilities." Buckelew v. Grossbard, 87 N.J. at 526, 435. "[A] plaintiff need not exclude all other possible causes of an accident" to invoke the *res ipsa* doctrine, provided that the circumstances establish "that it is more probable than not that the defendant's negligence was a proximate cause of the mishap." Brown v. Racquet, 95 N.J. at 287, 291–92, 295 (holding in case in which stairway abruptly collapsed that "the trial court properly instructed the jury to consider the issue of liability under the doctrine of *res ipsares ipsa loquitur*"); see also Eaton, supra, 119 N.J. at 639, 642,

575 A.2d 858 (holding that "the unexplained departure of a car from the roadway 'ordinarily bespeaks negligence' " on driver's part and that failure to give *res ipsa* instruction constituted plain error).

Thus, if *res ipsa* applies, the factfinder may draw "'the inference that if due care had been exercised by the person having control of the instrumentality causing the injury, the mishap would not have occurred.'" Brown, supra, 95 N.J. at 288–89, (quoting Bornstein, supra, 26 N.J. at 269, 139 A.2d 404). Because the inference is purely permissive, the factfinder "is free to accept or reject" it. Buckelew, supra, 87 N.J. at 526. Although *res ipsa* does not shift the burden of proof to the defendant, it ordinarily assures the plaintiff a prima facie case that will survive summary judgment. Ibid. When *res ipsa* applies, the defendant can only win a directed verdict if the defendant's countervailing proofs are so overwhelming that they destroy any reasonable inference of negligence and leave no room for reasonable doubt concerning defendant's lack of negligence. Brown, supra, 95 N.J. at 289, 471 A.2d 25 (citations omitted).

In Cortez-Staricco v. Pier Vill. LWAG, A-4319-14T3, 2017 WL 2223996, at *4 (N.J. Super. Ct. App. Div. May 22, 2017), is clear in its finding of what can be within the knowledge of the ordinary person:

"…The trial court found *res ipsares ipsa loquitur* was inapplicable because the sprinkler system was a complex piece of machinery which required expert testimony to detail the workings of the system. However, our Supreme Court has "disagree[d] with [the] sweeping suggestion ... that in almost all complex instrumentality cases a *res ipsa* inference will be conditioned on the production of the expert testimony." Jerista, supra, 185 *N.J.* at 197. "The question is not whether the instrumentality at issue is complex or simple, but whether based on common knowledge the balance of probabilities favors negligence, thus rendering fair the drawing of a *res ipsa* inference." *Id.* at 199. Although the inner workings and mechanisms of a sprinkler system may be outside the ken of the average juror, here it was undisputed that the Village sprinkler system should not have turned on between 8:00 a.m. and 8:30 a.m. on a Tuesday. Our Supreme Court faced an analogous situation in Jerista. There, it was conceded that while the plaintiff was entering a supermarket, the automatic door suddenly closed, striking and injuring her. Id. at 182. The Court considered whether a jury could "infer, based on common knowledge, that automatic doors ordinarily do not malfunction unless negligently maintained by the store owner or whether the *res*

ipsa reference is preconditioned on the expert testimony first explaining the door's mechanics." Id. at 180. The Court held "[a]n automatic door may be a highly sophisticated piece of machinery," but "an automatic door that closes onto and injures a customer entering a supermarket is an occurrence bespeaking negligence that falls within jurors' common knowledge," so "expert testimony is not mandated" and "a *res ipsa* inference" is justified. Id. at 197, 200. (Exhibit C – "Cortez-Staricco").

It has been additionally demonstrated that even something like dentistry can have elements that are within the purview of ordinary experience. For example, the court in Steinke v. Bell, 32 N.J.Super. 67, 70, 107 A.2d 825 (App.Div.1954), stated that, "It has long been settled that pulling the wrong tooth is negligent as a matter of common knowledge.".

To begin its analysis, the Court needs to understand exactly what each party was responsible for under the contracts and specifications.

a. Common sense arguments pertaining to Wilson

The contract documents make it clear that WMS was responsible for the materials and labor for the following: All framing (interior and exterior), exterior sheathing, insulation (interior and exterior), roofing, opening preparation on exterior (windows and doors) and sheetrock on interior. The following contracts outline the individual responsibility of WMS. Based on contracts with NWAC, WMS was responsible for the following:

A. Schedule C: WMS shall provide material, labor and all necessary functions to complete the full scope of work associated with framing and exterior sheathing for the New Lodge. WMS will perform all work including all specified details as per plans.
B. Schedule E: WMS shall provide material, labor and all necessary functions to complete the full scope of work associated with the installation of insulation for the New Lodge. WMS will perform all work including all specified details as per plans.
C. Schedule F: WMS shall provide material, labor and all necessary functions to complete the full scope of work associated with the installation of roof for the new lodge. WMS will perform all work including all specified details as per plans.

D. Schedule H: WMS shall provide material, labor and all necessary functions to complete the full scope of work associated with the prep window opening for the New Lodge. WMS will perform all work including all specified details as per plans

E. Schedule I: WMS shall provide material, labor and all necessary functions to complete the full scope of work associated with sheetrock and spackle for the new lodge. WMS will perform all work including all specified details as per plans.

F. Schedule K: WMS shall provide material, labor and all necessary functions to complete the full scope of work associated with blocking of all required openings at the new NWAC lodge at the above referenced location. WMS will perform all work, equipment and materials with all specified details as per approved plans, approved shop drawings and approved samples (mockups)

(Exhibit A - "Contract Documents).

At first blush, some of these items may appear complex, but much of them can be thought of similarly to "on/off" switches. Walking through each item provides clarity as to the actual simplicity of the failure of WMS to perform framing as contracted. Minimally, no expert testimony should be required to

determine the absence of work, and no expert testimony should be required to determine that interior products should not be used on the exterior. For example, an expert is not required to tell us that a door was not installed where a door should clearly be installed.

WMS failed to install materials and assemblies as specified in the Contract Documents and per industry standards. The following are various instances of such occurrences.

i. At various locations, materials or systems were used that were not in line with Contract Documents, or industry standards as detailed by HHA. For example: Exterior sheathing installed on interior walls, prohibiting the required fire rating from being achieved on said walls. Again, this is simply, were the materials specified and paid for by NWAC used? The answer is “no”.

ii. Exterior sheathing was used on the interior side of an exterior wall where electrical panels were installed. This prevented the required insulation from being installed. Common sense would dictate that you cannot cover the electrical panel, whether inside your own home or anywhere else.

iii. Fasteners installed connecting the exterior sheathing to the metal studs were not properly placed with respect to the distance from the panel

edge, depth of install or field spacing. The installed fasteners did not meet the requirements of the contract documents, the manufacturers installation instructions or the 3rd party inspector. NWAC is able to rely upon the inspection reports and HHA's reports, to determine that the work was done incorrectly.

iv. Incorrect joint treatment installed on the exterior of the building around each sheathing panel and around all fastener heads. Interior fire caulking was used in lieu of exterior sealant. The joint treatment was not warrantable, had to be covered and eventually lead to the loss of warranty on the exterior sheathing. Common sense would dictate that you cannot use interior products on the exterior of any structure.

v. Exterior sheathing was missing on various external elements, most notably the structural framing. Anyone can see the absence of something that was supposed to be there but isn't.

vi. Wall framing was not installed per the contract documents, or industry standards. Many people have done simple framing in their own homes. Wall framing is not exclusively in the realm of expert testimony. HHA may testify that the framing was not correct as shown in their reports.

vii. Headers missing at openings (doors and windows). Most people can understand that doors and windows need tops.

viii. Fasteners missing connecting track to studs. Anyone can see the absence of something that was supposed to be there but isn't. Most people are familiar with how track doors operate because many people have sliding doors or windows.

ix. Fastener type at track to concrete condition inconsistent, not adequately spaced. This is not exclusively in the realm of expert testimony. HHA may testify that the spacing was inconsistent as shown in their reports. Or any person who can tell measure can tell if there is a difference in spacing between each fastener.

x. All bridging and bracing missing. Anyone can see the absence of something that was supposed to be there but isn't.

xi. Track connecting walls and soffits to the roof/structure above at the 3rd floor missing actual connection. Various locations had no physical connection between wall/soffit and the structure above, leaving the wall inadequately braced. Anyone can see the absence of something that was supposed to be there but isn't.

xii. Various tracks were cut leaving the remainder of the track insufficient for its intended use and various studs cut too short to fit properly in

the track. HHA may testify that the tracks were cut incorrectly. Most people are familiar with how track doors operate because many people have sliding doors or windows. Those people would understand that the door or window would need to slide along the entire opening.

xiii. Shaft channels not installed per the contract documents. HHA may testify that the channels were not installed as per the contract documents as shown in their reports.

xiv. Studs installed prior to support angles being installed, resulting in cantilevered, unsupported wall assemblies. HHA may testify that the channels were not installed as per the contract documents as shown in their reports.

xv. Stud walls not installed per AISI standards, most notably with knock-outs not being aligned, preventing electrical, plumbing and bridging from being installed. HHA may testify they were not installed as per the contract documents as shown in their reports.

xvi. Structural connection between exterior wall assemblies and structural beams not installed (slide clips). Wilson noted on various occasions these were installed. Upon sheathing removal to inspect, clips were not present. Anyone can see the absence of something that was supposed to be there but isn't.

xvii. Framing in various locations not installed per the contract documents. Columns enclosures, exterior walls not framed per the drawings. This determination requires that a person look at the plans and determine if basic shapes, such as rectangles or squares, containing right angles, were present. Most children can accomplish this. HHA may testify that they were not installed as per the contract documents as shown in their reports.

xviii. Gasketing not installed between track and concrete, studs and concrete. Anyone can see the absence of something that was supposed to be there but isn't.

xix. Incorrect insulation installed (lack of foil facing). Most people can determine whether insulation has foil or not.

xx. Insulation installed out of sequence (open building, not weathertight) voiding the warranty. Most people who have ever been to a local hardware store such as Home Depot know that interior insulation should be installed on the interior of the building. Most people also know that if there are no walls, then there is no "interior".

xxi. Weather barrier on the roof was left exposed too long prior to the metal decking being installed, voiding the warranty of the membrane.

A reasonable person can determine the duration of time between installation and the expiration of a term.

xxii. No gutters, leaders or fascia were installed (part of roof), which lead to various areas of water damage around the building. Anyone can see the absence of something that was supposed to be there but isn't. Most reasonable people who have a home understand that gutters, leaders, and facia are important for routing water.

xxiii. Blocking for openings (windows and doors) not installed. Anyone can see the absence of something that was supposed to be there but isn't.

xxiv. Sheetrock and spackle were not installed. Anyone can see the absence of something that was supposed to be there but isn't.

xxv. Studs missing on exterior wall assembly, preventing cladding from being installed. Anyone can see the absence of something that was supposed to be there but isn't.

xxvi. Track and stud assembly cut too short, not attaching to structure above. HHA may testify that the tracks were cut incorrectly. Most people are familiar with how track doors operate because many people have sliding doors or windows. Those people would understand that the door or window would need to slide along the entire opening and

that the device that secures them needs to be long enough not to fall out.

xxvii. Stud walls not installed square/plumb. This determination requires that a person look at the plans and determine if basic shapes, such as rectangles or squares, containing right angles, were present. Most children can accomplish this. HHA may testify that they were not installed as per the contract documents as shown in their reports.

xxviii. Insulation missing ahead of the building being closed up. Anyone can see the absence of something that was supposed to be there but isn't.

xxix. Exterior sheathing left overexposed, voiding warranty. A reasonable person can determine the duration of time between installation and the expiration of a term.

xxx. Framing materials not protected (building not enclosed), causing framing to rust. Most people have experience understanding that materials would not be rusty if they were not exposed to weather for a significant duration of time.

xxxi. Correct exterior framing could not be confirmed, however the studs were rusty if they were rust-proof as required.

xxxii. Exterior cladding shop drawings not provided, required as per the contract documents. Anyone can see the absence of something that was supposed to be there but isn't.
(Exhibit A - "Contract Documents", Exhibit B – "HHA Reports", precise citation to reports provided in the Statement of Facts).

WMS was on notice of these deficiencies as per the meetings and reports provided by HHA. Specifically, regarding insulation, Wilson Management failed to install insulation that met the requirements outlined in the Contract Documents. WMS had told NWAC that the insulation was compliant with the Contract Documents, meaning it had the proper R-value (thermal value), foil facing (fire protection) and vapor retarder (vapor barrier for moisture protection). WMS elected to cover said insulation without inspection. HHA requested the insulation to be uncovered and determined the insulation did not meet the code requirements, nor the requirements outlined in the contract documents. Insulation was also installed in an open building, where it was exposed to the elements. Such insulation is not intended to be installed in an open building and therefore, the warranty was no longer valid, as confirmed by the manufacturer. All instances of installed batt insulation had to be removed and discarded as the material was not

warrantable and the manufacturer would not confirm that the product was mold free.

WMS used incorrect shielding and used interior caulking. As a result, the correct fireproofing could not be installed, and the sheathing warranty was invalidated. The exterior joint treatment installed by WMS failed to meet the requirements of the contract documents. The product that Wilson Management used for the exterior joint treatment to seal the sheathing and all fastener penetrations was a product intended for interior only fire caulking. The material is specifically designed to be installed on the interior side of climate-controlled buildings for the sole purpose of fire caulking and as such, was not tested or approved for use on the exterior for weather sealing. The material warranty could not be maintained and the material around the entirety of the building had to be treated (sealed) and tested to ensure the integrity of the exterior waterproofing could be maintained. As this process took so long, the remainder of the exterior coverings could not be installed and the exterior sheathing warranty was voided, as the material was left over exposed.

b. Common sense arguments pertaining to Conklin

Knowing what essential electrical features are present in a room is basic. For example: a room has outlets, lighting fixtures, and light switches. Walking

through each item provides clarity as to the actual simplicity of the failure of Conklin to perform as contracted. Minimally, no expert testimony should be required to determine the absence of work, and no expert testimony should be required to determine that electrical work should not be exposed to water. Specifically, the following are a list of some of the items NWAC paid for but were not completed correctly:

a. Incorrect location of electrical rough-in (receptacles, lighting conduit, panels). Most people can tell where an electrical outlet or lights should be on a plan as those elements are typically client driven and based on common sense. People usually want outlets and lighting to be situated conveniently.

b. Transformer as specified not installed, alternate (without approval) was installed. A reasonable person can see they paid for "A" brand of transformer and were instead given "X".

c. Installation of conduits running to transformer not as specified (flexible versus rigid). Most people can tell the difference between a flexible tube and a stiff tube.

d. Installed electrical panels on exterior sheathing, instead of sheetrock. This rendered it impossible to install the insulation as designed at this wall. It is common knowledge that electrical panels for interior electrical work should face inside the building.

e. Installed burglar and fire alarm wiring without shop drawings or submittals. Most people can determine the absence of receiving something that was required; especially if it is a piece of paper.

f. Installed exposed fire alarm wiring, was supposed to be concealed in conduit. A reasonable person knows that loose wires should not be visible.

g. Conduit on exterior of the building not as specified. A reasonable person could see that electrical work should not run down the side of a building in the wrong place. All exterior electrical work was to be encased in concrete and therefore not visible.

h. Installed electrical equipment and wiring, not rated for damp/wet conditions, in an open building. Electrical equipment was energized and live, with standing water present in the building. Most people know that water and electricity do not mix.

i. Via change order, the following scope was removed from the job and no credit was issued to the client: two sets of automatic sliding doors and fire alarm devices in basement. A reasonable person could expect a credit from not receiving said high cost and obvious items.

(b) Missing fixtures / Rough-in.

1. Corridor 004

a. Missing Fixture Type B1 and open junction boxes.

Most people can tell that there are no functioning lights in a hallway when they paid for functioning lights in a hallway. Most people understand that complete electrical work requires functionality. If the work was completed as paid for and required, the lights would turn on.

2. Men's Room 006
    a. Lighting rough not completed. All ceiling fixtures must be prepped with jumpers, along with 2 open ceiling boxes.

       Most people can tell that there are no functioning lights in a bathroom when they paid for functioning lights in a bathroom. Most people understand that complete electrical work requires functionality. If the work was completed as paid for and required, the lights would turn on.

3. Women's Room 007
    a. Lighting rough not completed. All ceiling fixtures must be prepped with jumpers, along with 3 open ceiling boxes.

Most people can tell that there are no functioning lights in a bathroom when they paid for functioning lights in a bathroom.

4. Room 002
    a. Missing fixtures by water fountain.
    b. Exit signs with open boxes and wires.

    Most people can tell when there are missing light fixtures and exit signs with wires hanging out of them.

5. Vestibule 012
    a. Lighting not wired as shown on plan
    b. Missing LMRC 211, LMPX 100 controllers. Rough in with line voltage switch not shown on plan.

    Most people know that to turn lights on, a light switch is required.

6. Mech Room 005
        i. Missing all circuits for mechanical equipment
        ii. Lighting rough not complete.
        iii. Missing fixtures.

Most people can tell when there are missing light fixtures and wires that should connect them in an open building.

b. Food Prep 013

i. Rough not complete.

ii. Missing fixtures.

Most people can tell when there are missing light fixtures.

c. Elevator Pit & Shaft

i. No work done.

Most people can tell when there are missing electrical work in an empty concrete shaft.

d. Egress Stairs 008

i. Missing fixtures

Most people can tell when there are missing light fixtures.

(ii) First Floor

1. Sky Tuning

a. Missing Outlets, not roughed in.

Most people can determine that there are not the correct number of electrical outlets in a room.

2. Equipment Facilities Room 102

   a. Emergency lights layout, not according to plan.

   Most people can understand that emergency lights are associated with the emergency exit lighting. Emergency lights are usually, by their nature, apparent.

3. Egress Stairs 108

   a. Missing fixtures, not roughed in.

   b. Lighting control system, not installed.

   Most people can tell when there are missing lighting controls because they cannot turn on the lights.

4. Exterior Front

   a. Wires roughed in, but no fixtures installed.

   Most people can tell when there are missing light fixtures

5. Exterior Rear

   a. Wires roughed in, but no fixtures installed.

   Most people can tell when there are missing light fixtures

(iii) Second Floor

1. Entry Vestibule 206

a. Missing Fixtures and wires not roughed in.

b. Missing lighting control system.

Most people can tell when there are missing light fixtures and no light switches.

2. Egress Stairs 204

a. Missing Fixtures and wires not roughed in.

b. Missing lighting control system.

Most people can tell when there are missing light fixtures and no light switches.

3. Kitchen 202

a. Missing fixtures and wires not roughed in.

b. Missing all outlets.

c. Missing panel, installed in wrong area, not per plan.

Most people can tell when there are missing light fixtures, no outlets, and no light switches. It is simple to see where the panel should go on a plan. The plan will be labeled “panel”.

4. Dry Storage 213

a. Missing Fixtures and wires not roughed in.

b. Missing lighting control system.

c. Panel installed in this room. This was not on plan.

Most people can tell when there are missing light fixtures and no light switches. It is simple to see where the panel should go on a plan. The plan will be labeled “panel”.

5. Third Floor

a. Dining 301

i. Wires roughed in but no fixtures installed.

ii. Outlets missing, rough wire incomplete.

iii. Exit signs missing.

Most people can tell when there are missing light fixtures, no exit signed, and no light switches.

b. Egress Stairs 307

i. Wires roughed in, but no fixtures installed.

ii. Heater wiring missing.

Most people can tell when there are missing light fixtures and no light switches.

c. Satellite Kitchen 302

i. No panels or wiring installed.

ii. Framing not complete.

Most people can tell when there is no wiring in a kitchen.

d. Office 309

i. Framing incomplete.

ii. Wires coiled waiting for framing.

Most people understand that if electrical work is completed, there are not balled up "extra" wires hanging.

e. Mechanical Room 306

i. Incomplete framing.

ii. Some wires coiled and waiting for walls.

Most people understand that if electrical work is completed, there are not balled up "extra" wires hanging.

(c) Burglar Quote was paid in full by NWAC.

(i) Scope of the quote was to install wiring for the burglar and card readers.

1. Incomplete Items:

a. Shop drawings not provided.

b. Wiring and Devices not installed.

c. Inspections not completed.

Most people can tell whether or not a burglar system was installed. Most people can tell that an inspection was not completed by the lack of documentation from the municipality and contractor.

(d) Removal of Conduit paid in full by NWAC.

(i) Scope of the work was to remove conduits on the columns that were getting refinished, reinstall conduits after refinishing is complete.

(ii) Non-Conforming Items: Under the original contract, all conduit was supposed to be concealed inside the concrete. As part of the remediation efforts for the concrete, all of the exposed conduit had to be removed and reinstalled. As this conduit was incorrectly installed originally (surface mounted on concrete), the cost to remove and reinstall should be void.

Most reasonable people know that if this electrical work is to be incased in concrete, it should not be visible outside the concrete.

(e) Underground Trenching

(i) The scope of this work was to dig out trench to the new lodge for the power and communication conduits, to call for inspections, and to backfill.

(ii) Non-Conforming Items: The back deck runs around the exterior of the existing lodge for a service entry. The electrical service from the transformer runs a similar path to the New Lodge. Conklin did not run the electrical line around the deck, not through it. This brought the source of electricity in direct conflict with the concrete support piers for the deck. There was no option to move the pier move the piers and running high voltage electrical line through the piers was not an option. Electrical and low voltage service to the New Lodge building had to be dug up and re-run. In addition, the conductors used were of the wrong material (aluminum, not copper) as the drawings indicate.

Most people can tell if a trench is placed through or around a building. Most people can tell the difference in copper and aluminum. They are two metals of completely different visible characteristics and prices.

c. Common sense arguments pertaining to Xcel

Xcel performed admittedly performed in a different manner, the Court should find that Xcel was required to perform in accordance with those Contract Documents. And when both Parties acknowledge that inspections were not completed, and completion was defined as having satisfactory inspections and signing off by Schone Mallet, the Court should again, find that Xcel was required to perform in accordance with those Contract Documents. It is not that difficult. For the other items, like the above examples in caselaw, an ordinary person can tell if something is above or under concrete. Ordinary people know that a "sleeve" for a pipe is something that you put a pipe through like a sleeve of your shirt.

Xcel was continuously on notice of these deficiencies as per the meetings and reports provided by HHA. Xcel never questioned the integrity and accuracy of the reports by HHA. NWAC paid for the work that is not in conformance with the agreements the parties made.

d. Common sense arguments pertaining to Rell

Nuno Perriera, in his sworn testimony has admitted the statements provided in his transcript and statement of facts that the owner is entitled to receive what is contained in the specifications *and* plans and that if the work done by Rell did not conform, then NWAC should not have to pay for that work.

Nuno Perriera testified that pitch, level, plumb, and square could all be determined using math. The math has been provided to all parties during the

discovery process by reports and reports made in the ordinary course of business by NWAC's licensed architectural firm HHA and other firms, and has been provided herein. Mr. Perriera has admitted that if the math demonstrates that there the work was out of compliance with the specifications and plans, that Rell is responsible.

It has been demonstrated extensively that the work from Rell was incomplete, not performed, or performed incorrectly according to its own testimony. Additionally, most reasonable people can understand that a building needs to be square, plumb, level, have grading to remove water away from the building, have smooth concrete for aesthetic reasons rather than rough unfinished walls…

Accordingly, totality of evidence provided here support NWAC's claims that Rell is not entitled to any monetary damages from NWAC.

iii. Contract Damages do not require expert testimony

HHA's reports are clear that Rell, Wilson, Xcel, and Conklin were responsible for work being accomplished as per the plans and specifications. The Controlling Agreements between Rell, Wilson, Xcel, and Conklin are identical and specifically calls for various types of damages. Additionally, a plaintiff who is successful on a claim for breach of contract is entitled to "compensatory damages for such losses as may fairly be considered to have arisen naturally from the defendant's breach of

contract". Wade v. Kessler Institute, 343 N.J. Super. 338, 352 (App. Div. 2001). A necessary element of a breach of contract claim is that the plaintiff themselves must prove that they sustained damages are a result of the breach. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007).

"[A] party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract." State v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 617 (App. Div. 2006) (quoting Pickett v. Lloyd's, 131 N.J. 457, 474 (1993). "Compensatory damages are designed 'to put the injured party in as good a position as he would have had if performance had been rendered as promised.'" 525 Main St. Corp. v. Eagle Roofing Co., 34 N.J. 251,254 (1961) (quoting 5 Corbin on Contracts§ 992, p. 5 (1951); 1 Restatement of Contracts§ 329 comment § (1932)). Compensatory damages should be in an amount reasonably within the contemplation of the parties at the time the contract was formed and sufficient to put the injured party in the same position it would have enjoyed if the breaching party had performed, no better position and no worse. Donovan v. Bachstadt, 91 N.J. 434, 444-45 (1982); Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 292-93 (App.Div.1998).

The Supreme Court has explained, "[when] the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages

have resulted, mere uncertainty as to the amount will not preclude recovery -- courts will fashion a remedy even though the proof on damages is inexact." Kozlowski v. Kozlowski, 80 N.J. 378,388 (1979) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975)).

Rell, Wilson, Xcel, and Conklin failed to correct noted deficiencies, or complete the scope of work under the various contracts and as such, work had to be remediated, removed or installed by alternative contractors hired by NWAC.

In their signed contract, NWAC is entitled to contract damages and liquidated damages for delay, as well as all other benefits included. Additionally, Rell, Wilson, Xcel, and Conklin have been unjustly and inequitably enriched by retaining the benefit of the previous payments made by NWAC and simultaneously causing NWAC substantial monetary damages. To state a claim for unjust enrichment under New Jersey law, a plaintiff must allege: (1) that defendant has received a benefit from the plaintiff; and (2) that the retention of that benefit without payment would be unjust. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 544 (1994).

CONCLUSION

For the foregoing reasons, NWAC request that this Court find that the absence of an expert should not result in Rell, Wilson, Xcel, and Conklin to prevail on their respective motions. In this brief, NWAC has provided the business records, and

additional supporting documents that show that NWAC was not provided with the work Rell, Wilson, Xcel, and Conklin were supposed to perform. The claims brought by NWAC can be proven by documents, statements, testimony from HHA, and the Court's own experiences. Minimally, the missing work and products do not require an expert conclusion. NWAC respectfully asks this Court to consider its claims and find that expert testimony may not be required.

Respectfully submitted,

By: 

Cara A. Parmigiani, Esq.

Date: 5/15/25

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RELL CONCRETE CORP., Plaintiff, v. NATIONAL WINTER ACTIVITY CENTER d/b/a WINTER4KIDS, Defendant. and NATIONAL WINTER ACTIVITY CENTER d/b/a WINTER4KIDS, Defendant/Third-Party Plaintiff. v. KENT EXCAVATING AND BUILDING LLC, AQM ANALYTICAL QUALITY AND MONITORING SERVICES, INC., CONCKLIN ELECTRIC & CONSTRUCTION LLC, XCEL PLUMBING & HEATING, INC., WILSON MANAGEMENT SERVICES, and JOHN DOES 1-10, and ABC CORPORATIONS 1-	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001430-24 SAT BELOW: THE HONORABLE GREGG A. PADOVANO, J.S.C. SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-2913-22

10(fictitious names/entities), Third-Party Defendants.	

RESPONDENT WILSON MANAGEMENT SERVICES' BRIEF IN OPPOSITION TO NWAC'S REQUEST FOR RELIEF

On the Brief:
Paul Piantino III, Esq.
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PRELIMINARY STATEMENT

National Winter Activity Center, D/B/A Winter4Kids (hereafter "NWAC") filed this appeal after the Honorable Judge Padovano granted summary judgment in favor of Wilson Management Services (hereafter "WMS") and the other respondents. The issue here is simple: NWAC failed to serve a timely expert report, NWAC's late served expert report was **barred** by Judge Padovano, and, therefore, NWAC cannot prove **any** of its claims against WMS or any of the Respondents. New Jersey law on this issue is well-settled and clear.

As background, this matter involves a complex commercial construction project involving numerous trades located in Vernon, New Jersey. NWAC alleged that WMS was responsible for, *inter alia*, exterior framing, insulation and roofing of one of the buildings. NWAC failed to provide any expert testimony to substantiate its claims against WMS.

Critically, during proceedings at the trial court, NWAC attempted to serve an eleventh-hour expert report – after discovery closed. WMS moved to bar this expert report. Judge Padovano providently granted the motion to bar. **NWAC fails to raise the Order barring the expert report on this appeal and any such arguments are now waived under New Jersey law.**

Even were NWAC to raise this issue – which it has now waived and cannot appeal – the ruling of Judge Padovano was sound and must be upheld.

Now, instead of contesting the Order barring the expert report, NWAC argues that it does not require expert testimony to prove its complicated construction claims against WMS and the other Respondents. This argument is meritless. New Jersey precedent on this issue is long-settled and NWAC's arguments must be rejected.

Further, NWAC now apparently attempts to manipulate a non-expert "report" and allow an unlicensed architect – whom was never identified as an expert – to provide 'expert' testimony as to the alleged defective conditions and construction issues at the site. This argument, rejected below, must also be disregarded here in the face of sound precedent on this well-settled issue.

Simply put, in a complex commercial construction defect case, a plaintiff is required to submit credible expert testimony in order to substantiate and prove its claims. The case at bar epitomizes the need for such expert testimony, as the issues raised by NWAC are complex and include intricate and nuanced construction practices and industry standards that are far beyond the ken of an average juror. As such, as Judge Padovano held, NWAC's claims must be dismissed. Judge Padovano's Order granting summary judgment in favor of the

respondents was well-founded, reasoned and must be upheld. There is no basis to overturn this Order and NWAC's appeal must be denied.

CONCISE PROCEDURAL HISTORY

On May 31, 2022, Plaintiff, Rell Concrete Corp. ("Plaintiff"), filed its Complaint against defendant, National Winter Activity Center, Inc. ("NWAC"). (Da0001). On March 17, 2023, NWAC, as third-party plaintiff, filed the operative pleading in this action, its Second Amended Answer and Third Party Complaint with claims against Third Party Defendant WMS. (Da0201). NWAC's Third Party Complaint alleges as follows: First Count, Breach of Contract; Second Count, Unjust Enrichment; Third Count, Contribution; Fourth Count, Violations of the Consumer Fraud Act; Fifth Count, Fraud; and Sixth Count, Damages. See Id. On July 17, 2023, WMS filed its Answer with Crossclaims against NWAC. (Da0313).

On August 2, 2024, Judge Gregg A. Padavano, J.S.C., entered an Order barring and precluding NWAC from using the expert report of Jason Randle, PE of Robson Forensic, Inc. (Ra0001). On August 19, 2024, Judge Gregg A. Padavano, J.S.C. partially granted Plaintiff, Rell Concrete Corp.'s Motion for Summary Judgment, including dismissing the CFA claims and fraud claims against Rell. (Da1722).

On December 16, 2024, Judge Padovano granted summary judgment in favor of WMS as to all claims by NWAC.

WMS'S COUNTERSTATEMENT OF FACTS

1. The claims involved in this action involve a large commercial construction project located in Vernon, New Jersey. See Da0001, ¶¶ 4-7.

2. NWAC alleges that WMS was responsible for exterior framing, insulating, and roofing of the building. Da0201, ¶ 91.

3. NWAC failed to provide any expert testimony to substantiate this claim.

4. NWAC then alleges that WMS "did not install/use materials specified by the project documents in ways that are inconsistent with an environmentally efficient building." Id. at ¶ 92.

5. NWAC failed to provide any expert testimony to substantiate this claim.

6. NWAC alleges that WMS did not correct deficiencies in its work and had too few people on site to complete the work correctly. Da0201, ¶ 93-94.

7. NWAC failed to provide any expert testimony to substantiate this claim.

8. NWAC alleges that WMS "installed unfaced batting in a building open to the environment, which invalidated its product warranty and may have caused mold." Id. at ¶ 95.

9. NWAC failed to provide any expert testimony to substantiate this claim.

10. NWAC alleges that WMS "used incorrect shielding [sic] and used interior caulking. As a result, the correct fire proofing could not be installed, and the sheathing warranty was invalidated." Id. at ¶ 96.

11. NWAC failed to provide any expert testimony to substantiate this claim.

12. NWAC alleges "Kent was responsible for inspecting the work performed by [WMS]." Id. at ¶ 97.

13. NWAC failed to provide any expert testimony to substantiate this claim.

14. NWAC alleges the following, verbatim, "should have inspected. Once the architect was asked by the owner – missing fasteners and not to the right depth. Did they get paid 100% if so should not have[.]" Id. at ¶ 98.

15. NWAC failed to provide any expert testimony to substantiate this unintelligible claim.

16. NWAC then alleges, verbatim, "Tried to correct their own damage. Had an entire remediation plan. Caused even more damage…" Id. at ¶ 99.

17. NWAC failed to provide any expert testimony to substantiate this unintelligible claim.

18. NWAC then claims that "Because delays caused by [WMS], the project lost the exterior cladding subcontractor." Id. at ¶ 100.

19. NWAC failed to provide any expert testimony to substantiate this claim.

20. NWAC then alleges WMS's "failure to provide adequate work caused delays and damages to NWAC." Id. at ¶ 100.

21. NWAC failed to provide any expert testimony to substantiate this claim.

22. NWAC's representative, Schone Malliet, testified at his deposition that the counterclaims at issue mostly center on allegations of defective work. Da1400, Deposition Transcript of Schone Malliet, 277:14-21.

23. Mr. Malliet also testified that his understanding of the factual basis of NWAC's claims was that WMS's work deviated from specifications in place at the project. Id. at 366:23 through 367:4.

24. When asked to identify any specific defects, Mr. Malliet testified "No, not directly, not – I wouldn't – I wouldn't even know what the defects or whatever were." Id. at 379:17-23.

25. NWAC failed to provide any expert testimony to substantiate this claim.

26. Discovery concluded on July 1, 2024. (See Docket Number BER-L-002913-22)

27. Discovery cannot be reopened.

28. NWAC did not, and cannot, present expert testimony in support of its claims against WMS.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Appellate courts review the legal conclusions underlying a summary judgment motion on a plenary de novo basis. Johnson v. McClellan, 468 N.J. Super. 562 (App. Div. 2021). "Legal issues are reviewed de novo." State v. Vargas, 213 N.J. 301, 327 (2013). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, Ltd. P'ship v. Twp. Comm., 140 N.J. 366, 378 (1995) (citing State v. Brown, 118 N.J. 595, 604 (1990).

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT (Da4253); (Ra0001)

A. NWAC Waived Any Arguments Relating To The August 2, 2024 Order Barring NWAC's Purported Expert By Failing To Brief This Issue On Appeal. The Trial Court's August 2, 2024 Order Barring NWAC's Expert Is Not Subject To Review On This Appeal, Was Correctly Decided, And Is Dispositive Of The Ultimate Issues Herein (Da4253); Ra0001).

On August 2, 2024, Judge Padovano correctly barred an expert report and testimony of Jason Randle, PE of Robson Forensic, Inc., which was served by NWAC after the discovery end date passed. (Ra0001). Notably, NWAC failed to raise any issue related to the barred report on this Appeal. However, it must be noted to this Court that the Order barring NWAC's expert served as the basis for summary judgment below.

NWAC has waived any right to appeal the issue of the barred expert report, as such was not raised by NWAC on this appeal. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 404 (App. Div. 2002) (citing Liebling v. Garden State Indemn., 337 N.J. Super. 447, 465-66 (App. Div. 2001) (plaintiff failed to brief contentions and they were therefore waived); Society Hill Condominium Ass'n, Inc. v. Society Hill Associates, 347 N.J. Super. 163, 174 (App. Div. 2002) (an issue not briefed is deemed waived).

NWAC failed to brief or raise any issue regarding the barred expert reports. As such, NWAC has waived these contentions on this Appeal.

As will be further developed and discussed below, NWAC's failure to procure any expert testimony in support of the complex construction claims at issue herein is dispositive in this case. Simply put, NWAC cannot prove its claims without expert testimony.

B. NWAC Provides No Legal Support For Its Position That Expert Testimony Is NOT Required In A Complex Commercial Construction Project. (Da4253); (Ra0001).

Much to the chagrin of NWAC, this is not a case of screwing in a lightbulb. By NWAC's very own allegations, without any need to even look elsewhere, it is clear that complex construction standards are at play. Indeed, this is a project with multiple different contracting trades, multiple means and methods, and involves multiple buildings on the site. NWAC's entire theory of appeal is based upon the idea that expert testimony is not needed for this case. However, if ever there was a case demonstrating the necessity of expert testimony, it is this case.

NWAC's claims are predicated on negligence in the construction of the building, which relies upon contrived construction practices that are unfamiliar to any reasonable juror. NWAC was required to articulate, via expert testimony, any deviations from accepted construction industry practices for a particular trade – such as roofing, framing, insulating or general contracting – and that these articulated deviations were the proximate cause of Plaintiff's damages.

Indeed, many of the negligence claims are premised on the sequencing of the project itself – which is clearly beyond the ken of a reasonable juror. For example, at what point in time does "fireproofing" occur in comparison to "shielding" for an framing subcontractor? In order to prove such allegations against WMS, NWAC was required to provide expert testimony to substantiate these claims. NWAC failed to do so. Furthermore, NWAC failed to provide any case law that NWAC need not furnish expert testimony in order to prove the merits of its case. In fact, such arguments suggesting that expert testimony is not required for complex construction litigation have been denied by the Appellate Division. See Strumeier v. Lenard, 2016 WL 7010532 (App. Div. 2016)[1]

As will be discussed below, and which was noted by Judge Padovano below, the abundance of case law mandates that expert testimony is required in complex commercial construction litigation.

C. NWAC Cannot Prove Its Claims Against WMS Without Expert Testimony (Da4253); (Ra0001).

i. Standard of Care for Defective Work Based Claims

To successfully pursue a negligence claim based upon defective work, which here was apparently couched as a contribution claim, a claimant must

[1] Respondents Appendix at Ra0006. Defendant is unaware of any case law to the contrary.

prove: (1) the defendant owed a duty of care; (2) the defendant breached that duty of care; (3) the defendant's breach of that duty of care was the proximate cause of the claimant's damages; and (4) the claimant sustained actual damages. See Weinberg v. Dinger, 106 N.J. 496, 484 (1987). A claimant bears the burden of establishing those elements "by some competent proof." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014); see also Strumeier v. Lenard, 2016 WL 7010532 (App. Div. 2016)[2] (*citing* Ford Motor Credit Co., LLC v. Mendola, 427 N.J. Super. 226, 236-37 (App. Div. 2012).

Proximate cause is "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." Conklin v. Hannoch Weisman, 145 N.J. 395, 418 (1996). The issue of proximate cause is ordinarily left to the factfinder, but may be removed from the factfinder in cases "in which reasonable minds could not differ on whether that issue has been established." Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999). To prove the element of causation, NWAC bears the burden to:

> introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly

[2] Respondents Appendix at Ra0006. Defendant is unaware of any case law to the contrary.

> balanced, it becomes the duty of the court to direct a verdict for the defendant.

Davidson v. Slater, 189 N.J. 166, 185 (2007).

Here, NWAC failed to serve any liability expert report in support of its claims against WMS. Absent expert testimony, NWAC was an is unable to establish the proper standard of care for WMS's work on the project. All of the factual allegations against WMS require a showing of expert testimony in order to substantiate, as they involve complex construction practices that are well beyond the ken of the average juror. Moreover, NWAC cannot prove that any alleged deviation from accepted construction standards proximately caused NWAC's damages.

ii. Expert Testimony Is Required In Construction Litigation, Including Breach Of Contract Actions

This Court recently affirmed that expert opinion is required in breach of contract actions alleging defective work or deviations in performance under construction contracts. More particularly, Enclave Condominium Association v. Lime Contracting, Inc., 2021 WL 3120864 (App. Div. 2021),[3] involved a breach of contract action wherein the trial court found that an expert was required in order to prove breach of contract claims based upon defective construction work. Applying the long-standing Butler v. Acme Markets, Inc.,

[3] Respondents Appendix at Ra0011. Defendant is unaware of any case law to the contrary.

89 N.J. 270 (1982), the trial court found that the construction case "involved many terms of art such as 'workmanlike manner' and 'construction industry standards' and the interpretation of 'plans and specifications' that are beyond the common knowledge of the average juror." Id. at * 8. The judge found that "most typical jurors of common judgment and experience would have a very difficult time and would more than likely be unable to form a valid judgment as to whether Lime's conduct was reasonable . . ." and ". . . that the terms and standards involved in this action, the deviation from the standards, the causal connection between the deviation and the physical damages, if any, and the monetary amount of the alleged damages are matters beyond the common knowledge and experience of the average juror." Id. Thus, the trial court determined "that expert testimony was required for [the plaintiff] to successfully prove its breach of contract claims against [defendant contractor]." Id. Therefore, the trial court granted summary judgment because there was no competent expert testimony to prove any contractual violation by the contractor. Id.

The Appellate Division affirmed, noting that "**construction litigation relies on expert opinion because judges, jurors and lawyers are unfamiliar with construction methods, terms, purposes and standards**.". Id. at 12 (emphasis added).

All claims against WMS, including the breach of contract claims, are based upon whether or not WMS performed its work in a defective manner. Due to the complexity of the construction claims at issue, which are beyond the ken of a lay juror, these claims require expert testimony to substantiate. Judge Padovano agreed and ruled on this issue. Without such expert testimony it is simply impossible to determine whether WMS performed its work in accordance to industry standards for, *inter alia*, roofing, insulating and framing. Likewise, it is impossible to determine whether WMS's work conformed to the contract plans, designs and specifications, or the directions of either the general contractor and/or the architect. As such, as Judge Padovano providently held, NWAC's claims against WMS fail.

D. NWAC Cannot Establish A Standard Of Care Or Prove Causation For Any Alleged Defective Work Without Expert Testimony (Da4253); (Ra0001).

At issue in this case is whether or not WMS performed its work in accordance with industry standards and/or in accordance with detailed and complex architectural and design documents. Each claim presented against WMS is premised upon a claim that WMS performed its work defectively.

NWAC did not properly serve any liability expert report in support of its theory that WMS's work on the Project was defective in any way. In order to prove causation on NWAC's negligent work claim, NWAC is required to present

expert testimony detailing the specific industry standards with respect to each item of allegedly defective work (*inter alia*, framing, insulating and roofing) and to explain, in detail, how such alleged defective work did not comport with industry standards. See Enclave, supra at *13. Such testimony is required to be from an expert as it is beyond the ken of the average juror, especially so in construction litigation. Id. Judge Padovano agreed.

A jury may not make conclusions for complex questions of fact without expert testimony when the subject matter "is so esoteric or specialized that jurors of common judgment and experience cannot form a valid conclusion." Giantonnio v. Taccard, 291 N.J. Super. 31, 676 A.2d 1110, 1115 (App. Div. 1996).

Next, NWAC must demonstrate a nexus between the deviations from roofing, insulating and/or framing industry standards, and the cause of Plaintiff's damages. Without an expert report to prove causality, NWAC cannot succeed on any of its claims against WMS based upon defective work. 428 N.J. Super. 277, 288 (App. Div), certif. denied, 213 N.J. 534 (2013).

Generally, cases that do not involve suit against a licensed professional covered by the New Jersey Affidavit of Merit Statute (N.J.S.A. § 2A:53A-26), "do not inexorably require an expert witness to testify about standards of care." Jacobs, supra, 452 N.J. at 505. But, when a negligence claim arises out of alleged

defects involving "a complex instrumentality," the claimant must provide expert testimony to establish liability. Rocco v. NJ Transit Rail Operations, 330 N.J. Super. 320, 341 (App. Div. 2000). Expert testimony in that regard is "necessary to assist the fact finder in understanding the mechanical intricacies of the instrumentality and in excluding other possible causes of the accident." Lauder v. Teaneck Volunteer Ambulance Corps, 386 N.J. Super. 320, 331 (App. Div. 2004).

Complex commercial construction defect claims uniformly require expert testimony. As discussed, supra, the Appellate Division in Enclave noted that such expert testimony is required in construction litigation due to the complexities of the standards involved. See Enclave, supra at *12.

In Barfield v. Manley, 2005 WL 3730516 at *3 (App. Div. 2006)[4], the Appellate Division found that there "must be a causal connection between any alleged construction defect and any ascertainable loss alleged under the [CFA]." There, the Appellate Division did not disturb the finding of the trial court's conclusion that "the homeowner had failed to provide any expert testimony to establish the validity of her claim that the job had not been completed in a workman-like fashion." Id. see also Gore v. Otis Elevator Co., 335 N.J. Super.

[4] Respondents Appendix at Ra0022. Defendant is unaware of any case law to the contrary.

296, 302-04 (App. Div. 2000) (expert was required to prove improper maintenance, and not defective design, caused an elevator door to malfunction).

In Turkowski v. Stanbery Hamilton, LLC, 2014 WL 1271464 (App. Div. 2014)[5], Plaintiff was injured in a dressing room of a store when she tripped over a metal cap installed for a sewer clean-out, which was three-sixteenth of an inch higher than the floor. Although Plaintiff hired a liability expert, the expert did not provide any industry standards, reasonings, regulations or codes to support his findings. Id. The Court rejected Plaintiff's argument that expert testimony was not necessary to assist the jury in resolving the disputed issues of fact. Id. The Court held that "Whether the construction was proper requires a detailed analysis of the architectural plans, when and how much deviation from the plans is allowable, and the applicable building codes and standards." Id.

Further, the Appellate Division has upheld summary judgment being granted where an expert report is barred. Recently, in Borough of Lincoln Park v. A.G. Construction Corporation, 2023 WL 4839938 (App. Div. 2023)[6], the Appellate Division upheld the granting of summary judgment on the basis that the plaintiff's expert report was barred as untimely. The Court upheld summary

[5] Respondents Appendix at Ra0028. Defendant is unaware of any case law to the contrary.
[6] Respondents Appendix at Ra0033. Defendant is unaware of any case law to the contrary.

judgment on the basis that the plaintiff failed to provide the necessary expert testimony to prove its claims. Id; see also Enclave, supra.

Here, NWAC has failed to provide any expert testimony to substantiate the defective workmanship claims against WMS. There is no expert testimony that details how the work deviated in any way from the plans. There is no expert testimony that discusses whether WMS performed its work in accordance with industry standards or deviated from such standards. There is no expert testimony on causation. There is no expert testimony regarding WMS's work at all. This large complex commercial construction project had detailed architectural plans, specifications and renderings. Moreover, there are allegations that a general contractor supervised and/or directed WMS's work. Expert testimony is required in order to determine whether WMS's work conformed with industry standards and/or any architectural and engineering plans. NWAC has failed to provide any expert testimony, or even actual factual testimony, that WMS's work was specifically defective under industry standards in any way.

Contrary to NWAC's arguments, this case is one that epitomizes the need for expert testimony. This is a large commercial construction project with multiple trades. This is not a simple action where one contractor was hired to change a lightbulb. Multiple contractors of different trades were contracted,

with a construction manager and general contractor hired to assist the owner in overseeing the work. Expert testimony is necessary to prove the claims where so many different issues and alleged deficiencies are at play, especially where such deficiencies are alleged to have occurred as a result of other deficiencies from other contractors. For example, just one of many potential defenses to all of the claims is that the sequencing of the project by the Owner resulted in whatever the claimed damages are. Without expert testimony by NWAC to establish any defective conditions, WMS and the other defendants have nothing to rebut as to any alleged conditions. Simply put, NWAC failed to explain what the defective conditions are with properly submitted expert testimony and evidence.

Since all of NWAC's claims arise out of and relate to a complex commercial construction project, expert testimony is required. It is impossible for NWAC to demonstrate which contractor was responsible for any of the alleged defects. This is required especially at a project such as this where there were many different contractors, architects and engineers all performing work. Here, NWAC raised claims against five different contracting trades. In addition, NWAC brought claims against the general contractor who was alleged to have been responsible for overseeing and supervising all the work performed. However, no expert testimony has been proffered to determine what work was

performed, what work was done improperly, what work was done in compliance with industry standard and what work was not. NWAC cannot sustain any of its claims against WMS without an expert to opine on these critical issues. Without an expert, NWAC cannot prove any of its claims against WMS. This includes its claimed breach of contract defective workmanship; negligence/contribution; and CFA claims. Unjust enrichment, contribution and damages are all derivative of the theory that WMS's work was defective.

The case law above establishes that where defective construction work is at issue, an expert is required to substantiate the allegations. Here, NWAC has failed to serve an admissible expert report that supports any theory of defective work. All of NWAC's claims are based upon the allegation that WMS's work on this project was defective. As such, NWAC cannot prove any of these elements without an expert report to opine as to each allegedly defective condition. As Judge Padovano correctly held, this Court should affirm the requirement for expert testimony to prove complex construction defects. Since NWAC is barred from doing so, this Court must enter judgement in favor of WMS on all claims.

CONCLUSION

Here, NWAC is advocating for a change in long-standing New Jersey law. However, this case epitomizes the exact reason for the rule, i.e., expert testimony

is required in order to prove complex construction defect claims. In this case, with multiple contractors on a large and complex commercial development, NWAC failed to provide expert testimony to substantiate its claims. Without such testimony, it is impossible to prove how any contractor's work deviated from industry standards. The rule of law must be upheld and reaffirmed – NWAC's appeal must be denied.

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Dated: July 16, 2025

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RELL CONCRETE CORP., Plaintiff-Respondent, vs. NATIONAL WINTER ACTIVITY CENTER, D/B/A WINTER4KIDS, Defendant. NATIONAL WINTER ACTIVITY CENTER, D/B/A WINTER4KIDS, Defendant-Third-Party Plaintiff-Appellant, vs. KENT EXCAVATING AND BUILDING LLC, AQM ANALYTICAL QUALITY AND MONITORING SERVICES, INC., CONKLIN ELECTRIC & CONSTRUCTION, LLC, XCEL PLUMBING & HEATING, INC., WILSON MANAGEMENT SERVICES and JOHN DOES 1-10,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-1430-24 Civil Action Sat Below: Honorable Gregg A. Padovano, J.S.C., Superior Court of New Jersey, Law Division, Bergen County Docket No.: BER-L-2913-22 Submitted: July 18, 2025

and ABC CORPORATIONS 1-10 (fictitious names/entities) Third-Party Defendants-Respondents.	

BRIEF OF PLAINTIFF RELL CONCRETE CORP.

JAY B. LEIGHTON, ESQUIRE
Of Counsel and on the Brief

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PROCEDURAL HISTORY

On May 31, 2022, this civil action was filed in the Law Division, Bergen County. (Da1-Da11). Plaintiff Rell Concrete Corp.'s complaint asserted claims against Defendant National Winter Activity Center (hereinafter, "Defendant") for breach of contract, unjust enrichment, and account stated. (Da1-Da4). On June 2, 2022, Defendant filed its original Answer, Counterclaim and Third-Party Complaint. (Da12-Da27). On June 2, 2022, Defendant filed its first Amended Answer, Counterclaim and Third-Party. (Da28-Da41). The original Discovery End Date was March 29, 2023. (Pa13).

On July 6, 2022, Plaintiff filed its answer to the Defendant's Counterclaims. (Da42-Da57). On October 6, 2022, Defendant filed its Second Amended Answer, Counterclaim and Third-Party. (Da58-Da80). On November 28, 2022, Third-Party Defendant Kent Excavating and Building LLC filed its answer to the Defendant's Third-Party claims and cross-claims. (Da83-Da120). On November 30, 2022, Third-Party Defendant Xcel Plumbing & Heating, Inc. filed its answer to the Defendant's Third-Party claims and cross-claims. (Da121-Da148).

On December 1, 2022, Defendant filed its Answer to Cross-Claims. (Da149-Da150). On January 2, 2023, the Plaintiff filed its Answer to Cross-Claims and Cross-Claims. (Da179-Da184). On January 17, 2023, Third-Party

Defendant Conklin Electric, Inc. filed its answer to the Defendant's Third-Party claims and Cross-Claims. (Da185-Da200).

On March 16, 2023, the trial court entered a Consent Order extending the Discovery End Date for several months to October 25, 2023. (Pa1-Pa4). On March 17, 2023, the trial court entered an order granting the Motion to Permit NWAC to File a Third Amended pleading. (Pa5-Pa6). Also on March 17, 2023, Defendant filed its Third Amended Answer, Counterclaims, and Third-Party Claims. (Da201-Da226).

On March 24, 2023, Third-Party Defendant Kent Excavating and Building LLC filed its answer to the Defendant's Third Amended Third-Party claims and cross-claims. (Da255-Da292). On April 6, 2023, Plaintiff filed its answer to the Defendant's Third Amended counterclaims. (Da293-Da312). On July 17, 2023, Third-Party Defendant Wilson Management Services filed its answer to the Defendant's Third Amended Third-Party claims and cross-claims. (Da313-Da340). On July 18, 2023, Third-Party Defendant Conklin Electric, Inc. filed its answer to the Defendant's Third Amended Third-Party claims. (Da341-Da355). On August 29, 2023, the trial court entered a Consent Order Extending Discovery and it set a new Discovery End Date of January 25, 2024. (Pa7-Pa12).

On January 23, 2024, the trial court entered a Case Management Order further extending the Discovery End Date to July 1, 2024, which was less time

than had been requested. (Da1751-Da1752). In that Case Management Order, the trial court stated as follows: "and the Court recognizing that this matter has already been afforded over 600 days of discovery." (Da1752). The Case Management Order required Defendant National Winter Activity Center, Inc. to serve its expert report no later than April 30, 2024.[1] (Da1752).

On May 21, 2024, Plaintiff filed its Motion for Summary Judgment against Defendant National Winter Activity Center, Inc. (Da365-Da425). On June 10, 2024, Defendant National Winter Activity Center, Inc. filed a Cross-Motion for Summary Judgment against Plaintiff as to Defendant's counterclaims and opposition to Plaintiff's Motion for Summary Judgment. (Da426-Da1270). On July 1, 2024, Plaintiff filed its opposition to Defendant National Winter Activity Center, Inc.'s Cross-Motion for Summary Judgment and reply. (Da1271-Da1721).

On July 2, 2024, after the Discovery End Date, Defendant National Winter Activity Center, Inc. served an expert report. (Da1762-Da1799). On July 17, 2024, Third-Party Defendant Wilson Management filed a Motion to Bar the expert report and testimony from the expert witness retained by Defendant National Winter

[1] The Case Management Order entered on January 23, 2024 included a typographical error. That Order stated, in relevant part, that "ORDERED, that Plaintiff shall provide all expert reports by April 30, 2024; . . . ." (emphasis added). But, Defendant National Winter Activity Center was the party claiming that the workmanship of Plaintiff Rell Concrete Corp. and the Third-Party Defendants was defective. Thus, it is undisputed that the Case Management Order required *Defendant* National Winter Activity Center to serve its expert report by April 30, 2024. (Da1752).

Activity Center, Inc.'s. (Da1739-Da1795). On July 18, 2025, Defendant National Winter Activity Center, Inc. filed opposition to the Motion to Bar its expert and to the cross-motion to bar. (Da1796-Da1800).

On July 25, 2024, Third-Party Defendant Xcel Plumbing & Heating, Inc. filed a Cross-Motion to Bar Defendant National Winter Activity Center's expert witness. (Da1801-Da1825). On July 31, 2024, Third-Party Defendant Conklin Electric Inc. filed a Motion to Bar Defendant National Winter Activity Center's expert report. (Da1834-Da1848).

On August 2, 2024, the trial court entered orders granting both the Motion to Bar filed by Wilson Management Services and the Cross-Motion to Bar filed by Xcel Plumbing & Heating, Inc. (Da1849-Da1853). On August 19, 2024, the trial court entered an order granting Third-Party Defendant Conklin Electric Inc.'s Motion to Bar Defendant National Winter Activity Center's expert report. (Da1854-Da1856). On that same day, the trial court entered an order that granted summary judgment in favor of Plaintiff and against Defendant National Winter Activity Center only as to Defendant's counterclaims for common law fraud and consumer fraud. (Da1722-Da1738). The lower court also denied Defendant National Winter Activity Center's Cross-Motion for Summary Judgment against the Plaintiff and it denied Plaintiff's Motion for Summary Judgment as to

Plaintiff's remaining claims against National Winter Activity Center. (Da1722-Da1738).

On September 27, 2024, Third-Party Defendant Wilson Management Services filed a Motion for Summary Judgment. (Da1857-Da1890). On October 8, 2024, Third-Party Defendant Conklin Electric Inc. filed a Motion for Summary Judgment. (Da1891-Da1927). On October 22, 2024, Third-Party Defendant Xcel Plumbing & Heating, Inc. filed a Cross-Motion for Summary Judgment. (Da1928-Da2007). On October 24, 2024, Defendant National Winter Activity Center filed oppositions and Cross-Motions for Summary Judgment against Third-Party Defendants Wilson Management Services and Conklin Electric Inc. (Da2008-Da3412). On October 29, 2024, the Plaintiff filed partial opposition to the Motion for Summary Judgment filed by Third-Party Defendant Conklin Electric Inc. (Da4125-Da4131). On November 4, 2024, the Plaintiff filed partial opposition to the Motion for Summary Judgment filed by Third-Party Defendant Xcel Plumbing & Heating, Inc. (Da4136-Da4143). On November 4, 2024, Defendant National Winter Activity Center filed its opposition to Third-Party Defendant Xcel Plumbing & Heating, Inc.'s Cross-Motion for Summary Judgment and its own cross-motion for summary judgment. (Da3413-Da4124). On November 8, 2024, Xcel Plumbing & Heating, Inc. filed opposition to Defendant National Winter Activity Center's Cross-Motion for Summary Judgment. (Da4165-Da4221).

On November 20, 2024, Wilson Management Services filed a Motion to Bar the trial testimony and report of architect Allison Adderley. (Da4222-Da4252). On December 16, 2024, the trial court entered an order granting summary judgment to Third-Party Defendants Conklin Electric, Inc., Wilson Management Services, and Xcel Plumbing & Heating, Inc. (Da4253-Da4254). On that same day, the trial court denied all of Defendant National Winter Activity Center's cross-motions for summary judgment as to the Third-Party Defendants. (Da4253-Da4254). Furthermore, the lower court entered an Order Denying the Motion to Bar the trial testimony and field reports of architect Allison Adderley filed by Wilson Management Services, without prejudice. (Da4279-Da4280).

On December 17, 2024, the Plaintiff filed its Motion for Partial Reconsideration of the trial court's August 19, 2024 summary judgment order. (Da4281-Da4292). On December 18, 2024, Defendant National Winter Activity Center filed opposition to Plaintiff's Motion for Partial Reconsideration. (Da4293-Da4296). On January 9, 2025, the Law Division entered an order granting the Plaintiff's Motion for Partial Reconsideration and entered summary judgment against National Winter Activity Center as to its remaining counterclaims against Plaintiff. (Da4297-Da4302).

On January 10, 2025, Defendant National Winter Activity Center and Third-Party Defendant Xcel Plumbing & Heating, Inc. entered into a Stipulation of

Dismissal of Xcel Plumbing & Heating, Inc.'s claims against National Winter Activity Center. (Da362-Da363). Also on January 10, 2025, Plaintiff and Defendant National Winter Activity Center filed a Stipulation of Dismissal of Plaintiff's claims against National Winter Activity Center. (Da360-Da361).

On February 28, 2025, Defendant National Winter Activity Center filed a Notice of Dismissal with Prejudice as to Third-Party Defendant AQM Analytical Quality and Monitoring Services, Inc. (Da364).

COUNTERSTATEMENT OF FACTS

On or about September 15, 2017, the Plaintiff, Rell Concrete Corp. entered into a commercial construction contract that was titled as a Controlling Agreement with Defendant, National Winter Activity Center, d/b/a Winter4Kids ("NWAC") for labor and materials in the amount of $1,682,850.00. (Da376; Da389). Rell worked as a concrete subcontractor on the NWAC new ski lodge project. (Da376). In addition to the parties' contract, there were seven change orders that increased the total dollar amount of the contract. (Da376). The total dollar amount of Plaintiff's contract with NWAC for the ski lodge project was $1,827,010.00. (Da445).

For the project, NWAC utilized architect Allison Adderley, who is not (and was not) licensed as an architect in the State of New Jersey. (Da1691-Da1692). Once Rell had copies of Adderley's field reports, it contested them, contrary to the statements made by NWAC in its appellate brief. (Da1272; Da1718-Da1719). During the time Rell was working on the ski lodge project, they did not receive copies of field reports from either Heitler Houstoun Architects ("HHA") or from National Winter Activity Center ("NWAC"). (Da1272). Nuno Pereira did not see any of the field reports until after Rell sued NWAC for non-payment. (Da 1272). During Rell's time on the NWAC project, Rell was not provided with copies of the field reports so Rell never had an opportunity during its time on the project to

"question the accuracy of any report provided by HHA or any other entity." (Da1272). If there actually were so many defects in Rell's work, it would be assumed someone from NWAC or HHA would have advised Rell while we were working on the project. (Da1273). While Mr. Pereira was reviewing the field reports from NWAC's attorney he noticed that certain alleged defects were highlighted that relate to work that was not Rell's responsibility, but was the responsibility of other contractors working on the job site. (Da1273).

During his deposition, Rell's representative, Nuno Pereira confirmed that if the bubble in a level shows a surface is not perfectly level, it is still acceptable construction industry practice as it is within tolerance and is not evidence of defective construction: "when the bubble [is] between the lines, if it tilts a little bit to the left or right, you have tolerance, in structural engineering." (Da 562). In a follow-up question Rell's attorney asked Mr. Pereira: "If measurements are level, if you're checking whether something is level, if it's within tolerance, is that acceptable construction practice? Is that acceptable?" (Da562). To this question, Mr. Pereira answered "Yes." (Da 562). Mr. Pereira has approximately 20 years of concrete industry experience. (Da1272). Rell Concrete has successfully worked on a soccer stadium, nursing homes, and other large, commercial concrete construction projects. (Da1272). Contrary to the opinion of NWAC's legal counsel, concrete construction does not need to be perfectly plumb to be deemed

acceptable construction. (Da1277-Da1278).

The ski lodge, a work-in-progress for many years, had not been closed up by NWAC yet and birds and rain (at least as of September of 2023) were being allowed to enter the interior portions of the new ski lodge, which is not Rell's fault. (Da1278). Also, during Rell's site visit in September of 2023, they noticed a number of holes in the building where water could get into the building when it rains. (Da1278). NWAC would need to fully close up the ski lodge in order to protect it from the elements and water intrusion damage. (Da1278). Rell did not fully complete certain items for the NWAC project because Rell was not allowed an opportunity to do so. (Da1281). Rell was never asked back to finish the ski lodge project, much to its surprise. (Da 563).

Defendant, NWAC ultimately failed to pay Plaintiff for labor and materials rendered in the amount of $171,626.00. (Da377). NWAC failed to pay a number of other contractors on the project as well. (Da1347-Da1367). The Defendant never provided any default or termination notice to the Plaintiff. (Da377). The Defendant never asked Rell to return to the project site after January 5, 2021 and Rell never had an opportunity to complete its work on the ski lodge project for which it had entered into a contract with NWAC. (Da377). NWAC never gave Rell the courtesy of an e-mail or telephone call to say it would not be permitted to complete its work on the project. (Da377).

LEGAL ARGUMENT

Standards of Review (Da4297-Da4302)

a. Conclusions of Law

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan Twp., 140 N.J. 366, 378 (1995). With respect to the trial court's conclusions on issues of law, this Court reviews such conclusions de novo and accords "no deference" to such conclusions. Borough of Seaside Park v. Comm'r of N.J. Dep't of Educ., 432 N.J. Super. 167, 201 (App. Div. 2013).

b. Summary Judgment

The Appellate Division employs "the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). The Appellate Division "first decides whether there was a genuine issue of material fact and, if there was not, it then decides whether the trial judge's ruling on the law was correct." Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

c. Reconsideration

On appeal, the "standard of review on a motion for reconsideration is deferential." Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022). "[A]

trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). "An abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Kornbleuth v. Westover, 241 N.J. 289, 302 (2020) (internal quotation marks omitted).

"Rule 4:42-2 allows courts to revise interlocutory orders any time before the entry of a final judgment in the sound discretion of the court in the interest of justice." Musconetcong Watershed Ass'n v. N.J. Dept. of Envt'l. Prot., 476 N.J. Super. 465, (App. Div. 2023). "Where the order sought to be reconsidered is interlocutory, as in this case, Rule 4:42-2 governs the motion." JPC Merger Sub LLC v. Tricon Enters., Inc., 474 N.J. Super. 145, 160 (App. Div. 2022); accord In re Estate of Jones, 477 N.J. Super. 203, 209 (App. Div. 2023).

I. PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE AUGUST 19, 2024 ORDER PARTIALLY DENYING SUMMARY JUDGMENT WAS PROPERLY GRANTED BY THE TRIAL COURT AS DEFENDANT COULD NOT PRESENT EXPERT TESTIMONY AT TRIAL (Da4297-Da4302)

Pursuant to Rule 4:46-2(c), summary judgment shall be granted in favor of the movant only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

In Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995), the New Jersey Supreme Court adopted the federal standard for granting summary judgment set forth in the United States Supreme Court trilogy of decisions: Matsushita Elec. Indus. Co., Ltd. v. Zenith Video Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986).

Under the Brill standard, the motion judge must decide:

> Whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.
> . . .
>
> To send a case to trial, knowing that a rational jury could reach but one conclusion, is indeed "worthless" and will "serve no useful purpose."

Id. at 523 & 541. The Brill Court emphasized that the thrust of its decision "is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541. Summary judgment should only be granted where the competent evidential materials are "so one-sided that one party must prevail as a matter of law." Id. at 536. The Brill Court further stated that its purpose was to afford "protection . . . against groundless claims or

frivolous defenses, not only to save antagonists the expense of protracted litigation, but also to reserve judicial manpower and facilities to cases which meritoriously command attention." Id. at 542 (citing Robbins v. Jersey City, 23 N.J. 229, 240-41 (1954)) (emphasis added). The Brill Court went on to note that the thrust of its decision "is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541. The Court addressed what it perceived to be the prior hesitancy of motion judges, stating:

> Some have suggested that trial courts, out of fear of reversal, or out of an overly restricting reading of Judson, supra, 17 N.J. at 65, or a combination thereof, allow cases to survive summary judgment so long as there is any disputed issue of fact . . . .

Id. at 541 (emphasis in original).

The court's task is to decide "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-446 (2007) (quoting Brill, 142 N.J. at 536). Although "the trier of fact makes determinations as to credibility," the law "does not require a court to turn a blind eye to the weight of the evidence; the opponent must do more than simply show that there is some metaphysical doubt as to the

material facts." O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 606-607 (App. Div. 2001) (internal quotation marks omitted).

"Mere assertions in the pleadings" are not sufficient to defeat a motion for summary judgment. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 383 (App. Div. 1960). "Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011). One party's self-serving assertions are "clearly insufficient to create a question of material fact for purposes of a summary judgment motion." Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002). Furthermore, mere speculation and disputes as to irrelevant facts are insufficient to bar entry of summary judgment. Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005). In response to a summary judgment motion, "the nonmovant cannot sit on his or her hands and still prevail." Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998).

"Motions for reconsideration of interlocutory orders shall be determined pursuant to Rule 4:42-2." R. 1:7-4(b). Rule 4:42-2 states, in relevant part, as follows:

> [A]ny order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of

> the claims, and **it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.**

R. 4:42-2(b) (emphasis added). "Rule 4:42-2 allows courts to revise interlocutory orders any time before the entry of a final judgment in the sound discretion of the court in the interest of justice." Musconetcong Watershed Ass'n v. N.J. Dept. of Envt'l. Prot., 476 N.J. Super. 465, (App. Div. 2023). "Where the order sought to be reconsidered is interlocutory, as in this case, Rule 4:42-2 governs the motion." JPC Merger Sub LLC v. Tricon Enters., Inc., 474 N.J. Super. 145, 160 (App. Div. 2022); accord In re Estate of Jones, 477 N.J. Super. 203, 209 (App. Div. 2023). "Reconsideration under this rule offers a 'far more liberal approach' than Rule 4:49-2, governing reconsideration of a final order." JPC Merger Sub LLC, 474 N.J. Super. at 160 (quoting Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021)). Review of an interlocutory order is not subject to the time constraints or the requirements of Rule 4:49-2, which expressly only applies to final judgments or orders. R. 4:49-2; Lawson, 468 N.J. Super. at 135; Rusak v. Ryan Auto., L.L.C., 418 N.J. Super. 107, 117 n.5 (App. Div. 2011). It is well-settled that an order denying summary judgment or granting partial summary judgment is an interlocutory order. See, e.g., Applestein v. United Board & Carton Corp., 35 N.J. 343, 351 (1961) (observing "A 'partial summary judgment' differs from a

'complete summary judgment' in two essential respects. It is apparent that, by its very nature, a partial summary judgment cannot end a proceeding and is therefore an interlocutory adjudication."); Rendon v. Kassimis, 140 N.J. Super. 395, 398 (App. Div. 1976) (stating "Orders denying motions for summary judgment are intrinsically interlocutory, contemplating plenary rather than summary disposition of the matter in issue; a trial judge lacks power to render them final and hence appealable by resort to R. 4:42-2.").

The trial court "has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987). "[W]here a litigation has not terminated, an interlocutory order is always subject to revision where the judge believes it would be just to do so." Lombardi v. Masso, 207 N.J. 517, 536 (2011). In considering a motion for reconsideration, the Court should exercise its discretion "for good cause shown and in the service of the ultimate goal of substantial justice." Johnson, 220 N.J. Super. at 264. This standard, while broad, is "endowed with an unmistakable substantive content by the common understanding which underlies our jurisprudence of what is fair, right and just in the circumstances." Id.

As the Appellate Division cautioned in 2021, the standard for reconsideration motions set forth in Rule 4:49-2 and the oft-cited decision in

Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996) are not applicable to interlocutory orders:

> Because Rule 4:49-2 applies only to motions to alter or amend final judgments and final orders, and doesn't apply when an interlocutory order is challenged, so too the standard described in Cummings v. Bahr — the standard cited by the trial judge that requires a showing that the challenged order was the result of a "palpably incorrect or irrational" analysis or of the judge's failure to "consider" or "appreciate" competent and probative evidence, 295 N.J. Super. at 384, 685 A.2d 60 — did not apply to the motion before the trial judge. Instead, in ruling on the motion at hand, the judge should have been guided only by Rule 4:42-2 and its far more liberal approach to reconsideration, not the methodology employed when a motion is based on Rule 4:49-2.
>
> Rule 4:42-2 declares that interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." A motion for reconsideration does not require a showing that the challenged order was "palpably incorrect," "irrational," or based on a misapprehension or overlooking of significant material presented on the earlier application. Until entry of final judgment, only "sound discretion" and the "interest of justice" guides the trial court, as Rule 4:42-2 expressly states. Nearly forty years ago, Judge Michels said for this court in Ford v. Weisman, 188 N.J. Super. 614, 619, 458 A.2d 142 (App. Div. 1983) that, until the suit ends, a trial court "has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to

> do so." Accord Lombardi, 207 N.J. at 536, 25 A.3d 1080; Johnson, 220 N.J. Super. at 257-59, 531 A.2d 1078; see also Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc., 441 N.J. Super. 198, 248-49, 117 A.3d 200 (App. Div. 2015), aff'd o.b., Ginsberg v. Quest Diagnostics, Inc., 227 N.J. 7, 147 A.3d 434 (2016); Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399-400, 109 A.3d 228 (App. Div. 2015); Johnson v. Benjamin Moore & Co., 347 N.J. Super. 71, 82, 788 A.2d 906 (App. Div. 2002); Hart v. City of Jersey City, 308 N.J. Super. 487, 497-98, 706 A.2d 256 (App. Div. 1998).[2] By invoking Cummings, the trial judge applied the wrong standard in denying plaintiff's motion.

Lawson v. Dewar, 468 N.J. Super. 128, 135-136 (App. Div. 2021). Indeed, Rule 4:42-2 was amended in September of 2022 in response to the Appellate Division's decision in Lawson. PRESSLER & VERNIERO, Current N.J. Court Rules, (GANN), comment 3 on Rule 4:42-2 (2024).

In certain cases, the "jury is not competent to supply the standard by which to measure the defendant's conduct, and the plaintiff must instead establish the requisite standard of care and the defendant's deviation from that standard by presenting reliable expert testimony on the subject[.]" Davis v. Brickman Landscaping, 219 N.J. 395, 407 (2014) (internal brackets, quotation marks and citations omitted). "In general, expert testimony is needed where the factfinder would not be expected to have sufficient knowledge or experience and would have to speculate without the aid of expert testimony." Torres v. Schripps, Inc., 342

N.J. Super. 419, 430 (App. Div. 2001). Expert opinion is required if "the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). "A jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). "[M]ere allegations of a design flaw or construction defect, without some form of evidentiary support, will not defeat a meritorious motion for summary judgment." D'Alessandro v. Hartzel, 422 N.J. Super. 575, 582-583 (App. Div. 2011). "Even then, expert testimony of deficiencies in design or construction is required because the matter under consideration is so esoteric or specialized that jurors of common judgment and experience cannot form a valid conclusion." (internal quotation marks omitted). D'Alessandro, 422 N.J. Super. at 583; see also Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (finding plaintiff "failed to introduce any evidence that the construction of a platform [forty-four] inches high without steps or a ladder was in any way a deviation from standard construction, or that it was unsafe"). "Given the inherently voluminous and highly technical nature of the data in such cases, the parties in a construction-contract

dispute usually must retain experts to summarize and interpret that data." Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994).

In Enclave Condominium Association v. Lime Contracting, Inc., a construction defect case, this Court affirmed summary judgment in favor of the contractor where the trial court had barred the Plaintiff's expert report:

> Judge Savio next addressed whether expert testimony was necessary to establish Enclave's breach of contract claim against Lime. Applying Butler v. Acme Markets, Inc., 89 N.J. 270 (1982), he found this case "involve[d] many terms of art such as 'workmanlike manner' and 'construction industry standards' and the interpretation of "plans and specifications' that are beyond the common knowledge of the average juror." The judge found that "most typical jurors of common judgment and experience would have a very difficult time and would more than likely be unable to form a valid judgment as to whether Lime's conduct was reasonable." More specifically, the court found "that the terms and standards involved in this action, the deviation from the standards, the casual connection between the deviation and the physical damages, if any, and the monetary amount of the alleged damages are matters beyond the common knowledge and experience of the average juror." The judge, therefore, determined "that expert testimony [was] required for Enclave to successfully prove its breach of contract claims as to Lime." Accordingly, he concluded Enclave would be unable to establish a breach of contract claim against Lime and Lumbermens because the reports and testimony by Enclave's only liability expert were inadmissible at trial. Judge Savio granted summary judgment dismissing count five, concluding there was no "competent expert testimony that there has been any contractual violation by Lime."
>
> . . . .

> Having upheld the exclusion of plaintiff's liability expert, we readily agree that the court had a sound basis to grant summary judgment to defendants. Here, there is no viable argument that this is a "common knowledge" case that can go to a jury without proper expert support. Indeed, Enclave acknowledges that "[c]onstruction litigation relies on expert opinion because judges, jurors and lawyers are unfamiliar with construction methods, terms, purposes and standards . . . ."

Enclave Condo. Ass'n v. Lime Contracting, Inc., Appeal No. A-4058-18 (App. Div. Jul. 23, 2021), cert. denied 249 N.J. 461 (2022).[2] Similarly, in Anderson v. K. Hovnanian at Port Imperial II Urban Renewal, LLC, Appeal No. A-5209-15T2 (App. Div. Apr. 11, 2018),[3] another construction defect case, the Appellate Division affirmed summary judgment in favor of the contractor where the Plaintiff was not going to present an expert to testify at trial.

Here, Defendant NWAC asserted counterclaims against Rell for breach of contract, unjust enrichment, and damages that arise from allegedly defective workmanship. Defendant NWAC did not have an expert who could testify at trial. This is despite the fact that the parties were afforded 760 days for discovery in the Law Division. NWAC had almost two years from the time the complaint was filed to serve any expert reports. NWAC needed an expert to testify as to the allegedly defective workmanship of Rell and the basis of NWAC's alleged damages.

[2] Pursuant to Rules 1:36-3 and 2:6-1(a)(1)(h), a copy of this unpublished Appellate Division decision is included in the Defendant's appendix. (Da1694-Da1703).
[3] Pursuant to Rules 1:36-3 and 2:6-1(a)(1)(h), a copy of this unpublished Appellate Division decision is included in the Defendant's appendix. (Da1706-Da1714).

NWAC could not sustain its burden of proof at trial without the necessary expert testimony.

The lower court correctly granted partial reconsideration of its interlocutory order dated August 19, 2024 and entered summary judgment against NWAC as to its remaining counterclaims. Such reconsideration was necessary, in the interest of justice. The trial court properly exercised its discretion and reconsidered its prior interlocutory decision not to grant Plaintiff Rell Concrete Corp. a summary judgment as to Defendant NWAC's counterclaims alleging defective workmanship by Plaintiff. The three remaining counterclaims all allege defective workmanship by Plaintiff. But, as Rell has argued, NWAC did not have an expert witness and could not meet its burden to prove defective workmanship at trial.

Determining if Rell's workmanship was defective would require the jurors to somehow understand construction industry standards. The jurors would also be required to fully understand and interpret the project plans and specifications as they relate to Rell. The average juror is unfamiliar with the codes and standards applicable to the workmanship of a concrete contractor on a complex, multi-million-dollar commercial construction project. Jurors are also unfamiliar with the terms of commercial construction contracts. Without any expert testimony, a jury would be left to wander aimlessly and improperly speculate on the issues of liability and damages. Leaving a jury to decide liability and any damages in this

complex commercial construction case without the aid of expert testimony would be improper under the law and unfair to Rell. The average juror cannot correctly interpret architectural plans and determine if they were followed. The average juror, on their own and unaided by expert testimony, cannot accurately ascertain if construction industry standards were adhered to by Rell or not. Whether project specifications were followed or not is also beyond the knowledge of the average juror. Skilled contractors have many years of training and experience that the average person does not have. NWAC needed to have an expert to meet its burden of proof. The average juror would simply not be able to make any informed decision as to whether Rell's work was defective or not. Any jury would absolutely need expert testimony to meaningfully consider NWAC's claims of defective work against Rell and render a proper verdict.

The multi-million-dollar commercial construction ski lodge project at issue is far more complicated than NWAC's counsel asks the Court to believe. NWAC and its counsel have their own opinion as to whether Rell's workmanship was defective, but that is certainly not competent evidence. To the contrary, it is irrelevant opinion and speculation that is grossly insufficient to overcome summary judgment. Likewise, NWAC's interpretation of Mr. Pereira's deposition testimony is not relevant as it is undisputed that neither NWAC nor its counsel has any experience whatsoever as a concrete construction contractor.

There was no discussion in the Court's August 19, 2024 Statement of Reasons as to why the Court believed NWAC's counterclaims against Rell for defective work should go to trial without any expert testimony. That original decision was also inconsistent with the trial court's decisions to grant summary judgment to the other contractors who worked on the same ski lodge project as Rell. Accordingly, the Law Division properly exercised its discretion to grant partial reconsideration of its interlocutory August 19, 2024 order and enter summary judgment in favor or Rell as to all of NWAC's remaining counterclaims for allegedly defective workmanship.

II. THE LAW DIVISION PROPERLY REJECTED DEFENDANT'S ARGUMENT THAT THE DOCTRINE OF RES IPSA LOQUITUR EXCUSED ITS OBLIGATION TO PRESENT EXPERT TESTIMONY AT TRIAL TO MEET ITS BURDEN OF PROOF

"[O]rdinarily negligence must be proved and will never be presumed, that indeed there is a presumption against it, and that the burden of proving negligence is on the plaintiff." Buckelew v. Grossbard, 87 N.J. 512, 525 (1981). "Res ipsa loquitur, a Latin phrase meaning 'the thing speaks for itself,' is a rule that governs the availability and adequacy of evidence of negligence in special circumstances." Brown v. Raquet Club of Bricktown, 95 N.J. 280, 288 (1984). The res ipsa loquitur doctrine "permits an inference of defendant's negligence where (a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within

the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect." Buckelew, 87 N.J. at 525 (internal quotation marks omitted). "Exclusive control of the instrumentality by the defendant is of the essence of this rule of evidence." Bornstein v. Metropolitan Bottling Co., Inc., 26 N.J. 263, 271 (1958). The absence of exclusive control by the allegedly negligent party is a critical factor in our courts refusing to apply the Doctrine of Res Ipsa Loquitur. See Krigsman v. Beach Concrete, Inc., 95 N.J. Super. 192, 195 (App. Div. 1966). "Res ipsa loquitur is not a panacea for the less-than-diligent plaintiff or the doomed negligence cause of action." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 400 (2005).

Most importantly, the application of the Doctrine of Res Ipsa Loquitur does not automatically eliminate a party's obligation to provide admissible expert testimony in complex matters:

> In addition, a plaintiff relying on *res ipsa loquitur* must produce expert opinion that would guide the jury in determining whether the incident occurred, more likely than not, as a result of defendant's negligence. See Allendorf v. Kaiserman Enters., supra, 266 N.J. Super. at 668, 630 A.2d 402 (testimony of professional engineering expert that the cause of elevator doors closing on plaintiff was most likely attributable to failure of an electric eye safety device, which was known to be, *inter alia,* out of working order); Buckelew v. Grossbard, supra, 87 N.J. at 526, 435 A.2d 1150 (the circumstantial evidence must be

> sufficient to conclude that the balance of probabilities favors negligence); Dombrowska v. Kresge-Newark, Inc., supra, 75 N.J. Super. at 274-75, 183 A.2d 111 (expert testimony that a worn wheel mechanism can cause a "bumpy" motion in an escalator was insufficient proof of malfunction where no evidence was produced to show that any of the approximately 280 such wheels on the escalator in question was worn); Pisano v. S. Klein On the Square, supra, 78 N.J. Super. at 396, 188 A.2d 622 (plaintiff's proofs sufficient to invoke *res ipsa loquitur* when the jerk of an escalator was tied to probable malfunction by "detailed expert testimony").

Jiminez v. GNOC Corp., 286 N.J. Super. 533, 545 (App. Div. 1996).

In this case, NWAC has not asserted a negligence claim against Rell or argued that Rell caused any accident. The doctrine of res ipsa loquitur should not be applied in a breach of contract case. Also, there were multiple contractors other than Rell working on the ski lodge job site so Rell did not have exclusive control over the job site. In addition, a different concrete contractor worked on the ski lodge after Rell's last day on the project. Furthermore, the unfinished ski lodge was left open to the elements and bad weather after Rell was no longer working at the site. Once again, res ipsa loquitur does not apply to rescue NWAC's deficient contract claims as Rell never exercised exclusive control over the job site. NWAC's arguments for its application to this matter should be rejected. NWAC cannot rely upon res ipsa loquitur to reinstate its unsupported contract claims when it had more than ample opportunity to serve a timely expert report.

Accordingly, the Order under appeal should be affirmed.

III. IN ORDER TO OVERCOME SUMMARY JUDGMENT, THE DEFENDANT WAS REQUIRED TO PROFFER EXPERT TESTIMONY AS TO ITS ALLEGED CONTRACT DAMAGES TO DEMONSTRATE IT COULD SATISFY ITS BURDEN OF PROOF AT TRIAL

A breach of contract claim requires that the following three elements be established: (1) "a valid contract"; (2) "defective performance by the defendant"; and (3) "resulting damages." Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985). "Although [p]roof of damages need not be done with exactitude damages must be proven with such certainty as the nature of the case may permit and may not be a matter of speculation." D'Agostino v. Maldonado, 216 N.J. 168, 183 (2013) (internal quotation marks omitted). "The law abhors damages based upon mere speculation." Lewis v. Read, 80 N.J. Super. 148, 174 (App. Div. 1963). The "plaintiff has the burden of proving . . . loss or damage." Caldwell v. Haynes, 132 N.J. 422, 436 (1994) (internal quotation marks omitted); see also N.J. Model Civil Jury Instructions 1.12 (I) & (G) ("The burden of proof is on the . . . party to establish his/her/their claim by a preponderance of the evidence. In other words, if a person makes an allegation then that person must prove the allegation.").

In Enclave Condominium Association, Inc. v. Lime Contracting, the Appellate Division affirmed the trial court's finding that the average juror's knowledge and experience was insufficient to decide the issue of damages: "that the terms and standards involved in this action, the deviation from the standards,

the casual connection between the deviation and the physical damages, if any, and the monetary amount of the alleged damages are matters beyond the common knowledge and experience of the average juror." Enclave Condo. Ass'n, Appeal No. A-4058-18, at pg. 24.

Here, the average juror is unfamiliar with how much construction labor and materials should cost in a complex, multi-million-dollar commercial construction project. The average juror, without expert testimony, could not properly determine, if certain work could (or should) be replaced or simply repaired. NWAC would have needed to present expert testimony as to damages at trial in order to satisfy its burden of proof. NWAC is clearly aware of this and it provided an untimely expert report on damages after discovery had ended and months after it was due under the Court's Order of January 23, 2024. Just as the appellate courts concluded in cases cited above, summary judgment should likewise be entered against NWAC in this case due to the lack of expert testimony on the issue of damages. Without an expert, a jury would be left to improperly speculate on the issue of damages.

NWAC has failed to meet its burden to provide competent proof of its alleged damages to overcome summary judgment. In the trial court, NWAC sought damages against Rell for allegedly defective workmanship in the amount of $1.665 million. NWAC would not have had any damages expert for trial as it did

not serve its expert report until months after the April 30, 2024 deadline had passed and after the Discovery End Date. The original deadline for NWAC's expert report was extended multiple times. What NWAC has provided to the Court is merely its own speculation/fabrication and hearsay in an attempt to support its counterclaims. This is wholly insufficient and would not allow NWAC to meet its burden of proof.

Accordingly, there is no genuine issue of material fact for trial and the lower court's entry of summary judgment in favor of Plaintiff as to the Defendant's counterclaim was proper.

CONCLUSION

Based upon the foregoing, the trial court's order dated January 9, 2025 should be affirmed in all respects.

Respectfully submitted,

LEIGHTON LAW GROUP, LLC
Attorneys for Plaintiff-Respondent

BY: s/ *Jay B. Leighton*
JAY B. LEIGHTON

DATED: July 18, 2025

RELL CONCRETE CORP.,

Plaintiff,

v.

NATIONAL WINTER ACTIVITY CENTER D/B/A WINTER4KIDS,

Defendant.

NATIONAL WINTER ACTIVITY CENTER D/B/A WINTER4KIDS,

Defendant/Third-Party Plaintiff,

v.

KENT EXCAVATING AND BUILDING, LLC, AQM ANALYTICAL QUALITY AND MONITORING SERVICES, INC., CONKLIN ELECTRIC & CONSTRUCTION, LLC, XCEL PLUMBING AND HEATING, INC. and JOHN DOES 1-10, and ABC CORPORATIONS 1-10 (fictitious names/entities),

Third-Party Defendants.

Civil Action

DOCKET NO. A-001430-24

On Appeal from:

Judgment of the Law Division, Civil Part, Bergen County

Docket No. BER-L-002913-22

Civil Action

Sat Below:
Honorable Gregg A. Padovano, J.S.C.

BRIEF IN OPPOSITION TO NWAC'S REQUEST FOR RELIEF ON BEHALF OF THIRD PARTY DEFENDANT - RESPONDENT CONKLIN ELECTRIC, INC.

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PRELIMINARY STATEMENT

The subject action arises out of alleged complex construction claim allegedly involving defective work at a large commercial project in Vernon, New Jersey (the "project"). Da0001, Da201. The overall project included a ski lodge addition, operations building, Ski Patrol, and Nordic Center, located on National Winter Activity Center, Inc. ("NWAC")'s property. Da201.

On May 31, 2022, Rell Concrete Corp. ("Rell"), filed its Complaint against NWAC sounding in breach of contract, unjust enrichment and account stated. Da0001. On March 17, 2023, NWAC filed its Second Amended Answer and Third Party Complaint with claims against Third Party Defendant Conklin Electric, Inc. ("Conklin"). Da201. On July 18, 2023, Conklin Electric filed its Answer to the Amended Third Party Complaint with Crossclaims against NWAC. Da341.

According to Conklin's Answers to Interrogatories, Conklin performed electrical work at the project, specifically for the lodge addition, including the installation of a transformer, rough wiring, installation of conduits, lighting fixtures and electrical service (i.e., switch gear). Da1906, Da1400 (294:12-24). As to Conklin, the Third Party Complaint alleges that: Conklin installed electrical elements out of order; Conklin installed electrical elements that were exposed to weather conditions; and Conklin installed conduit above instead of underneath the concrete. Da201. NWAC's Third Party Complaint against Conklin Electric alleges

the following causes of action: breach of contract, unjust enrichment, contribution, violations of the Consumer Fraud Act (not subject to this appeal), and fraud (not subject to this appeal).

NWAC's designated corporate representative, Schone Malliet ("Malliet"), testified at his deposition that the various claims by NWAC against the subcontractors at issue center on allegations of defective work. Da1400 (277:14-21). Multiple times during his deposition, Malliet testified that he had no direct knowledge of change orders, issues relating to obtaining the transformer from the preferred manufacturer, the height of the lighting fixtures or the order of the work on the project. Da1400 (316:19-317:23; 321:10-19; 336:10-12).

Malliet had no knowledge as to the purpose of the transformer or the mechanism by which a project receives temporary lighting. Da1400 (316:19-317:23). Malliet had no knowledge of whether the conduit should have been installed inside of the concrete support members because in part, he "probably wouldn't know what [I] was looking at". Da1400 (323:7-324:22).

Malliet is not an electrician and does not understand how the transformer would provide electricity for the tools on the project. Da1400 (317:24-318:8). Malliet testified that he did not know why Conklin Electric stopped working on the project. Da1400 (307:17-308:18). Malliet admitted that the work on the project was not his area of expertise. Da1400 (331:14-333:4). Malliet testified that he "trusted

individuals who were leading that to give me the guidance for things to be done properly, . . . and according to what's been defined as plans and specifications, period". Da1400 (315:12-22).

In order to prevail on its claims as to Conklin Electric, NWAC must prove that Conklin Electric failed to perform its work in accordance with industry standards. Moreover, NWAC must prove that Conklin Electric failed to perform its work in accordance with architectural and engineering plans and design documents. The claims at hand involve construction defect claims that are beyond the ken of an average juror and require expert testimony for interpretation. However, NWAC does not have an expert in this case. On August 19, 2024, the Honorable Gregg A. Padavano, J.S.C., entered an Order barring and precluding NWAC from using the expert report of Jason B. Randle, PE (who is not a Licensed Electrician in any State) of Robson Forensic, Inc. Da1854).

Without any qualified and competent expert testimony, NWAC's claims against Conklin Electric cannot be substantiated and should be dismissed.

CONKLIN'S RESPONSE TO NWAC'S STATEMENT OF FACTS AS IT RELATES TO CONKLIN

36. Admit only as to the execution of a written contract with the Conklin but denied that the Contract Documents are the only evidence that relate to the scope of work of Conklin when Heitler Houston Architects ("HHA"), the architect of record,

Steve Kent of Kent Excavation and Building, LLC ("Kent") the General Contractor and/or NWAC made revisions to Conklin's scope of work in the field. Da4132.

37. Deny. Da4132.

38. Deny, in that the scope of work of Conklin in the field was at the direction of Heitler Houston Architects ("HHA"), the architect of record, Steve Kent of Kent Excavation and Building, LLC ("Kent") the General Contractor and/or NWAC, which included revisions to Conklin's scope of work in the field. Da4132.

39. Deny, in that Conklin was never provided with the HHA reports of HHA meeting nor was ever asked to attend any of the HHA meetings. Da4132.

40. Deny in that Conklin was told by NWAC that it would not be paid and that NWAC was going to bring a lawsuit against Conklin. Da4132

41. Deny in that Conklin was never asked to provide any such credit but offered to discuss that transition to any new electrician hired on project which never occurred because NWAC never contacted Conklin. Da4132

42. Deny. NWAC has not provided an expert report with the "opinion" that Conklin failed to provide "adequate work" which allegedly "caused damage to NWAC." Da4132.

CONKLIN'S RESPONSE TO NWAC'S COMMON STATEMENT OF FACTS AS IT RELATES TO RELL, WILSON, CONKLIN AND XCEL

50. Deny, in that Conklin was never provided with the HHA reports of HHA meeting nor was ever asked to attend any of the HHA meetings. Da4132.

51. Deny, in that Conklin was never provided with the HHA reports of HHA meeting nor was ever asked to attend any of the HHA meetings. Da4132.

52. Deny, in that Conklin was never provided with the HHA reports of HHA meeting nor was ever asked to attend any of the HHA meetings. Da4132.

LEGAL ARGUMENT
POINT I

THIRD PARTY DEFENDANT CONKLIN ELECTRIC IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

Summary judgment is designed to provide a "prompt, businesslike and inexpensive method of [resolving cases]." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Summary judgment is appropriate if there is "no genuine issue as to any material fact" in the record. R. 4:46-2(c). The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. Ibid.

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), outlined the standard for deciding a summary judgment motion: [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Therefore, the motion must be considered on the basis that the non-moving parties' assertions of fact are true, and "the court must grant all the favorable inferences to the non-movant." Id. at 536.

The determination is whether the evidence " 'is so one-sided that one party must prevail as a matter of law.' " Ibid., quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Id. at 540 (*citation omitted*).

"However, an opposing party who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230,

234 (App. Div.), certif. denied, 113 N.J. 353 (1988)(*citation omitted.*) Assertions that are conclusory and self-serving are insufficient to defeat a summary judgment motion. Puder v. Buechel, 183 N.J. 428, 440-441 (2005).

In the matter at bar, there is no disputed issue of fact for a jury to decide even when the facts are viewed in the light most favorable to Conklin. It is undisputed that NWAC failed to provide any expert testimony regarding its claims against Conklin. It is the Conklin's position that it is also undisputed that these claims cannot be proven without such expert testimony. Therefore, Conklin respectfully requests that the appeal be denied and the lower court's granting of summary judgment in favor of Conkin be affirmed.

POINT II

CONKLIN IS ENTITLED TO SUMMARY JUDGMENT AS THE WRONG ENTITY WAS SUED IN THE UNDERLYING ACTION

It is noted at the outset that NWAC brings its third party complaint against the wrong Conklin entity. According to the certification of Christopher Conklin (Da4132) and the contract documents, the entity that entered into the contract with NWAC is Conklin Electric, Inc. ("Conklin"), which is now a defunct company that is in the process of being dissolved. The named third party defendant, Conklin Electric & Construction, LLC, was formed after Christpher Conklin moved to Florida in or about 2023 (after Conkin was off the site). To be clear, Conklin Electric & Construction, LLC never signed any contract with NWAC and never worked at the subject job site. The deposition of Christopher Conklin was never scheduled or requested by NWAC to learn of this fact (in fact, the only depositions taken in this matter were of Schone Malliet of NWAC, Steve Kent of Kent and Nuno Pereira of Rell). NWAC never corrected the pleadings to name Conklin Electric, Inc. Da3142.

Based on the foregoing, the appeal should be denied and the trial court's granting of summary judgment in favor of Conklin should be affirmed.

A. NWAC FAILURE TO PROFFER EXPERT TESTIMONY BARS ITS CLAIMS AS TO CONKLIN

As argued on the original summary judgment below, in order to prevail on its claims as to Conklin, NWAC must prove that Conklin failed to perform its work in accordance with industry standards. Moreover, NWAC must prove that Conklin Electric failed to perform its work in accordance with architectural and engineering plans and design documents by way of expert testimony. There is no question that this complex construction defect litigation involves claims that are beyond the ken of an average juror and require expert testimony for interpretation. However, NWAC does not have an expert in this case. On August 19, 2024, the Honorable Gregg A. Padavano, J.S.C., entered an Order barring and precluding NWAC from using the expert report of Jason Randle, PE of Robson Forensic, Inc. Da1854. Without expert testimony, NWAC's claims against Conklin cannot be substantiated and should be dismissed.

Absent expert testimony, NWAC cannot establish the proper standard of care for Conklin's work on the project. The purpose of expert testimony is not to suggest an outcome based upon one party's best case scenario (i.e., comparing the plans/contract documents against the as built conditions in the field) while ignoring the undisputed facts. Rather, it is to assist jurors in matters so esoteric as to be beyond the

general comprehension of lay persons. Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). Expert testimony is required in an area where laypersons could not be expected to have sufficient knowledge or experience because a jury would then be compelled to speculate. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997) (*citations omitted*). An expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable. Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992). The court's role is to "determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field. Id. at 417.

In the present matter, NWAC has submitted in it's brief serval pages of Counterstatement of Facts listing the alleged electrical defects and relies only on the HHA meeting minutes and HHA Field Reports, which were never provided to Conklin until produced in this litigation. When a negligence claim arises out of alleged defects involving "a complex instrumentality," the claimant must provide expert testimony to establish liability. Rocco v. NJ Transit Rail Operations, 330 N.J. Super. 320, 341 (App. Div. 2000). Expert testimony in that regard is "necessary to assist the fact finder in understanding the mechanical intricacies of the instrumentality and in excluding other possible causes of the accident." Lauder v. Teaneck Volunteer Ambulance Corps, 386 N.J. Super. 320, 331 (App. Div. 2004).

Moreover, NWAC cannot prove that any alleged defect and/or Conklin Electric's failure to cure any alleged defect proximately caused NWAC's damages. In Enclave Condominium Association v. Lime Contracting, Inc., 2021 N.J. Super. Unpub. LEXIS 1559 (App. Div. 2021) Da1693, a breach of contract action, the trial court found that an expert was required in order to prove breach of contract claims based upon defective construction work. Applying Butler v. Acme Markets. Inc., 89 N.J. 270 (1982), the trial court found that the construction case "involved many terms of art such as 'workmanlike manner' and 'construction industry standards' and the interpretation of 'plans and specifications' that are beyond the common knowledge of the average juror." Id. at 24-25. The judge found that "most typical jurors of common judgment and experience would have a very difficult time and would more than likely be unable to form a valid judgment as to whether Lime's conduct was reasonable . . ." and ". . . that the terms and standards involved in this action, the deviation from the standards, the causal connection between the deviation and the physical damages, if any, and the monetary amount of the alleged damages are matters beyond the common knowledge and experience of the average juror." Id. at 25. Thus, the trial court determined "that expert testimony was required for [the plaintiff] to successfully prove its breach of contract claims against [defendant contractor]." Id. The trial court granted summary judgment because there was no

competent expert testimony to prove any contractual violation by the contractor. Id. The Appellate Division affirmed, noting that "construction litigation relies on expert opinion because judges, jurors and lawyers are unfamiliar with construction methods, terms, purposes and standards." Id. at 34-35. See also Barfield v. Manley, 2006 N.J. Super. Unpub. LEXIS 470 at 3 (App. Div. 2006). Da1877. In Barfield, the Appellate Division affirmed trial court's conclusion that "the homeowner had failed to provide any expert testimony to establish the validity of her claim that the job had not been completed in a workmanlike fashion." Id at 3. Da1877.

In Turkowski v. Stanbery Hamilton, LLC, 2014 N.J. Super. Unpub. LEXIS 705 (App. Div. 2014) Da1884, the plaintiff was injured in a dressing room of a store when she tripped over a metal cap installed for a sewer clean-out, which was three-sixteenth of an inch higher than the floor. Although Plaintiff hired a liability expert, the expert did not provide any industry standards, reasonings, regulations or codes to support his findings. Id. at 12-13. The Court held that "Whether the construction was proper requires a detailed analysis of the architectural plans, when and how much deviation from the plans is allowable, and the applicable building codes and standards." Id. At 13. See also Borough of Lincoln Park v. A.G. Construction Corporation, 2023 N.J. Super. LEXIS 1309 (App. Div. 2023). Da1826. In the Borough of Lincoln Park, the Appellate Division upheld the granting of summary judgment where plaintiff's expert report was barred as untimely).

Here, NWAC has failed to provide any expert testimony to substantiate the defective workmanship claims against Conklin Electric. There is no expert testimony that details how the work deviated in any way from the plans. There is no expert testimony on causation. There is no expert testimony that discusses whether Conklin Electric performed its work in accordance with industry standards or deviated from such standards. Further, NWAC's designated corporate representative admittedly is not an electrician and has no knowledge of the scope of the project. NWAC cannot prove that Conklin Electric's work was defective or deviated from the plans and specifications. Furthermore, the fact that the NWAC attempted to serve a late excerpt report of Jason B. Randle, PE (which was ordered by the trial court to be barred and is not subject to this appeal), is actual proof that NWAC new that an expert was required in this matter.

Lastly, NWAC has produced 61 HHA meeting minutes (starting from September 19, 2019 until February 6, 2022) and the 6 HHA field reports (starting from March 6, 2020 until September 23, 2021). Da2694. Chritopher Conklin was never present at these meetings, never asked to attend these meetings and never was provided with copies of the 61 HHA meeting minutes until after this lawsuit was filed. Da4132. Likewise, the HHA field reports also do not indicate that Christopher Conklin was present (or invited to attend) these meetings and never saw these field

reports until after the subject lawsuit was filed. Da2694. Accordingly, any reference to the HHA documents produced by NWAC in this matter that "have never been challenged for their accuracy" or never argued that the reports were "incomplete, not performed or performed incorrectly" should be dismissed as not relevant. To be sure, all of these recorded meetings were attended only by representatives of HHA, NWAC and Kent (until Kent left the project in September of 2021 according to the HHA meeting minutes). It should also be noted that Kent, the General Contractor, has settled with NWAC in this litigation.

As indicated by the Certification of Chris Conklin (Da4132) all appropriate permits were applied for by Conklin and all work performed by Conklin was inspected and approved by the Vernon Building Department. To be sure, every aspect of Conklin's electrical work was directed, supervised and approved by Steve Kent of Kent, Allison Adderly of HHA and/or Schone Malliet, of NWAC. During the time that Conkin was working on the subject project, there were numerous changes made in the field that deviated from the plans that were directed, supervised and approved by NWAC, HHA and/or Kent. It wasn't until early in 2022, Schone Malliet told Conklin that NWAC would not make any further payments to Conklin and NWAC was going to file a lawsuit against Conklin and other contractors on the project. Conklin was never told of any defective electrical work at the time Conklin was told that NWAC was not going to pay Conklin for any work going forward and

that NWAC was going to sue Conklin. Accordingly, Conklin had no choice but to withdraw from the project (Da4132).

Prior to leaving the project, Conklin advised NWAC that Christopher Conklin would be available to meet with and work with the substitute electrician to review all electrical work performed by Conklin and to address any questions by the substitute to ensure a smooth transition in early 2022. There is no question that Conklin was never contacted by NWAC at anytime until the filing of this lawsuit. There is no question that Conklin was never provided notice to inspect the alleged defective electrical work or given the opportunity to remedy any alleged defective electrical work (Da4132).

NWAC's designated corporate representative, Schone Malliet ("Malliet"), testified at his deposition that the claims at issue center on allegations of defective work. Da1400 (277:14-21). Multiple times during his deposition, Malliet testified that he had no direct knowledge of change orders, issues relating to obtaining the transformer from the preferred manufacturer, the height of the lighting fixtures or the order of the work on the project. Da1400 (316:19-317:23; 321:10-19; 336:10-12).

Malliet had no knowledge as to the purpose of the transformer or the mechanism by which a project receives temporary lighting. Da1400 (316:19-317:23). Malliet had no knowledge of whether the conduit should have been

installed inside of the concrete because in part, he "probably wouldn't know what [I] was looking at". Da1400 (323:7-324:22). Malliet admitted that he is not an electrician and does not understand how the transformer would provide electricity for the tools on the site. Da1400 (317:24-318:8). Malliet admitted that the work on the project was not his area of expertise. Da1400 (331:14-333:4).

Clearly, NWAC has failed to serve a timely, competent and qualified expert report in this matter. Accordingly, the appeal should be denied.

B. BREACH OF CONTRACT

It is painfully obvious that NWAC, on this appeal, is asking the Appellate Division to review the facts of this case in a vacuum (i.e., compare the plans and specifications to what was constructed in the field at the direction, supervision and approval of NWAC or its architect of record (HHA) or its General Contractor (Kent). No verbal or written communication was ever provided to Conklin about the alleged defects in the field before this lawsuit. There is no factual support that any delays on this project were in any way related to the work of Conklin that needed to be corrected. Conklin was never provided with a "stop order" on the project for the years that Conklin worked on the project. To the contrary, Conklin was advised to continue working at the site in 2019, 2020, 2021 and 2022. According to the last HHA meeting minutes dated February 6, 2022, 70% of the electrical work was completed by Conklin. Da2694. Shortly thereafter, Shone Malliet informed that

NWAC would make no further payments to Conklin and that NWAC was going bring suit against Conklin. There is no question that NWAC breached its contract with Conklin and left Conklin no alternative but to leave the project, the same way that Kent did in September of 2021.

C. ANY REFERENCE TO RES IPSA LOQITUR SHOULD BE REJECTED

For the first time in this case, on the underlying motion for summary judgment and on this appeal, NWAC attempts to argue that "res ipsa loquitur" applies in this matter, and thus relieve it from the responsibility to produce an expert to testify at trial. "Res ipsa loqitur" is generally considered a rule of evidence and does not need to be pleaded.

However, NWAC must establish certain elements to use the doctrine of "res ipsa loquitur" in New Jersey:

- Injury: The plaintiff must prove that it was injured.
- Circumstances: The injury must have occurred in a way that would not normally happen without negligence.
- Control: The instrumentality that caused the injury must have been under the defendant's exclusive control.
- No contributory negligence: The plaintiff must prove that it was not at fault for the injury.

The doctrine of "res ipsa loquitur" in inapplicable in this present matter as there is no question that NWAC was in control of the job site by having its architect and General Contractor supervising and monitoring the progress on the job on a monthly, if not weekly basis, as revealed by the HHA meeting minutes and field reports. Furthermore, the work that was left on the project by Conklin could not be concluded until other work was completed. There is no showing that any work done by Conklin caused any delays on this project. In fact, as revealed by the testimony in this case, most, if not all, of the delays on this project was the direct result of the actions of NWAC, the architect and/or Kent.

Finally, the work of Conklin (and the alleged resultant damages) does not bespeak of negligence. Accordingly, any reliance by NWAC on the doctrine of "res ipsa loquitur" in arguing that it does not need an expert is misplaced.

CONCLUSION

Based upon the foregoing, Third Party Defendant-Respondent, Conklin Electric, Inc. respectfully requests that this Court deny NWAC's appeal in its entirety and affirm the trial court's order granting the motion for summary judgment in favor of Conklin, dismissing the Third Party Complaint and any and all cross-claims against it in its entirety, with prejudice.

Respectfully submitted,

Kevin J. Conyngham

Kevin J. Conyngham

Dated: July 16, 2025

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RELL CONCRETE CORP.,

Plaintiff

vs.

NATIONAL WINTER ACTIVITY CENTER d/b/a WINTER4KIDS,

Defendant.

and

NATIONAL WINTER ACTIVITY CENTER d/b/a WINTER4KIDS,

Defendant/Third-Party Plaintiff,

vs.

KENT EXCAVATING AND BUILDING LLC, AQM ANALYTICAL QUALITY AND MONITORING SERVICES, INC., CONCKLIN ELECTRIC & CONSTRUCTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NUMBER: A-001430-24

CIVIL ACTION:

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, BERGEN COUNTY
DOCKET NUMBER: BER-L-002913-22

Sat Below:
Hon. Gregg A. Padovano, J.S.C.

RESPONDENT/THIRD PARTY DEFENDANT XCEL PLUMBING & HEATING, INC.'S AMENDED BRIEF IN OPPOSITION TO APPELLANT NATIONAL WINTER'S APPEAL

LLC, XCEL PLUMBING & HEATING, INC., WILSON MANAGEMENT SERVICES, and JOHN DOES 1-10,

Third Party Defendants

On the Brief:
Randall S. Bruckman, Esq.
Gold, Albanese & Barletti, LLC

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PRELIMINARY STATEMENT

This matter arises out of a Third-Party Complaint filed by Appellant/Defendant/Third Party Plaintiff, National Winter Activity Center, Inc. ("NWAC") against Respondent/Third Party Defendant XCel Plumbing and Heating, Inc. ("XCel") as well as other third party defendant contractors which Third Party Complaint pursues defective construction claims arising out of a large commercial project in Vernon, New Jersey. NWAC's third party complaint against XCel alleges breach of contract, unjust enrichment, contribution, violations of the Consumer Fraud Act, and fraud. XCel denied the allegations of NWAC's Third Party Complaint and filed a Counterclaim seeking the payment of the retainage improperly withheld by NWAC pursuant to the terms of the written contract between the parties.

NWAC failed to serve an expert report during the discovery period. NWAC attempted to serve an expert report after discovery period had expired and without a Certification of Due Diligence as required by R. 4:17-7 but NWAC's expert report was barred by Judge Padovano's Order entered August 2, 2024 which ordered that the expert report and any related expert testimony be barred for all purposes at time of trial [Da1851]. NWAC never filed any cross-motion seeking to re-open and extend discovery after the motions to bar NWAC's expert were filed. All of NWAC's claims against XCel require expert testimony to substantiate. Without such expert testimony, NWAC cannot assert a prima facie claim against XCel. Summary Judgement was entered by Hon. Gregg A.

Padovano on December 16, 2024 dismissing NWAC's Third Party Complaint as to Xcel as well as the other third party defendant contractors [Da 4253].

NWAC contends in their appeal that an expert is not required to establish a prima facie claim where the construction defects are within the realm of the experience of a reasonable person or within their common knowledge. However, Respondent Xcel utilized a licensed plumber to perform their services for NWAC and the issues involving Xcel require an understanding and interpretation of the applicable building and plumbing codes, whether certain materials qualify under certain standards as well as an understanding of how to read and interpret blueprints, change orders and revisions, all of which are beyond the ken of a reasonable person and require expert testimony. Summary judgement was properly granted as to Respondent Xcel because Appellant NWAC has no expert to explain and substantiate any alleged plumbing defect and NWAC can not assert a prima facie claim against Xcel without an expert.

PROCEDURAL HISTORY

1. Respondent Xcel acknowledges that Appellant NWAC's Procedural History is accurate but supplements it as follows.
2. On October 3, 2023 Xcel filed an Amended Answer to the Amended Third Party Complaint and a Counterclaim against Appellant NWAC regarding the retainage that NWAC had allegedly not paid to Xcel and which was owing. (TPDa-1)

3. Appellant NWAC settled with Third Party defendant Kent Excavating and Building, LLC on or about May 31, 2024 as per the correspondence e-filed by counsel for Third Party defendant Kent Excavating and Building, LLC on May 31, 2024 advising the Court that they will not be appearing for a scheduled settlement conference because their client settled with National Winter Activity Center. (TPDa-28)
4. A Stipulation of Dismissal regarding NWAC's claims against Third Party defendant Kent Excavating and Building, LLC was filed on or about August 12, 2024 (TPDa-30)
5. A Stipulation of Dismissal regarding Xcel's Counterclaim against NWAC was filed on January 10, 2025. (Da-362)

XCEL'S RESPONSE TO NWAC'S STATEMENT OF FACTS SPECIFIC TO XCEL

28. Admit that a contract was entered into between NWAC and Xcel but denied that the contract documents and schedules are the only evidence of the scope of work for Xcel; instead, there were change orders and revisions in the field that changed Xcel's scope of work including materials used; see Xcel's Counter statement of facts below. Appellant NWAC's cite to Da-1924 does not include a copy of the contract documents and schedules [it only contains an Exhibit page]. For a copy of the

contract and schedules see (TPDa-32). [The appendix for Appellant NWAC claims that the Controlling Agreement between NWAC and Xcel and the Schedules that were attached to that agreement were included in their appendix but a review of their appendix confirms they were not included; this document was originally Exhibit B of Xcel's cross motion for summary judgment].

29. Denied; there were change orders and revisions that changed Xcel's scope of work including materials used; see Xcel's Counter statement of facts below including but not limited to Frank Dunn's Certification at paragraph 17 (Da-4186).

30. It is not possible to respond to this statement because NWAC's brief cites Da-892 as the source for their claim that Xcel did not install the correct sleeves for exterior penetrations and Da-892 is a page that only has photo #39 that shows a concrete slab with water and construction materials on it but shows no pipe sleeves. It is a photo attachment to HHA field notes dated 6/22/20 regarding observations made on 6/11/20, which is 3 months after Xcel stopped work on the project, and those field notes, specifically the 'Items to be verified or action taken' section in it do not reference any incorrect sleeves that were allegedly installed; see (Da-852); see also Xcel's Counter statement of facts below. The 'attendants' listed at the 6/22/20 meeting minutes also confirm that neither Frank Dunn nor any Xcel representative were in attendance. (Da-892). NWAC's claim that Xcel did not install the correct sleeves for exterior penetration is vague and without any proper reference

to the record. Xcel denies that they installed incorrect sleeves for exterior penetrations.

31. It is not possible to respond to this statement because NWAC's brief cites Da-892 as the source for their claim that Xcel installed rejected materials that were of low quality but Da-892 is a page that only has photo #39 that shows a concrete slab with water and construction materials on it. Da-892 is a photo attachment to HHA field notes dated 6/22/20 regarding observations made on 6/11/20, which is 3 months after Xcel stopped work on the project, and those field notes, and specifically the 'Items to be verified or action taken' section in it do not reference any materials that Xcel allegedly installed that had been rejected or were of low quality; see (Da-852 to Da-853); in addition, NWAC's statement generally refers to 'installed materials that were rejected by NWAC' but fails to identify what materials they are referring to and fail to indicate where in the building they were allegedly installed, so the statement is so vague and without any proper reference to the record that Xcel is not able to respond to it; see also Xcel's Counter statement of facts below. The 'attendants' listed at the 6/22/20 meeting minutes also confirm that neither Frank Dunn nor any Xcel representative were in attendance. (Da-892). Xcel denies that they installed rejected materials or materials that were of low quality.

32. It is not possible to respond to this statement because NWAC's brief cites Da-3129 as the source for their claim that Xcel failed to properly follow the architect's

drawings so there were items in the schedules that were non-conforming and Da-3129 is the HHA meeting minutes dated 3/26/20, in the midst of the covid pandemic, and those meeting minutes merely refer to the basement plumbing rough-in was started and was projected to be on-going with respect to plumbing issues. There is nothing in those meeting minutes to support the claim that that Xcel failed to properly follow the architect's drawings so there were items in the schedules that were non-conforming. The 'attendants' listed at the 3/26/20 meeting minutes also confirm that neither Frank Dunn nor any Xcel representative were in attendance. (Da-3129). Xcel denies that they failed to properly follow the architect's drawings so there were items in the schedules that were non-conforming. NWAC's claim that Xcel failed to properly follow the architect's drawings so there were items in the schedules that were non-conforming is not supported by any references to the record.

33. It is not possible to respond to this statement because NWAC generally claims that Xcel 'utilized substandard, rejected materials, and the quality of its work was substantially lacking' but NWAC fails to identify what materials they are referring to as being substandard or rejected, what work Xcel performed that was lacking quality, and fails to indicate where in the building the substandard, rejected materials were allegedly installed and the substandard work was performed. In addition, the statement fails to contain any references to the record. Consequently, the statement is so vague and without any proper references to the record that Xcel is not able to

respond to it; Xcel denies that they utilized substandard, rejected materials, and or that the quality of its work was substantially lacking; see also Xcel's Counter statement of facts below.

34. Denied that no inspections occurred. The storm water/underground plumbing work as well as the under slab work that Xcel performed on the NWAC project was, in fact, inspected and approved by Township of Vernon Plumbing inspector, who is the local AHJ [Authority Having Jurisdiction], with inspections on 7/2/19, 7/3/19, 7/29/19, and 7/30/19, and which included the PVC piping under slab for radon; see paragraph 10 of the Certification of Frank Dunn, (Da-4184), (Da-4181). The Township of Vernon's Inspection Activity Report indicates that those inspections 'passed' which confirms the materials and manner the pipes were installed complied with building codes by the local AHJ [Authority Having Jurisdiction]. (Da-4208). Therefore, the use of PVC cellular core pipe ASTM F891 and ASTM D2665 that were used on this project complied with NSPC 3.4 and 3.5, as requested by NWAC's engineer, and were approved by the Township of Vernon Plumbing inspector, who is the local AHJ [Authority Having Jurisdiction]. see paragraph 10 of the Certification of Frank Dunn, (Da-4184), (Da-4208). See also photos of the PVC piping installed at NWAC with the ASTM F891 and ASTM D2665 noted at (Da-4213 and 4214). If one reviews the Township of Vernon's Inspection Activity Report one also sees that additional plumbing inspections were performed by the Vernon Township Plumbing inspector on 4/30/21 and 8/2/21, however, Xcel had not

been on the NWAC site since about March 2020. (Da-4208). Those 2 plumbing inspections were performed when Affinity Mechanical Services had been hired by NWAC to be the plumber on the project as of July 9, 2020, some 9 months *before* the 4/30/21 inspection; see (Da-4120), which is an executed Schedule A dated July 9, 2020 that indicates that NWAC hired Affinity Mechanical Services, Inc. to "complete the full scope of work associated with the Plumbing and structure for 44 Breakneck Road, Vernon, NJ 07462" regarding this project. see paragraph 11 of the Certification of Frank Dunn, (Da-4184), see (Da-4120). It is Frank Dunn of Xcel's understanding that the *final* plumbing inspections by the Vernon Township building inspector have not occurred yet because the building is not ready for the final plumbing inspection, at least as of the point when Xcel was last on the project in March 2020. The final inspections have not occurred yet but same is not attributable to Xcel. Xcel has been off the project since March 2020 when the covid pandemic was in full swing and Governor Murphy's Executive Order #122 put a halt to non-essential construction work including the NWAC project as of April 10, 2020 and then NWAC hired another plumbing subcontractor, Affinity Mechanical, on 7/8/20 to replace Xcel for the plumbing work. In addition, the town of Vernon, where the NWAC project is located, had a moratorium for a period of time and the town building officials were not doing inspections. See paragraphs 19 and 20 of the Certification of Frank Dunn, (Da-4187). Lastly, NWAC cites Da-892 as the source for their claim that the work was not completed, the work was not done properly,

and no inspections occurred. However, Da-892 is a page that only has photo #39 that shows a concrete slab with water and construction materials on it. It is a photo attachment to HHA field notes dated 6/22/20 regarding observations made on 6/11/20, which is 3 months *after* Xcel stopped work on the project, and those field notes, specifically the 'Items to be verified or action taken' section in it does not support their claim that Xcel's plumbing work was not completed, the work was not done properly, and no inspections occurred. The only reference to plumbing generally in the 'Items to be verified or action required' section of that document is in paragraph G 2: "Verify sanitary line near Stair D location and potential conflicts with finished space" which does not support any claim that their claim that Xcel's work was not completed, the work was not done properly, and no inspections occurred. Because this statement is so vague and without proper reference to the record, Xcel can not respond fully to this statement.

RESPONDENT XCEL'S COUNTER STATEMENT OF FACTS

1. Schone Malliet, the CEO and President of NWAC since 2014, testified in his 1/3/24 deposition that the subject construction project was a ski lodge addition with 'substantial concrete as part of its construction' and Heitler Houston [HHA] developed the [architectural] plans for the new lodge addition project, deposition pg. 15, lines 10-12 on (Da-1404), deposition pg. 52, lines 5-8 on (DA-1413), and

deposition page 54, lines 2-5, on (Da-1414). The existing lodge was about 5,000 square feet when the property was purchased in 2015 [before the subject addition]; see deposition pg. 45, lines3-24 on (Da-1411). The new lodge addition that is the subject of the within lawsuit is 24,000 square feet; see deposition page 101, lines 13-15 on (Da-1425). The lodge addition is not complete as of his deposition; deposition pg. 43, lines 19-23 on (Da-1411).

2. NWAC and XCel Plumbing and Heating, Inc. [hereinafter 'Xcel'] entered into a written and executed Controlling Agreement dated March 22, 2018 for plumbing and HVAC services to be performed on this project, which agreement had Schedules A through E attached to it. (TPDa-32) [The appendix for Appellant NWAC claims that the Controlling Agreement between NWAC and Xcel and the Schedules that were attached to that agreement were included in their appendix but a review of their appendix confirms they were not included; this document was originally Exhibit B of Xcel's cross motion for summary judgment].
3. NWAC's Third Party Complaint alleges that XCel breached the contract, obtained unjust enrichment, seeks contribution for Plaintiff Rell Concrete's or any other parties' claims, violated the Consumer Fraud Act, committed fraud, and NWAC sustained damages. (Da-12, Da-28, Da-58)
4. Frank Dunn, President of Xcel Plumbing & Heating, Inc., has been a licensed plumber in the State of New Jersey since 1998 to the present time and has been licensed in HVAC in the State of New Jersey since 2014 through the present

time, which timeframes include the work performed by Xcel for NWAC at issue in this lawsuit. He has been President of Xcel since the company was started in 1998. See paragraphs 1 and 2 of the Certification of Frank Dunn, (Da-4181)

5. The claims involved in this lawsuit involve construction of an addition to a ski lodge at the National Winter Activity Center ["NWAC"], a ski resort, in Vernon, New Jersey and which is a large complex commercial construction project [Schone Malliet of NWAC confirmed the new lodge addition that is the subject of the within lawsuit is 24,000 square feet; see deposition page 101, lines 13-15 on (Da-1425)]. Xcel was initially contracted to perform plumbing and HVAC work at this project. However, Xcel stopped work on the project in March 2020 and had not performed any significant HVAC work on the project by March 2020. The within lawsuit as it pertains to Xcel only concerns Xcel's plumbing work, and not any HVAC work. See paragraph 3 of the Certification of Frank Dunn, (Da-4182)

6. Xcel's proposal # 17-0077ES for the plumbing work at the NWAC Lodge Addition project is dated 4/12/18 and specified use of PVC piping for sanitary piping underground, sanitary and vent piping above ground, storm water piping above ground and storm water piping underground; see proposal at (Da-4189). The proposal did refer to item "28. Furnish and install under slab and radon piping, dwg C 001". See paragraph 4 of the Certification of Frank Dunn, (Da-4182) and see Xcel's Plumbing Proposal Revision 1.1, Da-4189)

7. However, Xcel submitted a Plumbing Change Order dated July 3, 2019 for "Credit on the Underground Work (Line 3 on AIA)" and it refers to original cost of $46,800 and cost with NWAC doing outside work was only $13,401 [this refers to use of PVC piping instead of metal piping] and therefore NWAC was *credited* a net $33,399. to the original cost; see Xcel's Plumbing Proposal Revision 1.1, page 3, Plumbing Change Order paragraph, (Da-4191), See paragraph 5 of the Certification of Frank Dunn, (Da-4182).
8. Xcel submitted AIA document G702, Application and Certificate for Payment, (Da-4205, Da-4181). Xcel submitted AID document G703, which provides an itemization of their billing and item on Line 3 refers to: "Underground drainage and radon" where the scheduled value was $46,800 [same amount as on the Change Order] and on item 41 of that invoice it refers to "Change Order—DeWatering System" and a credit of $33,399 was applied at AIA line 41; this change order involves substituting PVC piping to be used instead of more expensive metal piping which *saved* NWAC $33,399. (Da-4206), see paragraph 5 of the Certification of Frank Dunn, (Da-4183), see Xcel's Plumbing Proposal Revision 1.1, page 3, Plumbing Change Order paragraph, (Da-4191).
9. NWAC has paid Xcel $70,570 which is referenced as being paid on line 6 of our AIA document G702, (Da-4205), which includes the credit of $33,399 for the change order that involved use of PVC underslab piping for drainage and radon as referenced on Line 41, (Da-4206), and the only amount NWAC has not paid to

Xcel was Xcel's retainage, which was the subject of Xcel's Counterclaim against NWAC. (TPDa-20),

10. NWAC utilized HHA architects to review and approve Xcel's bills. HHA reviewed Xcel's schedule B work, and in the "Payments Made" section they acknowledged Xcel's change order with the credit of $33,399. for dewatering; (Da-3438), see the August 15, 2022 report of HHA regarding Schedule B, "Payments Made" section which references: "$33,399 change order reduction for dewatering", and see paragraph 7 of the Certification of Frank Dunn, (Da-4183). This confirms that HHA paid for and approved of the change order that involved use of PVC underslab piping for drainage and radon or HHA could have denied the payment and requested that different piping be installed.

11. NWAC's engineer stated to Xcel that the materials and piping must be incompliance with NSPC 3.4 and 3.5 [National Standard Plumbing Code] if not in compliance with the Contract Documents. The 12/7/20 HHA field notes state in pertinent part in paragraph G(2): "The above ground sanitary, Waste and Vent installed is PVC, where no hub cast iron is specified. Also, another pic indicates the PVC installed is cellular core where solid wall Schedule 40 is the standard if allowed by the specification. . ." More importantly, in paragraph N of the same HHA field notes, it states: "MEP Engineer Commentary-1. Materials and piping installed not in compliance with the Contract Documents shall comply with NSPC 3.4 and 3.5 and be approved by the local AHJ [Authority Having

Jurisdiction]". see paragraph 8 of the Certification of Frank Dunn, (Da-4183), (Da-4212), (Da-3642), (Da-4181) [the arrows and boxes with notes written in them were added by Frank Dunn as per paragraph 12 of Frank Dunn's Certification, Da-4185].

12. Frank Dunn of Xcel, a licensed plumber in New Jersey, certified that PVC cellular core pipe ASTM F891 and ASTM D2665 that were used on this project are approved for above and below ground piping for DWV purposes specified in NSPC 3.4 and 3.5. see paragraph 9 of the Certification of Frank Dunn, (Da-4184), (Da-4181). [ASTM refers to the American Society for Testing and Materials which is a standards organization that publishes technical standards for materials which may be referenced in building codes]. See also photos of the PVC piping installed at NWAC with the ASTM F891 and ASTM D2665 noted at (Da-4213 and 4214).

13. The storm water/underground plumbing work as well as the under slab work that Xcel performed on the NWAC project was, in fact, inspected and approved by Township of Vernon Plumbing inspector, who is the local AHJ [Authority Having Jurisdiction], with inspections on 7/2/19, 7/3/19, 7/29/19, and 7/30/19, and which included the PVC piping under slab for radon. see paragraph 10 of the Certification of Frank Dunn, (Da-4184), (Da-4181)

14. The Township of Vernon's Inspection Activity Report indicates that those inspections 'passed' which confirms the materials and manner the pipes were

installed complied with building codes by the local AHJ [Authority Having Jurisdiction]. (Da-4208). Therefore, the use of PVC cellular core pipe ASTM F891 and ASTM D2665 that were used on this project complied with NSPC 3.4 and 3.5, as requested by NWAC's engineer, and were approved by the Township of Vernon Plumbing inspector, who is the local AHJ [Authority Having Jurisdiction]. see paragraph 10 of the Certification of Frank Dunn, (Da-4184), (Da-4208). See also photos of the PVC piping installed at NWAC with the ASTM F891 and ASTM D2665 noted at (Da-4213 and 4214).

15. If one reviews the Township of Vernon's Inspection Activity Report one also sees that additional plumbing inspections were performed by the Vernon Township Plumbing inspector on 4/30/21 and 8/2/21, however, Xcel had not been on the NWAC site since about March 2020. (Da-4208). Those 2 plumbing inspections were performed when Affinity Mechanical Services had been hired by NWAC to be the plumber on the project as of July 9, 2020, some 9 months *before* the 4/30/21 inspection; see (Da-4120), which is an executed Schedule A dated July 9, 2020 that indicates that NWAC hired Affinity Mechanical Services, Inc. to "complete the full scope of work associated with the Plumbing and structure for 44 Breakneck Road, Vernon, NJ 07462" regarding this project. see paragraph 11 of the Certification of Frank Dunn, (Da-4184), see (Da-4120),

16. The CPVC water pipes referred to in the HHA 12/7/20 notes in paragraph G(1) were <u>not</u> installed by Xcel and Xcel did not hire any subcontractor to install any

CPVC water pipes. (Da-4184), (Da-3642). Xcel stopped work on the NWAC project in March 2020, about 9 months *before* these field notes were written, and any CPVC water pipes were installed by the contractor NWAC hired after Xcel left the job, which would be Affinity Mechanical Services; see (Da-4120) and (Da-4181). Affinity's Application for Payment is dated July 13, 2020, some 5 months *before* the December 7, 2020 HHA field notes referenced above and includes the installation of first, second and third floor Domestic Water Piping, which confirms that Affinity, not Xcel, installed the objected-to CPVC water pipes referred to in the 12/7/20 HHA field notes. Furthermore, Affinity's Application for Payment refers to a Contract date of July 8, 2020 which would be when NWAC and Affinity executed a contract for plumbing services at the NWAC project to replace Xcel, some 5 months *before* these notes were written. see paragraph 11 and 12 of the Certification of Frank Dunn, (Da-4184),

17. Xcel stopped work on the NWAC project in March 2020 because of the covid pandemic. On March 9, 2020 New Jersey Governor Phillip D. Murphy declared a public health emergency due to Covid-19 through Executive Order 103; On March 16, 2020 New Jersey Governor Phillip D. Murphy established statewide social mitigation strategies for combating Covid-19 via Executive Order 104; On March 21, 2020 New Jersey Governor Phillip D. Murphy established additional statewide social mitigation strategies for combating Covid-19 via Executive Order 107; see page one of the Executive Order #122 at (Da-4192); New Jersey

Governor Phillip D. Murphy signed Executive Order #122 that halted all non-essential construction projects effective April 10, 2020; the construction of the subject ski lodge addition for NWAC fails the definition of essential construction project under this Executive Order #122 and all non-essential construction, including the project at NWAC, was halted as of April 10, 2020; see paragraph 20 of the Certification of Frank Dunn, (Da-4187) and see paragraph 2 on page 7 of the New Jersey Governor's Executive Order #122 at (Da-4198). Xcel requested but was never shown any exemption or waiver letter for this project regarding Executive Order #122. In addition, Eric Pietracha, an employee of NWAC, advised Kim Dunn of Xcel in an email dated 4/16/20 that the offices of NWAC are closed [due to the covid pandemic] and people are working remotely; see paragraph 20 of the Certification of Frank Dunn, (Da-4188) and see Eric Pietracha's email dated 4/16/20 at (Da-4221).

18. Xcel did not install the floor sink referred to in the 12/7/20 HHA field notes paragraph G(3) and that floor sink was not installed by any subcontractor hired by Xcel. It would appear that it was installed by Affinity. (Da-3642), see paragraph 13 of Certification of Frank Dunn (Da-4185), and (Da-4181).

19. It is also noteworthy that *if* Affinity performed any work involving replacement of non-conforming materials that Xcel installed or if they performed any plumbing remediation work then Affinity would have noted that on their bill and would have billed for any such remediation work. However, if one reviews their

Application for Payment closely there is no reference to any work performed by Affinity to replace any non-conforming materials and there is no reference to any remediation plumbing work performed by Affinity. (Da-4121). Based on the absence of Affinity billing for any remediation work, it is clear that Affinity did not perform any remediation plumbing work regarding any alleged non-conforming work performed by Xcel. see paragraph 14 of Certification of Frank Dunn (Da-4185), and see (Da-4121).

20. NWAC relies upon HHA meeting minutes. However, those meetings were only between Steve Kent and HHA representatives based on a review of attendees/attendants of the meeting minutes that are listed at the top of every HHA report; see (Da-3429). Frank Dunn was not invited to attend those meetings nor were any Xcel representatives invited to those meetings to Frank Dunn's knowledge. Frank Dunn does not recall if Xcel was provided with copies of those meeting minutes before this lawsuit was commenced or if Xcel was told what was discussed in those meetings. See paragraph 15 of Frank Dunn's Certification, see paragraph 15 of Certification of Frank Dunn (Da-4185).

21. The 9/21/20 HHA field report refers to improperly installed foam inserts at pipe penetrations including insulation for underslab baseboard heating pipes; see photos at (Da-4217); Frank Dunn made the red arrows and red writing on those photos as per his Certification at paragraph 17 (Da-4186)]. Xcel had been off the NJWAC project since March 2020 and this 9/21/20 photo shows that the concrete

slab had been poured as of 9/21/20 and which included the placement of underslab piping with pipe insulation. This slab was NOT poured and the pipe insulation was not installed when Xcel was on the project and was likely poured when Affinity contracted to do the plumbing work as of 7/8/20. See Frank Dunn's Certification at paragraph 17 (Da-4186). Attached to Frank Dunn's Certification as Exhibit I, (Da-4220) is a photo attached to HHA report dated 11/21/19, when Xcel was still on the job, and it shows the area where the undersab baseboard heat was to be installed had not yet been poured with concrete and no piping or insulation run in that area [the yellow machine shown in photo is sitting on dirt is in the same area where baseboard piping was to have been installed including that shown in the 9/21/20 photo (Da-4217)]. Again, the underslab piping and foam pipe insulation shown in the 9/21/20 photo with the red arrow pointing to it (Da-4217) was not installed by Xcel, who had been off the job for about 6 months by then, and Xcel would not be responsible if it was defectively installed by Affinity. See Frank Dunn's Certification at paragraph 17 (Da-4186).

22. NWAC also relies upon the 2/9/22 Field Observation report of Luongo Associates, P.A., consulting engineers, regarding observations of the site that they made on February 9, 2022, which is about 2 years *after* Xcel stopped work on the site and nearly 2 years after Affinity entered into a contract with NWAC to perform the plumbing work on the project; see (Da-3443) for the 2/9/22 Field

Observation Report and see paragraph 11 of Certification of Frank Dunn for the 7/8/20 date that Affinity contracted with NWAC to replace Xcel for plumbing work (Da-4184). The 2/9/22 Field Observation Report is alleged to indicate deficiencies including sump pump line not installed per contract documents, missing penetrations in the slab, missing pipe insulation, and plumbing cores improperly located. All of these alleged deficiencies would be attributable to Affinity and not Xcel because Affinity performed those installations. See paragraph 16 of the Certification of Frank Dunn, (Da-4186).

23. It is Frank Dunn of Xcel's understanding that the *final* plumbing inspections by the Vernon Township building inspector have not occurred yet because the building is not ready for the final plumbing inspection, at least as of the point when Xcel was last on the project in March 2020. The final inspections have not occurred yet but same is not attributable to Xcel. Xcel has been off the project since March 2020 when the covid pandemic was in full swing and Governor Murphy's Executive Order #122 put a halt to non-essential construction work including the NWAC project as of April 10, 2020 and then NWAC hired another plumbing subcontractor, Affinity Mechanical, on 7/8/20 to replace Xcel for the plumbing work. In addition, the town of Vernon, where the NWAC project is located, had a moratorium for a period of time and the town building officials were not doing inspections. See paragraphs 19 and 20 of the Certification of Frank Dunn, (Da-4187).

24. NWAC failed to provide expert testimony or expert reports during discovery to support these claims. See paragraph 6 of Certification of Randall Bruckman, Esq. Submitted in support of Xcel's cross motion for summary judgment; (Da-1929).

25. On August 2, 2024, Hon. Gregg A. Padavano, J.S.C., entered an Order barring and precluding NWAC from using and relying upon the expert report of Jason Randle, PE of Robson Forensic, Inc. because it was served after discovery had expired. See filed Order dated August 2, 2024 of Hon. Gregg A. Padavano, J.S.C., (Da-18513), (Da-4277).

26. NWAC can not present any expert testimony at trial to support any of its claims in their Third Party Complaint against XCel because discovery has expired and they have no expert in this complex commercial construction matter. (Da-18513) and paragraph 6 of Certification of Randall Bruckman, Esq. Submitted in support of Xcel's cross motion for summary judgment; (Da-1929).

27. By Order dated December 16, 2024 of Hon. Gregg A. Padavano, J.S.C., entered an Order granting summary judgment and dismissing NWAC's Third Party Complaint as to third party defendants Xcel, Wilson Management and Conklin Electric. See Order dated December 16, 2024 of Hon. Gregg A. Padavano, J.S.C. (Da-4253).

LEGAL ARGUMENT

POINT I

XCEL IS ENTITLED TO SUMMARY JUDGMENT BECAUSE NWAC FAILED TO OFFER THE REQUISITE EXPERT TESTIMONY

In order to establish a prima facie claim, NWAC must prove that Xcel failed to perform its work in accordance with industry standards. NWAC must show by expert testimony that Xcel failed to perform its work in accordance with applicable building and plumbing codes and in accordance with the architectural and engineering plans, change orders and revisions. Xcel provided its plumbing services to NWAC through a plumber licensed in New Jersey since 1998, Frank Dunn, and the claims at issue involve the interpretation and application of the applicable plumbing and building codes as well as the interpretation of the architectural plans in this complex construction defect matter involving the construction of a 24,000 square foot ski lodge addition and involving various trades. NWAC's claims involve subject matter that is beyond the ken of an average juror and require expert testimony. However, NWAC has no expert in this matter and, instead, NWAC suggests that they do not require an expert to assert a prima facie claim.

In certain cases, the "jury is not competent to supply the standard by which to measure the defendant's conduct, and the plaintiff must instead establish the requisite standard of care and the defendant's deviation from that standard by presenting reliable expert testimony on the subject." Davis v. Brickman

Landscaping, 219 N.J. 395, 407 (2014). "In general, expert testimony is needed where the factfinder would not be expected to have sufficient knowledge or experience and would have to speculate without the aid of expert testimony." Torres v. Schripps, Inc., 342. N.J. Super. 419, 430 (App. Div. 2001). Expert opinion is required if "the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). Expert testimony is required in an area where laypersons could not be expected to have sufficient knowledge or experience because a jury would then be compelled to speculate. Kelly v.Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). An expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable. Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992). The court's role is to "determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field. "A jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). In Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996), our appellate court found that a jury may not make conclusions without expert testimony when the subject matter is so esoteric or specialized that

jurors cannot form a valid conclusion. A claimant must establish liability through expert testimony when a negligence claim arises out of alleged defects involving a complex instrumentality. Id., citing Rocco v. N.J. Transit Rail Operations, 330 N.J. Super. 320,341 (App. Div. 2000).

"[M]ere allegations of a design flaw or construction defect, without some form of evidentiary support, will not defeat a meritorious motion for summary judgment." D'Alessandro v. Hartzel, 422 N.J. Super. 575, 582-583 (App. Div. 2011). "Even then, expert testimony of deficiencies in design or construction is required because the matter under consideration is so esoteric or specialized that jurors of common judgment and experience cannot form a valid conclusion." D'Alessandro v. Hartzel, 422 N.J. Super. at 583; see also Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) where the Court found that plaintiff "failed to introduce any evidence that the construction of a platform forty-four inches high without steps or a ladder was in any way a deviation from standard construction, or that it was unsafe".

In Enclave Condominium Association v. Lime Contracting, Inc., our Appellate Division recognized that substantial construction projects involve issues and claims that are beyond the common knowledge of a jury thereby requiring expert reports and testimony:

> Judge Savio next addressed whether expert testimony was necessary to establish Enclave's breach of contract claim against Lime. Applying Butler v. Acme Markets, Inc., 89 N.J. 270 (1982), he found this case "involve[d] many

> terms of art such as 'workmanlike manner' and 'construction industry standards' and the interpretation of "plans and specifications' that are beyond the common knowledge of the average juror." The judge found that "most typical jurors of common judgment and experience would have a very difficult time and would more than likely be unable to form a valid judgment as to whether Lime's conduct was reasonable." More specifically, the court found "that the terms and standards involved in this action, the deviation from the standards, the casual connection between the deviation and the physical damages, if any, and the monetary amount of the alleged damages are matters beyond the common knowledge and experience of the average juror." The judge, therefore, determined "that expert testimony [was] required for Enclave to successfully prove its breach of contract claims as to Lime." Accordingly, he concluded Enclave would be unable to establish a breach of contract claim against Lime and Lumbermens because the reports and testimony by Enclave's only liability expert were inadmissible at trial. Judge Savio granted summary judgment dismissing count five, concluding there was no "competent expert testimony that there has been any contractual violation by Lime. Having upheld the exclusion of plaintiff's liability expert, we readily agree that the court had a sound basis to grant summary judgment to defendants. Here, there is no viable argument that this is a "common knowledge" case that can go to a jury without proper expert support. Indeed, Enclave acknowledges that "[c]onstruction litigation relies on expert opinion because judges, jurors and lawyers are unfamiliar with construction methods, terms, purposes and standards . . .

Enclave Condo. Ass'n v. Lime Contracting, Inc., Appeal No. A-4058-18 (App. Div. Jul. 23, 2021), cert. denied 249 N.J. 461 (2022). [a copy of the unpublished opinion can be found at (Da1694-1703). Pursuant to the same reasoning, the subject construction project involving a 24,000 square foot addition to a ski lodge with multiple trades involved is also beyond the common knowledge of a jury and require expert reports and testimony to assert a prima facie claim.

The motion Judge in the present matter relied upon the following in determining that NWAC was required to have an expert offer testimony in this

matter because the subject construction project falls outside the scope of the jury or finder of facts common knowledge:

> A negligence claim requires a plaintiff to establish the following four elements:(!) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395,406 (2014), citing Jersey Cent. Power & Light Co. v. Melcar. Util. Co. 212 NJ. 576, 594 (2013). Ordinarily, the plaintiff has the burden to prove negligence, and it is never presumed. Khan v. Singh, 200 N.J. 82, 91 (2009) (citing Hansen v.Eagle-Picher Lead Co., 8 NJ. 133, 139 (1951)). Except for malpractice cases, expert testimony is not generally required to establish the standard of care. Butler v. Acme Markets, Inc., 89 NJ. 270, 283 (1982). Expert testimony, however, is required to establish a duty of care and the violation of such duty when the matter is "so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Ibid., see Giantonnio v. Taccard, 291 NJ. Super. 31, 43 (App. Div. 1996). Where a case involves a complex instrumentality, expert testimony is needed to help the factfinder establish "'the mechanical intricacies of the instrumentality.'" Rocco, 330 NJ. Super. at 341, citing Jimenez v. GNOC, Corp. 286 NJ. Super. 533,546 (App. Div. 1996). (Da-4275). The motion Judge determined that the subject case at hand concerns issues related to electrical work, concrete penetrations, exterior

framing, roofing, and other construction materials and labors [including plumbing] in a large scale project. (Da-4276).

In determining whether Xcel's workmanship was defective in the present matter, the jurors would need to understand construction industry standards and building and plumbing codes, and they would need to understand and interpret the blueprints and engineering plans for the 24,000 square foot addition at issue in the present matter. The jury would need to understand whether the use of PVC cellular core pipe ASTM F891 and ASTM D2665 which Xcel used on this project complied with the National Plumbing Safety Codes NSPC 3.4 and 3.5, as requested by NWAC's engineer, and which were approved by the Township of Vernon Plumbing inspector, who is the local AHJ [Authority Having Jurisdiction]. See paragraph 10 of the Certification of Frank Dunn, (Da-4184), (Da-4208). See also photos of the PVC piping installed at NWAC with the ASTM F891 and ASTM D2665 designations printed on the pictured pipes at (Da-4213 and 4214). Frank Dunn of Xcel, a licensed plumber in New Jersey since 1998, certified that PVC cellular core pipe ASTM F891 and ASTM D2665 that were used on this project are approved for above and below ground piping for DWV purposes specified in NSPC 3.4 and 3.5, which standard was required by NWAC's engineer; see paragraph 9 of the Certification of Frank Dunn, (Da-4184), (Da-4181). [ASTM refers to the American Society for Testing and Materials which is a standards organization that publishes technical standards for materials which may be referenced in building codes]. See also photos

of the PVC piping installed at NWAC with the ASTM F891 and ASTM D2665 noted at (Da-4213 and 4214). Furthermore, the storm water/underground plumbing work as well as the under slab work that Xcel performed on the NWAC project was, in fact, inspected and approved by Township of Vernon Plumbing inspector, who is the local AHJ [Authority Having Jurisdiction], with inspections on 7/2/19, 7/3/19, 7/29/19, and 7/30/19, and which included the PVC piping under slab for radon. see paragraph 10 of the Certification of Frank Dunn, (Da-4184), (Da-4181). The Township of Vernon's Inspection Activity Report indicates that those inspections 'passed' which confirms the materials and manner the pipes were installed complied with building codes by the local AHJ [Authority Having Jurisdiction]. (Da-4208).

Without any expert testimony on behalf of NWAC, the jury would need to understand the National Safety Plumbing Codes, including NSPC 3.4 and 3.5, and would need to understand certain American Society for Testing and Materials [ASTM] standards in order to determine if Xcel violated construction standards. However, such knowledge and understanding is not within the knowledge and ken of reasonable person or the average juror. A plumbing expert is needed to explain and interpret those codes and standards to the jury. The plumbing claims involving Xcel in this matter are not as simple as the Xcel plumber installing a toilet inside the kitchen instead of a bathroom as the blueprints may specify. Instead, the claims involve complex plumbing codes and standards as well as the interpretation of blueprints and plans and change orders and revisions that are well beyond the

knowledge of a reasonable person or average juror. A plumbing expert is required for NWAC to assert a prima facie claim against Xcel in this matter.

NWAC's also asserts extremely vague claims that Xcel did not install the correct sleeves for exterior penetrations, their claim that Xcel installed rejected materials that were of low quality, that Xcel failed to properly follow the architect's drawings so there were items in the schedules that were non-conforming, and that Xcel 'utilized sub-standard, rejected materials, and the quality of its work was substantially lacking'. However, as indicated in Xcel's Response to NWAC's Statement of Facts, NWAC's Statement of Facts fails to provide detailed references in the record of those alleged vague defects which makes it impossible for Xcel to respond to those claims. NWAC does not identify any specific incorrect material being installed in any specific locations. The subject new lodge addition that is at issue in the subject matter involves the construction of a 24,000 square foot addition and NWAC failed to reference in the record any specific instances and specific locations of defect plumbing materials that Xcel allegedly installed. Also, in NWAC's Brief in the Legal Argument, Point 1, ii, paragraph c entitled: "Common Sense Arguments Pertaining To Xcel", NWAC also fails to reference in the record any specific locations and specific materials that NWAC claims were incorrectly installed by Xcel in this 24,000 square foot addition. This is in stark contrast to the other contractor-Respondents where NWAC provides extensive specific references in the record of the other contractor's alleged deficiencies. Xcel attempted to

respond to certain instances in their State of Facts but is not able to address otherwise vague claims that do not specify the particular material that was required, what was actually installed, and the location of the alleged defect. As a result, NWAC would need an expert to explain and interpret the architectural plans, as well as Xcel's change orders and revisions involved in this matter which were accepted and paid for by NWAC's agent, HHA. NWAC needs an expert to explain what materials the contract documents require, including but not limited to what particular pipe sleeves are required, and to explain how NWAC's engineer allowed substitution of materials that met certain plumbing codes and ASTM standards. All of the plumbing issues alleged by NWAC require expert testimony to substantiate.

Xcel also adopts the arguments of co-Respondents Wilson, Conklin Electric and Rell with respect to issues that are germane to Xcel including, but not limited to, the inapplicability of the doctrine of res ipsa loquitor in this matter to excuse NWAC's obligation to present expert testimony and the necessity of NWAC to offer expert testimony to establish alleged contract damages in this complex construction matter.

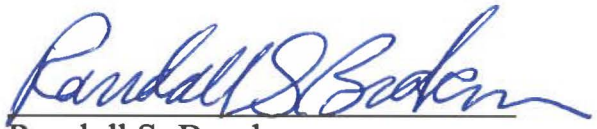
Overall, the construction issues that are the subject of the within matter, and particularly the plumbing issues that pertain to Xcel, require NWAC to present expert testimony to establish the standard of care and any deviations from such standards. Expert testimony is needed by NWAC to establish the elements of negligence and NWAC has no expert testimony or expert reports and, therefore, can

not meet its burden and can not establish a prima facie claim against Xcel. Summary judgment dismissing the Third Party Complaint of Appellant NWAC as against Respondent-Third Party Defendant Xcel was properly granted by the motion Judge and must be affirmed.

CONCLUSION

Based upon the foregoing, NWAC's appeal must be denied in its entirety and the trial Court's Order granting summary judgment in favor of Xcel and dismissing the Third Party Complaint and any cross claims against Xcel with prejudice must be affirmed.

Respectfully Submitted,



Randall S. Bruckman

Dated: July 31, 2025