
**MARTIN LAW FIRM, LLC,
Plaintiff**

v.

**KIRK LOURY,
Defendant/Counterclaim Plaintiff-
Appellant,**

v.

MARTIN LAW FIRM, LLC,

**Counterclaim Defendant-
Respondent.**

**SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO. A-1452-23T2**

Civil Action

**ON APPEAL FROM
SUPERIOR COURT OF NEW
JERSEY, BURLINGTON COUNTY,
LAW DIVISION
DOCKET NO. BER-L-1528-19**

**Hon. Aimee R. Belgard, P.J.CV.
Hon. M. Patricia Richmond, J.S.C.
Sat Below**

**BRIEF AND APPENDICES
FOR
APPELLANT KIRK E. LOURY**

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Submitted September 6, 2024

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Counterclaim Plaintiff-Appellant,
Kirk E. Loury

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* All appendix documents are of the best quality available; any highlighting remaining on a document could not be removed.

** The motion brief was for the underlying case, Kirk Loury v. Concord Equity Group Advisors, LLC in Monmouth County (Docket No. MON-L-5870-09) Motion for Summary Judgment included Statements of Undisputed material facts and the Defendant's response to the same.

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PRELIMINARY STATEMENT

Kirk Loury (“Loury”), Defendant/Counterclaim Plaintiff/ Appellant, experienced consistent and substantial motion rulings contrary to controlling legal precedent and court rules. Therefore, this appeal seeks a *de novo* review to restore Loury’s path to justice.

The Hon. Aimee R. Belgard, P.J.CV. barred Loury’s liability expert for legal malpractice, Bennett Wasserman, Esq. (“Wasserman”), not for the content of his report nor his expertise, but for her hypothesis in which she felt the record, as she understood it, would not support Loury’s damage claims when posed to a jury.

Case law details what is a net opinion, and precedent reflects how facts must be applied to a defined standard of care necessary for establishing negligence as the proximate cause for damages. Judge Belgard erred in barring Wasserman’s report during a reconsideration motion without assessing its structure, case facts, standard of care definition, and if the opinion was based on applied facts. Judge Belgard erred in placing herself as the ultimate trier of fact instead of allowing a “suit-within-a-suit” for the jury to hear and decide the record’s evidence and Loury’s arguments.

In a related motion to add Loury’s attorney, Joseph A. Martin, Esq. (“Martin”) as a Counterclaim co-defendant alongside his law firm Martin Law Firm, LLC (“MLF”), Judge Belgard: 1) improperly applied the “mistaken identify” rule of R. 4:9-3(2), 2) improperly started tolling the statute of limitations long before Loury

suffered damages, and 3) erroneously assigned prejudice where none could apply and of which Martin nor MLF claimed.

In a reconsideration motion, Loury presented case law that: 1) established tolling the statute of limitations well within the six-year rule, 2) confirmed that Martin and MLF had a single “identify of interest” defined by case law, and 3) with this single identity, no prejudice could exist. Judge Belgard erred in not reconsidering her previous ruling that denied Loury’s motion to add Martin as a co-defendant with the firm he founded and operated.

Judge Belgard’s rulings to bar both liability-expert Wasserman and damage-expert Loury, and not add Martin as a co-defendant with MLF, gutted Loury’s Counterclaim, particularly Count 1 (*in limine* rule violation). MLF did not file a motion for summary judgment.

In this void, and seeking to finally and formally validate the record evidence supporting Loury’s Counterclaim, Loury filed a motion for summary judgment. Judge Belgard did not acknowledge the volume of undisputed material facts nor rule on those in dispute.

Judge Belgard agreed that certain of Martin’s actions for Count 2 (those at the heart of Loury’s claim) would be cognizable to a juror’s common knowledge as negligent. With this as the proximate cause for Loury’s damage claim, he argued that controlling precedent mandated that the “plaintiff”/“client” – Loury himself -

bore the burden to define his damages. Judge Belgard erred in denying summary judgment solely because she had previously barred Loury as the damage expert.

MLF did not file a cross-motion for summary judgment in response to Loury's motion for the same. Instead, MLF filed a motion *in limine* to bar Wasserman's and Loury's expert reports and testimony, actions prohibited by R. 4:25-8(a)(1).

An *in limine* motion ruling is a trial judge's decision; this was the Hon. M. Patricia Richmond, J.S.C. Yet, Judge Belgard issued the order, and this bound Judge Richmond from allowing the jury to consider Loury's evidence/argument that Martin breached the MLF retainer agreement. Judge Belgard's *in limine* order violated precedent and kept Loury from presenting his Complaint defenses.

Therefore, for the arguments of misapplied/ignored precedent, faulty rules application, and denial of summary judgment, Loury requests a *de novo* review to: 1) restore Wasserman as a liability expert, 2) restore Loury as the fact witness and damage expert, 3) add Martin as a co-defendant to the Counterclaim, 4) grant Loury's motion for summary judgment, and 5) deny Martin's faulty motion *in limine*. Should summary judgment be denied for Count 2, Loury requests this court remand for a full new trial so Loury can present his evidence/arguments affirmatively and in defense.

PROCEDURAL HISTORY

MLF filed a complaint (Pa1) ¹ in the Burlington County Superior Court Law Division on July 22, 2019 for unpaid legal bills directly flowing from a remanded

new trial ordered by this court for the underlying case, Kirk Loury v. Concord Equity Group Advisors, LLC (“Concord”) (Pa7).

Loury filed a timely Counterclaim on September 2, 2019 (Pa53) ¹. Loury alleged that the sole reason for the remanded new trial and the legal bills incurred was this court’s ruling that the motion *in limine* barring Concord from presenting its evidence and argument was improper (i.e., Loury’s affirmative, breach-of-contract claims were upheld).

A second claim alleged that Martin was negligent, during a two-week recess and just prior to cross-examining Concord’s chief witness (CEO and CFO, Lee Argush (“Argush”)), in ignoring highly advantageous – and new – direct testimony and evidence. This testimony and evidence would be key inputs to a compensation formula in Loury’s employment agreement (“Agreement”) resulting in a much higher damage amount from Concord’s contract breach.

Martin filed an amended answer on September 15, 2020 (Pa89) ¹.

Loury procured an order on June 24, 2020 (Pa104) compelling MLF/Martin to fulfill their discovery obligations. Following this order, Martin/MLF still took ten months to comply.

¹ Because of Martin Law Firm, LLC’s (“MLF”) violation of R. 1:20 A-6 (Pre-action Notice to Client), Loury filed a motion to dismiss, which was granted without prejudice. MLF amended its complaint after the rule’s notice requirement. Following the amended complaint, Loury filed his amended answer and Counterclaim on December 18, 2019. **For purposes of this appeal, only the last amended versions of the Complaint (Pa1), Answer/Counterclaim (Pa53), and Answer (Pa89) are provided in the appendix.**

With discovery completed, MLF filed a series of motions seeking to bar Loury's damages evidence, and an order was entered on July 29, 2022 (Pa107) to have Loury serve a formal expert report, which was timely served on August 10, 2022; a court-ordered amended report was served on December 16, 2022² (Pa110).

Loury filed a motion to bar Martin's liability expert, Russell Lichtenstein, Esq. on April 5, 2023 because of non-responsiveness to the court-ordered deposition deadlines. Loury also filed a motion on April 12, 2023 to bar the report filed by Martin's ethics expert, Fredric Shenkman, Esq. ("Shenkman"), as a net opinion. MLF filed a cross-motion on April 18, 2023 to bar Wasserman as Loury's liability expert and Loury, himself, as damages expert.

On May 2, 2023 Loury filed a cross-motion to add Martin, MLF's sole owner, as a Counterclaim co-defendant.

Following an oral hearing (1T)³ on June 21, 2023, Judge Belgard entered an order denying Loury's motions to bar Shenkman's report as net opinion (Pa432), Lichtenstein's report for not complying with the scheduling order (Pa436), and adding Martin as a Counterclaim co-defendant (Pa439).

² The order had Loury amend his report by removing a few references to an earlier mediation, even though the references were allowed by rule or directly allowed in the mediation retainer agreement signed by the parties. **Only the December 16, 2022 amended report is in the Appendix (Pa110).**

³ 1T = transcript of June 21, 2023; 2T = transcript of September 8, 2023; 3T = transcript of October 12, 2023; 4T = transcript of November 13, 2023; 5T = transcript of November 14, 2023; 6T = transcript of Volume 1, November 15, 2023; 7T = transcript of Volume 2, November 15, 2023; 8T = transcript of November 16, 2023; 9T = transcript of November 17, 2023.

Note: in the appendix are a number of other transcripts separate from the listing above. These other transcripts are for depositions as well as the underlying case's two trials.

On the same day, Judge Belgard granted Martin's cross-motion to bar Wasserman and Loury for their reports and opinions and to further bar Wasserman's testimony (Pa442).

Loury filed two reconsideration motions on July 11, 2023 for the orders barring Wasserman and Loury as well as denying adding Martin as a co-defendant).

A motion hearing was held on September 8, 2023 (2T) and Judge Belgard denied both reconsideration motions on September 11, 2023 (Pa445)(Pa448).

Loury filed a motion for summary judgment on August 15, 2023 (Pa612), with a companion Statement of Undisputed Material Facts ("SUMF") (Pa615). MLF responded to the SUMFs on September 7, 2023 (Pa712); MLF did not add any new SUMFs of its own.

MLF filed an *in limine* motion on September 12, 2023 seeking to bar Loury's expert reports and all evidence and argument pertaining to Loury's Counterclaim.

Judge Belgard heard oral argument for Loury's summary judgment motion and MLF's *in limine* motion on October 12, 2023. (3T). She denied Loury's motion (Pa451) and granted MLF's (Pa454).

A jury trial was held before Judge Richmond from November 14 - 17, 2023 (4T; 5T; 6T; 7T; 8T; 9T) solely on MLF's Complaint. The jury entered a verdict for MLF on November 17, 2023.

A final order was entered on December 18, 2023 (Pa457) for Loury to pay MLF \$83,596.91 with pre- and post-judgment interest.

An amended notice of appeal was filed by Loury on March 14, 2024 (Pa459), and this brief is filed in support of the same.

STATEMENT OF FACTS: PERTINENT TO ARGUMENTS I AND II

1. Kirk Loury v. Concord Equity Group Advisors, LLC (“Concord”)

The underlying case was a breach-of-contract claim (Pa615; SUMF-KL: ¶40) in which Loury alleged that Concord, Loury’s employer, subtracted expenses from the revenue he generated for one type of compensation account, called Qualified Assets Under Management (“QAUM”); Loury’s employment agreement (“Agreement”) did not allow these subtractions (Pa615; SUMF-KL: ¶41-¶43).

Concord filed a counterclaim alleging that Loury violated the Computer Fraud and Abuse Act, the Computer Related Offenses Act, and various breaches of his Agreement (Pa615; SUMF-KL: ¶47). Throughout the litigation, Concord’s witness was its CEO and CFO, Lee Argush (“Argush”) (Pa615; SUMF-KL: ¶45-¶46).⁴

2. As It was Martin’s Standard Legal Practice, He Filed a Compliant Motion *In Limine* with the Pre-Trial Information Exchange

Consistent with Martin’s standard legal practice (Pa615; SUMF-KL: ¶68), he filed a pre-trial information package that included an *in limine* motion and brief compliant with R. 4:25-7(b) and Appendix XXIII ¶#4⁵ (Pa615; SUMF-KL: ¶76-¶77). This package was filed, according to the rules, seven days before the scheduled

⁴ Concord’s counterclaim was dismissed with prejudice via a summary judgment motion. Concord did not seek reconsideration.

⁵ This was the prevailing rule during Martin’s representation of Loury. R. 4:25-8, specific to motions *in limine*, was adopted on July 31, 2020.

trial (Pa615; SUMF-KL: ¶78). Martin sought to bar Concord's evidence and argument pertaining to its counterclaim ⁶ (Pa615; SUMF-KL: ¶77).

3. With Another Trial Adjournment, Martin Chose to Go Against His Standard Legal Practice and File the *In Limine* Motion on the Regular Calendar, Which Violated Appendix XXIII ¶#4

When the trial was adjourned for a seventh time (Pa615; SUMF-KL: ¶79), Martin chose to file the same *in limine* motion package, including the brief (Pa615; SUMF-KL: ¶80-¶86). He filed a notice of motion to the regular calendar for the next return date (Pa615; SUMF-KL: ¶84). A regular calendar *in limine* motion filing was prohibited under Appendix XXIII ¶#4 (Pa615; SUMF-KL: ¶65).

Loury's case was the first certain time that Martin filed an *in limine* motion on the regular calendar for a client. (Pa615; SUMF-KL: ¶80) This tactic was presumed to benefit Loury because Martin said it would be heard by the Hon. Linda Grasso-Jones J.S.C., who ruled on and granted Loury's summary judgment motion against Concord's counterclaim, instead of a "random judge" who would be unfamiliar with Loury's case (Pa615; SUMF-KL: ¶90-¶91).

4. The Day after Filing, Martin Learned that Judge Jones had been Transferred to the Family Part and Loury's Case was Orphaned

The day after Martin himself filed the notice of motion on the regular motion calendar, he learned from opposing counsel that Judge Jones had been transferred to the Family Part, thus orphaning Loury's case (Pa615; SUMF-KL: ¶94-¶97).

⁶ This court has ruled that *in limine* motions for judging the admissibility of evidence are the sole domain of the trial judge and should be granted sparingly. (See this brief's page 41 and Pa48).

Although Martin’s presumed tactical benefits for filing the non-compliant *in limine* motion on the regular calendar were negated with Judge Jones’s transfer, Martin still chose to keep the motion on the regular calendar instead of withdrawing it. He argued accordingly in a reply brief to Concord’s opposition to the motion (Pa615; SUMF-KL: ¶98-¶99).

When the calendar motion was adjourned multiple times across a three-month period (Pa615; SUMF-KL: ¶100), Martin stayed on his course, and he re-noticed the *in limine* motion back to the regular calendar (Pa615; SUMF-KL: ¶103-¶104).

5. Against the Very Reason He Sought to Avoid, Martin Allowed the Motion *In Limine* to be Heard by a Random, Regular-Motion Judge

The motion was heard by the Hon. Thomas F. Scully, J.S.C., a random motion judge and not the trial judge (Pa615; SUMF-KL: ¶106-¶107). Judge Scully granted the motion and issued the *in limine* order (Pa615; SUMF-KL: ¶105). The *in limine* order barred Concord from pursuing its counterclaim’s “evidence and argument” that Judge Jones denied with prejudice in her summary judgment ruling (Pa615; SUMF-KL: ¶108).

6. First Trial and Ruling

When the trial was finally held nine months later, the Hon. Judge Jamie Perri, J.S.C., a third judge, was constrained by the *in limine* order (Pa615; SUMF-KL: ¶110-¶112) yet she granted Loury’s contract claims and ordered damages (Pa615; SUMF-KL: ¶109-¶112).

7. Concord Appealed and Its Lead Position Argued that the *In Limine* Order Prevented It from Presenting Its Defenses, and This Court Agreed and Remanded for a New Trial

Concord filed an appeal (Pa615; SUMF-KL: ¶118) with its leading position being that the *in limine* order kept it from presenting its defenses (Pa615; SUMF-KL: ¶119) to Loury’s complaint. Although Loury’s breach claims were upheld, this court, on February 11, 2016 (Pa7), agreed with Concord on its *in limine* argument, granting a new trial only on this basis (Pa615; SUMF-KL: ¶151-¶155; ¶158-¶160).

8. The Remanded Second Trial was before the Hon. Joseph P. Quinn, P.J.Ch.

With the new trial (Pa615; SUMF-KL: ¶174-¶175) occurring in June and July 2017 before the Hon. Judge Joseph P. Quinn, P.J.Ch., now a fourth judge, Concord presented new testimony and evidence under its direct examination (i.e., after Loury’s direct and cross examinations) (Pa615; SUMF-KL: ¶185-¶200). As with the first trial (Pa615; SUMF-KL: ¶78), Argush was Concord’s sole witness to the allegations in Loury’s complaint (Pa615; SUMF-KL: ¶46).

9. Concord’s Revenue Methodology Captured in a New Revenue Formula

Quite different from the first trial, Argush presented an entirely new revenue methodology for Concord that included an additive revenue formula, “C” + “B” + “A” = “D”, with each of the variables to the left of the equal sign representing individual QAUM revenue types totaling to “D”, or the total QAUM revenue (Pa615; SUMF-KL: ¶188-¶191).

Just prior to introducing this revenue formula in court by writing it on a flip chart (Pa615; SUMF-KL: ¶188), Argush was directed by his attorney through three accounting statements explaining how Concord’s revenue was “collected”, “totaled”, and “booked” to its general ledger (Pa615; SUMF-KL: ¶186). In sum, Argush testified thirteen times that the “collected” and “booked” revenue was the “total fee” or “D” variable in the formula (Pa615; SUMF-KL: ¶196).

With the formula, Argush applied sample numbers to illustrate how the total “D” was additive (Pa615; SUMF-KL: ¶189-¶190). The total “D” was represented with a sample number of \$100, derived by adding the three other numbers to the left of the equal sign (Pa615; SUMF-KL: ¶191).

In the litigation through to Loury’s second trial direct examination – and shown on over 65 accounting statement pages – it was understood by Loury and Martin that Concord paid Loury from only one of the statements’ revenue columns (i.e., types), what came to be known in the second trial as the “C” variable or “CEGA fee” or “Sponsor Fee” (Pa615; SUMF-KL: ¶182). This formula variable was represented with a \$60 sample amount (Pa615; SUMF-KL: ¶190).

Loury’s Agreement for the QAUM compensation applicable to Concord’s revenue accounting was unambiguous (Pa615; SUMF-KL: ¶241). He was to be paid “10%” on “any revenue” (both of which were contract terms) that Concord earned from Loury’s QAUM client relationships, noting that the word “any” put no

qualification on the type of revenue, the amount, timing, or frequency (Pa615; SUMF-KL: ¶42; ¶237; ¶242).

10. Argush Rearranged the Formula with an Objective to Show the “C” Variable as “Revenue Less Expenses” or “Net Revenue”

Argush, during his direct examination, rearranged the revenue formula as “C” = “D” – “B” – “A” (Pa615; SUMF-KL: ¶192). His objective was to show that solving for the “C” revenue (i.e., the revenue type previously understood by Loury and Martin to be Concord’s revenue) was achieved by subtracting the “B” and “A” revenues from the total, “D” revenues (Pa615; SUMF-KL: ¶193). Loury’s Agreement did not allow this “net revenue” or “revenue less expenses” method as Argush admitted during cross examination (Pa615; SUMF-KL: ¶324).

11. The Impact of This New Testimony on Loury’s QAUM Compensation Formula was Substantial

This new testimony surprised Loury (Pa615; SUMF-KL: ¶202) (and Martin agreed in his deposition that this was “new” and “never before presented” (Pa615; SUMF-KL: ¶198)).

Since Loury’s Agreement paid him “10%” on “any revenue” regardless of type, amount, timing, or frequency (Pa615; SUMF-KL: ¶42), the introduction of Concord’s booked QAUM revenue as a total amount dramatically increased what Loury was due according to what his Agreement dictated (Pa615; SUMF-KL: ¶361).

In effect, and using Argush’s sample numbers to illustrate, instead of getting paid “10%” of \$60 or \$6 (the “C” variable) as Concord had paid him during Loury’s employment, the Agreement dictated that he was to be paid “10%” of \$100 or \$10

(the “D” variable) according to the “any revenue” contract term (Pa615; SUMF-KL: ¶191; ¶195; ¶205; ¶210; ¶242; ¶249).

In other words, regardless of how Argush rearranged Concord’s revenue formula or how he wanted to deduct expenses from its revenue prior to paying Loury his compensation, the Agreement paid on “any revenue” and not “revenue less expenses” (of any form or type) or “net revenue” (Id.).

12. On the First Day of a Two-Week Trial Recess, Loury Sent an Email and Detailed Attachment to Martin to Lock In This New Testimony for a Higher Damage Claim, but Martin Ignored It

The trial recessed for two weeks and before the bulk of Argush’s cross examination (Pa615; SUMF-KL: ¶201).

The first day of this recess, Loury wrote an email to Martin and attached a detailed document with these three purposes: 1) Loury wanted Martin to confirm to him the implications of Concord’s new revenue formula and associated testimony to Loury’s Agreement’s QAUM compensation formula and terms, 2) accordingly, Loury wanted Martin to pursue a higher damage award using Concord’s “total” and “booked” QAUM revenues as his Agreement’s formula’s “any revenue” amount, and 3) to accomplish #2, Loury gave a detailed outline for Argush’s cross examination when the trial resumed (Pa615; SUMF-KL: ¶202-¶207).

While Martin’s email server confirmed the email was read (Pa615; SUMF-KL: ¶207), Martin ignored Loury’s email and attachment (Pa615; SUMF-KL: ¶208; ¶216; ¶309).

13. Two Days before the Trial was to Resume, Loury Sent Another Email and Detailed Attachment that Martin Also Ignored

Two days before the trial was to resume, Loury sent a second email and attachment set to Martin (Pa615; SUMF-KL: ¶209). Again, Loury stated his objective for a higher damage award, and this was highlighted by the title of the attachment: “Positioning: A New Good Reason Claim Amount” (Pa615; SUMF-KL: ¶212). (“Good Reason” was the Agreement’s term that defined Loury’s severance provision for termination without cause (Pa615; SUMF-KL: ¶44)).

In addition to an updated cross-examination outline, this attachment included an outline of Loury’s explanation for how Argush’s new testimony and revenue formula changed from the first trial, and how this new revenue amount flowed into the Agreement’s QAUM compensation formula (Pa615; SUMF-KL: ¶211).

This time, Martin replied the same day that he would review what Loury sent “in the afternoon” (Pa615; SUMF-KL: ¶214). However, Martin ignored Loury again (Pa615; SUMF-KL: ¶216).

14. When Confronted Outside the Court Room as the Trial Was to Resume, Martin Verbally Refused Loury’s Objective to Pursue a Higher Damage Award

Outside the courtroom the morning the trial was to resume from its recess, Loury confronted Martin about the email and attachment sets that had been ignored. He was told by Martin, regarding Loury’s objective to file a higher damage award: “I won’t do it. It will hurt our case” (Pa615; SUMF-KL: ¶220).

Given Martin's declaration and the implications for Loury's financial solvency should he lose the case and have to return the damages he had received (i.e., \$378,934.45), Loury was forced to drop his pursuit of a higher damage award (Pa615; SUMF-KL: ¶221).

15. During Argush's Cross Examination, Martin Offered Argush a Bargain that Allowed Concord to Pay Loury on a Lower Revenue Amount than What Loury's Agreement Dictated

During Argush's cross examination (Pa615; SUMF-KL: ¶223), Martin did not follow Loury's suggestions given in his two email and attachment sets (Pa615; SUMF-KL: ¶224). Nonetheless, Argush stated three more times that Concord's revenue for Loury's QAUM compensation accounts was the "total fee" revenue ("D" amount), and Argush even put a revenue range for the largest of Loury's QAUM accounts ⁷ at \$500,000 to \$800,000 per quarter (or, \$2 million to \$3.2 million per year) (Pa615; SUMF-KL: ¶226). ⁸

As Argush pressed on in testifying that Concord's booked revenue was the total of the three individual revenue types, Martin, demonstrating an understanding of Concord's new revenue formula that Argush entered into evidence, put this direct

⁷ The largest QAUM account was First Citizens Investor Services ("FCIS"). FCIS was Concord's largest client in assets, revenues, profits, and number of advisors. Loury had secured FCIS as a QAUM account and was its sole relationship manager. (Pa705; Loury Certification ¶24-¶28)

⁸ This amount was consistent with Loury's suggested cross-examination outline given to Martin prior to this live cross-exam testimony. In the outline, Loury used Concord's actual invoices for FCIS to compile its revenues according to Concord's additive revenue formula for a quarterly total exceeding \$580,000 (i.e., \$2.32 million per year) (Pa615; SUMF-KL: ¶204-¶205; ¶361). According to the Agreement's formula, this would pay Loury "10%" of the quarterly "total fee" or approximately \$58,000 (i.e., \$232,000 per year) (Id.).

question to Argush: **“So Loury should be asking for your “D” number, not the “C” number for sponsor [or CEGA] fee?”** (Pa615; SUMF-KL: ¶229).

Martin was correct in specifying the “D” number since it was the “total fee” revenue in Concord’s formula. This aligned with Loury’s Agreement that specified “any revenue” for Loury’s QAUM compensation instead of the lower “C” number (“CEGA” or “Sponsor Fee”) that Argush asserted in his direct testimony (i.e., “revenue less expenses) (Pa615; SUMF-KL: ¶237). Pushing for this “D” number was what Loury wanted Martin to do (Pa615; SUMF-KL: ¶332-¶335).

Argush replied, **“Well, that wasn’t what was understood by the employment agreement”** (Pa615; SUMF-KL: ¶230).

Instead of pushing for the “D” number as his initial question posited, Martin pivoted to offering that Loury was due only the “C” revenue type, **“Right, it was C, right?”** (Pa615; SUMF-KL: ¶231).

Argush readily agreed: **“Right, what was understood was C.”** (Pa615; SUMF-KL: ¶232).

Having enabled this bargain – a non-contractual “understanding” that would pay Loury 10% on the lower “C” revenue amount (i.e., \$60 using Argush’s sample numbers) instead of the higher “D” total amount (i.e., \$100 using Argush’s sample numbers) – Martin solidified his in-court bargain with Argush by saying, **“Okay, we’re on the same page, thank you”**. Securing this bargain was to Loury’s detriment (Pa615; SUMF-KL: ¶233 + footnote).

16. Martin’s Post-Trial Brief Confirmed that the Agreement was “10%” on “Any Revenue” but He Held to the First Trial’s Damages

Instead of closing statements, Judge Quinn ordered post-trial briefs (Pa615; SUMF-KL: ¶239). Martin wrote in Loury’s brief,

“The Employment Agreement does not provide any qualifications or limitations on the term ‘any revenue,’ and it most certainly does not provide, expressly or by reasonable implication, that Concord may deduct expenses from such revenue before calculating Loury’s ten percent commission. Indeed, it does not say ‘any revenue less certain expenses’ (which is the strained position Concord is taking and asking the Court to read into the Employment Agreement and effectively rewrite the Agreement to make it more favorable to Concord). . . . The term “any revenue” is unambiguous.” [Emphasis added] (Pa615; SUMF-KL: ¶241; ¶242)

However, in this brief, Martin ignored Argush’s entire direct testimony (i.e., when Argush testified thirteen times that Concord’s booked revenue for Loury’s compensation accounts was the total fee (i.e., “D”) amount collected) (Pa615; SUMF-KL: ¶316).

Honoring the bargain that Martin gave to Concord, Loury’s adversary, Martin centered Loury’s damages only on the “C” revenue amount and not the “D” total-fee-revenue amount stipulated by the Agreement’s terms, “10%” times “any revenue” (Pa615; SUMF-KL: ¶231; ¶233; ¶243). This meant that Loury’s damage award from the first trial held, thus preventing Loury from additional QAUM compensation due from his Agreement’s terms based on Concord’s new testimony and revenue formula (Pa615; SUMF-KL: ¶361).

17. Judge Quinn Ruled that the Agreement was “10%” times “Gross Revenue” and not “Revenue Less Expenses” or “Net Revenue”

As the second trial was a full, new trial (Pa615; SUMF-KL: ¶173-¶175), Judge Quinn ruled that Loury did not breach his employment agreement as Concord's counterclaim alleged (Pa615; SUMF-KL: ¶245), thus Loury's termination was without cause. The Agreement's "good reason" severance provision was upheld (Pa615; SUMF-KL: ¶246).

Next, Judge Quinn ruled for Loury's contract-breach claims, and put on the record that the Agreement was:

“. . . clear on its face even using an example as to how Loury's additional compensation should be calculated and very clearly states that, as to the QAUM [compensation] accounts, Plaintiff should be paid 'ten percent of such revenue'". [Emphasis added] (Pa615; SUMF-KL: ¶247)

Judge Quinn then defined the Agreement's terms as *"this means gross revenue and not net revenue or revenue minus expenses"* [Emphasis added] (Pa615; SUMF-KL: ¶247).

18. Although Judge Quinn Defined Concord's Liability as "10%" times "Gross Revenue", Martin Did Not Enter a New Damage Award that Would Have Put in "Contest" or "Dispute" the Damages Loury was Awarded in the First Trial

Judge Quinn, ruling that Loury's Agreement paid him "10%" times "gross revenue" and not "revenue less expenses", established Concord's liability to the Agreement's terms exactly how Loury's two email and attachment sets defined it (Pa615; SUMF-KL: ¶41-¶43; ¶201-¶207; ¶208-¶219). This was the "theory of Loury" (Pa615; SUMF-KL: ¶233 + footnote).

Yet, following his liability determination, Judge Quinn wrote that Martin's damage order did not put into "contest" or "dispute" the damages Loury received from the first trial (Pa615; SUMF-KL: ¶253). Putting the first trial's damages in "contest" and "dispute" was precisely what Loury wanted Martin to do four separate times in writing and once verbally, but which Martin refused each time he was directed to do so (Pa615; SUMF-KL: ¶332-¶335; ¶25).

Consequently, Martin, in ignoring these five directives for a higher damage award (Pa615; SUMF-KL: ¶332-¶335; ¶25), prevented Judge Quinn from the rationale of his liability ruling to a damage order on that same logical line: Loury's additional QAUM compensation of "10%" on "gross revenue" (or "10%" on the "D" variable) should be paid according to the Agreement's "unambiguous" terms (Pa615; SUMF-KL: ¶247).

19. Martin Law Firm, LLC v. Kirk Loury v. Martin Law Firm, LLC ("MLF")

For this instant case, Martin Law Firm, LLC ("MLF") sued Loury for unpaid legal fees (Pa1).

Loury filed a Counterclaim alleging two primary claims (Pa53). Count 1 (aka Claim 1) alleged that Martin's violation of R. 4:25-7(b) and Appendix XXIII ¶#4 was the sole reason the three reviewing courts - (i.e., this court initially (Pa615; SUMF-KL: ¶153; ¶158-¶160); Judge Perri on reconsideration (Pa615; SUMF-KL: ¶165-¶167; ¶170); this court affirming reconsideration (Pa615; SUMF-KL: ¶171-¶172)) - ordered a full, new trial, with this being the proximate cause for Loury

incurring damages in the form of terminated consulting contracts (Pa615; SUMF-KL: ¶358-360) and more legal costs for the new trial and its motion practice (Pa615; SUMF-KL: ¶357-¶358).

Count 2 (aka Claim 2) alleged that Martin, in completely ignoring Loury's two email and attachment sets during the two-week recess, each of which wanted Martin to pursue a higher damage award (Pa615; SUMF-KL: ¶332-¶335) based on Argush's direct testimony (Pa615; SUMF-KL: ¶185-¶191; ¶195-¶196), prevented Loury from gaining the QAUM compensation his Agreement's terms dictated and that logically followed Judge Quinn's liability determination that Concord owed Loury on these contract terms.

When Martin refused to seek a higher damage award for Judge Quinn to consider, Loury was damaged in not receiving the QAUM compensation he was due according to Judge Quinn's "good reason" determination (Pa615; SUMF-KL: ¶44; ¶245-¶246; ¶361).

STATEMENT OF FACTS: PERTINENT TO ARGUMENT III

20. All Parties Had the Understanding that Martin and MLF were One and the Same (Martin = MLF)

In Loury's preparation of his Answer and Counterclaim (pro se at this time), he researched the rules for law firms and studied R. 1:21-1 B (Pa465; Loury Cert. #8 - #11).

Loury read that in R. 1:21-1 B a(a)(2):

“Any attorney who is a member, employee, agent, or representative of the limited liability company shall remain personally liable for his or her own negligence, omissions, malpractice, wrongful acts, or misconduct, . . .” (Pa465) Loury Cert. #14).

Further, in R. 1:21-1 B a(a)(6), Loury learned:

“No limited liability company may render legal services in this State except through its members, employees or agents who are duly licensed and otherwise qualified to render legal services under these rules.” (Pa465; Loury Cert. #12)

Loury understood this to mean that the employing legal entity itself (i.e., Martin’s employer for Count 1, Archer & Greiner (“Archer”) or MLF for Count 2) could not deliver legal services in a corporate sense but only through “duly licensed” and individual practitioners such as Martin (Pa465; Loury Cert. #12-#13; #18). Therefore, Loury believed these rules meant that his legal malpractice claims solely related to Martin’s personal representation of him regardless of his employment by Archer (Count 1) or MLF (Count 2) (Pa465; Loury Cert. #14-#15; #17-#18).

Because Martin was personally liable for his negligence regardless of his employer, and because Martin was MLF’s principal practitioner and sole owner, Loury considered Martin and MLF to be one and the same with respect to Martin’s continuous representation of him (Pa465; Loury Cert. #20).

From this understanding, Loury’s amended Counterclaim equated “Plaintiff, Martin Law Firm, LLC” to Martin, the practitioner irrespective of Count 1 or Count 2. For example, as Loury was specific that MLF was the Plaintiff (Pa65, ¶1), he

consistently applied MLF=Martin for Count 1's facts and claims (Pa66-68) even though Archer was the employer at the time (see as examples ¶8; ¶9; ¶11; ¶21; ¶22; ¶23; ¶24; ¶26; ¶27; ¶30).

In Martin's amended answer to Loury's amended Counterclaim (Pa89), only once among 52 paragraphs pertaining to all counts or those specific to Count 1 did Martin, in paragraph #16 {Pa91), make a specific denial: "Martin Law Firm, LLC was not even in existence in 2014". In all other applicable paragraphs, MLF made either non-specific denials, admissions, or specifically confirmed that, indeed, MLF did equal Martin.

To this, the amended Counterclaim's allegation #22 (Pa67) was specific to Martin's filing of the *in limine* motion while he was employed by Archer. Consistent with Loury's interchangeability of Martin and MLF as the plaintiff/Counterclaim defendant, MLF's newly appointed counsel for the Counterclaim, Jack Slimm, Esq. ("Slimm"),⁹ himself, stated in the amended Answer (Pa92, ¶22) one month after his appointment:

"Denied as stated, except to admit plaintiff/Counterclaim defendant [MLF] filed a Motion in limine with defendant/Counterclaimant's approval and knowledge of same."

⁹ In Travelers' coverage letter (Pa474), Slimm was appointed as Martin's counsel only for Count 2 (Pa476; Pa480). However, at no time during this litigation has Slimm or his colleague at Marshall & Dennehy, Jeremy Zacharias Esq., in their formal and informal communications with Loury and counsel, limited their representation of Martin only to Count 2. Slimm and Zacharias have liberally and consistently represented Martin for matters pertaining to Count 1 (i.e., while Martin was employed by Archer).

Here, Slimm presented MLF as “plaintiff/Counterclaim defendant” as the entity that “filed a Motion in limine” even though Martin was employed by Archer at the time. *As such, Slimm agreed with Loury that MLF=Martin.* This was not a mistake since the same admission was applied for the Counterclaim allegation #23 that was also specific to the *in limine* motion (Id. #23). (Slimm’s admissions were nearly identical with those of the prior law firm, Tenaglia & Hunt (“TH”), in its original Counterclaim answer.)

Furthermore, in Loury’s package of document requests, interrogatory submissions, and admissions submitted after the initial discovery order (Pa471), Loury confirmed his belief of the MLF and Martin interchangeability when he wrote this definition: “*Plaintiff refers to the Martin Law Firm, LLC and/or its principal shareholder, Mr. Joseph Martin*” [Emphasis Added] (Pa486, Definition #2).

At no time during the lengthy discovery period did Martin, MLF, TH, Slimm, or Zacharias correct or object to this definition (i.e., Martin=MLF).

Because of this understanding that “Plaintiff” also meant “Mr. Joseph A. Martin, Esq.”, Loury’s document requests #1 to #17 (Pa487-489) pertained solely to Count 1 and Martin’s representation of Loury while employed by Archer. Other than requests, #2, #11, #13, and #15 (Id.), the questions specifically included the term “Plaintiff” (i.e., MLF) in them.

Martin’s replies to Loury’s requests for documents (Pa498-502) pertaining to these first seventeen Count 1 questions had non-specific objections of this type:

“Plaintiff objects to this Request to the extent it is overly broad and seeks the production of documents that are not relevant to the claims or defenses in this case or likely to lead to the discovery of admissible evidence.”

This meant that Martin **did not** restrict his answers with a statement such as, “The Plaintiff [MLF] cannot respond to these document requests because it was not in existence at the time, and Mr. Martin was employed by the Archer & Greiner firm”. (This statement was true and better than MLF’s non-responsive objections.)

In fact, to the highly specific interrogatory #2 (Pa511) for Martin’s *in limine* practice while at Archer, MLF conformed to Loury’s definition of “Plaintiff” (Martin=MLF) in its answer.

“These objections notwithstanding, and subject to and without waiving them, Plaintiff [MLF] responds that Mr. Martin, Mr. Newman [associate counsel at Archer], and Defendant Loury were involved with the drafting, consultation, editing, and approval of the motion in *limine*.”

Again, MLF **did not** write something such as, “Plaintiff [MLF] is unaware of Martin’s role in the *in limine* motion filing since it was not in existence at the time”.

Slimm also interchanged Martin and MLF as the Plaintiff in pleadings and papers, even for the disclaimed-by-Travelers Count 1. In MLF’s amended Answer filed by Slimm (Pa89), of the 30 affirmative defenses listed (Pa99-102), not one disclaimed MLF of its legal exposure for Martin’s alleged Count 1 negligence.

In analyzing the transcripts for Martin’s two deposition sessions, the keyword “*limine*” was referenced 128 times (44 during the first session and 84 during the second) (Pa465; Loury Cert. #23 to #26). Although the depositions had focus on the *in limine* claim, yet Martin freely answered. This meant that he **did not** once clarify

by saying, “I can answer personally but not on behalf of the plaintiff since it was not in existence at the time.”

Similarly, Zacharias, Martin’s deposition counsel, **not once** objected to say that Martin could answer an *in limine* question personally but not on behalf of MLF.

Even more, when asked specifically about the professional liability insurance coverage for his legal representation, Martin said, "If I didn't, Jeremy, man, you would not be here representing me" (Pa514; p. 174). This answer was made during the first deposition session in which no questions were asked about Martin’s actions for Count 2 (i.e., while employed by MLF, which was the “named insured” covered by the Travelers policy).

LEGAL ARGUMENT

I. JUDGE BELGARD IMPROPERLY BARRED WASSERMAN AND HIS EXPERT REPORT WITHOUT DISQUALIFYING HIM UNDER N.J.R.E. 702/703 OR THE NET OPINION RULE (Raised below: Pa442; Pa445; 1T; 2T)

N.J.R.E. 702 specifies an expert must be qualified in his or her respective field. N.J.R.E. 703 mandates an expert’s testimony:

“be grounded in facts or data derived from[:] (1) the expert’s personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible into evidence, but which is the type of data normally relied upon by experts.” Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting, Polzo v. Cty. of Essex (Polzo I), 196 N.J. 569, 583 (2008)).

On April 9, 2024, this court approved for publication, State v. Shannon McGuigan. Directly for admitting expert testimony to N.J.R.E. 702, this court ruled

that a trial court should “construe” expert testimony “liberally” and “tilt in favor of admissibility” while putting its faith in “the jury’s function to judge the worth of that [expert’s] opinion.” State v. Shannon A. McGuigan, (App. Div. 2024; A-3224-21; p. 25 - 27)

A. Wasserman’s Expert Report was Barred Even though at No Time Did Martin or Judge Belgard Dispute Wasserman’s N.J.R.E. 702 Expert Qualifications, Dispute his Volume of Case Facts Applied Across his Report (i.e., N.J.R.E. 703), nor Did Judge Belgard Make a Net Opinion Rule Determination

McGuigan above defines the process for disqualifying an expert’s testimony as a trial witness. At no time did MLF in its papers or in oral argument, nor Judge Belgard in her ruling, challenge Wasserman’s N.J.R.E. 702/703 qualifications. Therefore, should an expert be qualified per N.J.R.E. 702/703, Townsend defines the net opinion rule¹⁰ as the only other path for barring an expert’s testimony at trial.

“The net opinion rule, however, mandates that experts ‘be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.’ Landrigan, supra, 127 N.J. at 417, 605 A. 2d 1079.”

¹⁰ MLF’s motion to bar Wasserman’s expert report as a net opinion was based on an incorrect holding that “Wasserman’s testimony [on liability determination] is not admissible because it violates the net opinion rule clearly because he didn’t opine on what the amount of the lost opportunity was under the circumstances” (1T 6/21/2023; 36:12-16); (Pa558, p. 4 ¶1-4; p. 28 ¶1-2). (Note: Wasserman was the liability/negligence expert, and **he did** define the damage categories with particularity (Pa540-541) and assessed damages as “more likely” (Pa538 first paragraph)).

MLF’s position also ignored Judge Belgard’s order months earlier, in response to MLF’s motion to bar Lorry’s damage evidence, (Pa107) that Lorry was to file an “expert narrative report” that would specify the amounts of such “lost opportunity[ies]” and the other Counterclaim damages.

See Argument II on p. 39 herein for the listing of controlling precedent specifying that it is the “client”/“plaintiff” – not the liability/negligence expert - that bears the burden of defining non-speculative damages and amounts.

“An expert's conclusion ‘ ‘is excluded if it is based merely on unfounded speculation and unquantified possibilities.’ ‘ Grzanka v. Pfeifer, 301 N.J.Super. 563, 580, 694 A. 2d 295 (App.Div.1997). [Citations omitted] Townsend v. Pierre, 221 N.J. 36, 55 (N.J. 2015)

This court, in Carbis Sales, evaluated a Wasserman expert report, similarly produced for its plaintiff, to the controlling standard of a net opinion rule determination and concluded it was **not** a net opinion. The table below maps how this court assessed Wasserman’s Carbis report compared, side by side, to the report Wasserman prepared for Loury (Pa516). This mapping is very tight, confirming the validity of Loury’s Wasserman report, especially considering State v. McGuigan’s call for liberal admissibility of expert testimony.

<u>Carbis Sales v. Eisenberg, 397 N.J. Super. 64, 79-80 (App. Div. 2007)</u> Wasserman Expert Report	Loury Wasserman Report (See Pa516)
“Wasserman specifically referenced extensive case law, as well as <u>R.P.C.</u> 1.3, establishing that an attorney has an obligation to carefully investigate his case and diligently pursue his or her client's claims before formulating legal strategies.”	<ul style="list-style-type: none"> ● “Case law” and RPC references: Pa534-535; Pa538 ● Obligation to “diligently pursue”: Pa532, Pa534-538; Pa537; Pa539 ● Obligation to pursue “client’s claims”: Pa539
“He also cited to cases and treatises indicating that an attorney cannot be held liable for an erroneous judgment call unless that judgment was not properly informed.”	<ul style="list-style-type: none"> ● Case law citations: Pa534-535 ● “Treatises” citations: Pa535 ● Not “held liable for an erroneous judgment call”: Pa539
“As previously detailed, Wasserman then went on to identify the deficiencies he perceived in Eisenberg's preparation of the case and the resulting ill-informed judgments defendant made as to the presentation of Carbis' defense to the jury.”	<ul style="list-style-type: none"> ● Discussion of Martin’s negligence based on the case’s facts: Pa536-540
“Such deviations, he opined, constitute a violation of the tenets of the Rules of Professional Responsibility and of the general duty to exercise	<ul style="list-style-type: none"> ● Opinion that Martin’s negligence “violat[ed] the tenets of the” RPCs: Pa539

<p>that degree of care, knowledge, judgment and skill that a reasonably prudent lawyer of ordinary ability would have exercised in the same or similar circumstances.”</p>	<ul style="list-style-type: none"> • Martin violated the standard of “a reasonably prudent lawyer of ordinary ability”: Pa537-538)
<p>“We are satisfied that Wasserman's opinion is clearly based on factual evidence of record, to which he applied generally accepted standards of care as reflected in both our case law and Rules of Professional Conduct. <u>St. Pius X House of Retreats v. Diocese of Camden</u>, 88 N.J. 571 , 588, 443 A.2d 1052 (1982).”</p>	<ul style="list-style-type: none"> • The “factual evidence of record” described with specificity: Pa522-532 • The factual record applied in Wasserman’s opinion: Pa536-540

At oral argument, Judge Belgard did not undertake a net opinion evaluation.

If she did not bar Wasserman according to this court’s valid paths - N.J.R.E. 702/703 failings; the Net Opinion Rule – why did she bar him as Loury’s liability expert?

B. Judge Belgard Barred the Wasserman Report because She Placed Herself in the Role of the Trier of Fact and Circumvented Loury’s Right to Present His Evidence and Argument to the Jury through the Suit-within-a-Suit Method

These were Judge Belgard’s questions during oral argument:

1. “How that rebuttal clarification testimony would have in any way changed the outcome here?” (1T: 6/21/2023; 59:11-13)
2. “How would this testimony have bolstered or added anything?” (1T 6/21/2023; 60:2-3)
3. “How do we then make the jump to the damages that Mr. Loury alleges?” (1T 6/21/2023; 60:10-12)

Judge Belgard concluded:

“Here we have a situation where it can't be established through the record evidence that this testimony would have in any way bolstered or changed - bolstered the decision in favor of Mr. Loury or changed the decision of Judge Quinn because Judge Quinn had already rejected the theory of Argush and accepted the theory of Loury and these expert reports can't establish that any damages that are set forth by Mr. Loury are related to this bolstered testimony.” (1T 6/21/2023; 60:22-61:5)

In barring Wasserman as Loury’s liability/negligence expert, and, summarily, Loury as the damage expert ¹¹, Judge Belgard violated controlling precedent in not directing at trial a “suit-within-a-suit” method that would engage the jury, for the questions she posed, in its rightful task of judging the presented record evidence and testimony. (Counsel advocated for a suit-within-a-suit (aka case-within-a-case) at the hearing (1T 6/21/2023; 49:14-22), but Judge Belgard ignored it.)

This court in Carbis Sales stated:

"The most common way to prove the harm inflicted by [legal] malpractice is to proceed by way of a `suit within a suit' in which a plaintiff presents the evidence that would have been submitted at trial had no malpractice occurred." Garcia v. Kozlov, Seaton, Romanini Brooks, P.C., 179 N.J. 343 , 358, 845 A.2d 602 (2004)."

“At such a trial, the plaintiff, who typically was the plaintiff in the underlying case, must prove, by a preponderance of the evidence that: "(1) he [or she] would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectability of such judgment" Ibid, (quoting Hoppe, supra, 158 N.J. Super. at 165, 385 A.2d 913)." Carbis Sales v. Eisenberg, 397 N.J. Super. 85 (App. Div. 2007)

This brief’s Statement of Facts – and a similarly abundant record provided to Judge Belgard in Loury’s reconsideration papers (i.e., an asserted fact supported by documentary evidence) - proves Judge Belgard’s error in ruling that “there was no record evidence” to support Loury’s claim (2T 09/08/2023; 28:9–29:12).

¹¹ Judge Belgard, responding to Martin’s motion practice to bar Loury’s damage evidence, ordered Loury to provide an expert report (Pa110). However, in her ruling, Judge Belgard did not provide any analysis that justified barring Loury’s report’s methodology, legal precedents, rules, categories, formulas, proving documents, or calculation results nor did she disqualify him based on N.J.R.E. 702/703.

Loury’s comprehensive inventory of substantiated facts (Facts: #8-#18) leads to a persuasive jury presentation supporting Count 2: 1) Argush’s testimony defining Concord’s revenue as the “total”, “booked”, and “collected” fees; 2) Argush’s revenue formula (i.e., “B” + “A” + “C” = “D”), 3) the Agreement’s terms of “10%” times “any revenue” (i.e. “D”); 4) Martin negotiating a bargain with Argush to pay Loury on the lesser “C” revenue and to Loury’s detriment; 5) Martin’s post-trial brief pushing “10%” times “any revenue” as “unambiguous”; 6) Judge Quinn’s ruling calling to the Agreement’s terms, which were “clear on the face”; 7) the ruling being that Loury was to be paid “10%” on “any revenue” (i.e., “D” in the formula) and not “revenue less expenses” or “net revenue” (i.e., “C” in the formula); 8) Martin’s failure to follow Loury’s directive - four times in writing and once verbally – to place an order before Judge Quinn for a higher damage award and put the first trial’s damages in “contest” and “dispute”.

Next, Loury, as the court-ordered damage expert (Pa107), would: 1) describe his damage methodology; 2) define the damage categories for Counts 1 and 2; 3) state the precise amounts for each category; 4) offer proving documents comprised of contracts, invoices, bank statements, emails, time sheets, and case law; 5) calculate the compensation formula to the dollar (Pa110).

Our Supreme Court, in Garcia v. Kozlov, referencing Lieberman’s application of the suit-within-a-suit method, said,

“Another factor to be considered is that in many [legal] malpractice actions the aggrieved plaintiff was a claimant or plaintiff in the original underlying

action, the professional mishandling of which gives rise to the malpractice suit. In such cases, there well might be a parallel between the two actions as to the identity of witnesses and the nature of the evidence so that a later ‘suit within a suit’ would not be inconvenient or difficult. Garcia v. Kozlov, 179 N.J. 343, 360 (N.J. 2004)

Rubanick v. Witco Chemical Corp. is a direct parallel to Judge Belgard’s error in barring Wasserman, and this court’s majority, in remanding Rubanick for trial, admonished the motion judge who interjected an opinion about an expert’s testimony, ruled on it, and usurped the jury’s role:

“It was for the jury to determine the facts and to either accept or reject the methodology used by Dr. Balis [the expert] and his opinion based on the reasons given therefor. The motion judge in this case usurped the jury’s fact-finding function. Moreover, in concluding that Dr. Balis had ‘glossed over’ significant factors the motion judge again intruded on the jury’s function. Such matters are properly the subject of exploration and cross-examination at a trial. Obviously, the [motion] proceeding here was not intended to be a substitute for a trial. It did, however, prevent a trial and had the effect of precluding plaintiffs from having their proper day in court. In our view Dr. Balis qualified as an appropriate expert and should have been allowed to express his opinion with respect to whether PCB contamination at Witco was a proximate cause of Rubanick’s cancer. Rubanick v. Witco Chemical Corp., 242 N.J. Super. 36, 55 (App. Div. 1990)

Judge Belgard, in barring Wasserman’s and Loury’s testimony without N.J.R.E. 702/703 or net opinion disqualifications, denied Loury his “proper day in court” to present his case in chief to the true trier of fact – the jury – at a trial designed for sifting the record’s voluminous evidence to reach a just verdict.

II. IN DENYING LOURY’S MOTION FOR SUMMARY JUDGMENT FOR COUNT 2, JUDGE BELGARD DID NOT RULE ON DISPUTED MATERIAL FACTS AND, WHILE ACKNOWLEDGING THAT CERTAIN OF MARTIN’S NEGLIGENCE FELL UNDER COMMON KNOWLEDGE, SHE DENIED THIS FRAMEWORK

BECAUSE SHE CONCLUDED A DAMAGE EXPERT WAS NEEDED (Raised below: Pa451; 3T)

Judge Belgard's reconsideration rulings bypassed Loury's paper's extensive documentary record for adding Martin as a defendant (2T 9/8/2024 27:25-28:8) and restoring Wasserman and Loury as experts (2T 9/8/2024 28:9-29:12).

Consequently, Loury filed a Motion for Summary Judgment because he wanted: 1) once and for all, to force a formal judicial determination of his Counterclaim's entire material fact record, and 2) with material facts agreed upon, to show that Martin's alleged Count 2 negligence was of such a basic nature to be discernable through a juror's common knowledge:¹²

"It is for you as jurors to say from your common knowledge and experience whether defendant(s) did something which the average member of defendant's profession would not have done or whether defendant failed to do something or failed to take some measure which the average member of defendant's profession would have done or taken in the circumstances of this case in the representation of the plaintiff(s)." (Pa561) CHARGE-Legal Malpractice 5.51A (8-9 of 10)

The bedrock of a R. 4:46-2 summary judgment ruling is a "show[ing] 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." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-29 (N.J. 1995)

The raw material for a "judgment or order" under R. 4:46-2 is the movant entering Statements of Undisputed Material Facts ("SUMF") and the non-movant

¹² With Wasserman's expertise still barred after reconsideration, Count 1 was gutted since an expert was required to assess the technical aspects of Martin's *in limine* motion practice. A juror's common knowledge could not apply.

“fil[ing] a responding statement either admitting or disputing each of the facts in the movant's statement.” See Loury’s SUMFs (aka “SUMF-KL”) at Pa615 in tandem with Martin’s SUMF responses at Pa712.

A. In Adjudicating Loury’s Summary Judgment Motion, Judge Belgard was Obligated to Rule on the Disputed Material Facts to Determine if There were Genuine Factual Issues; She Did Not Rule on a Single Disputed SUMF nor Acknowledge What had become a Vast Inventory of Material-Fact Agreement

A motion for summary judgment is a trial on paper in which our Supreme Court in Brill has been clear about a motion judge’s accountability to the task.

“Consistent with this national trend, we hold that under Rule 4:46-2, when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 539-40 (N.J. 1995)

“A summary judgment motion has in the past required and will in the future continue to require a searching review. Millison v. E.I. du Pont de Nemours Co., 101 N.J. 161, 167, 501 A.2d 505 (1985) (noting that Judson requires a ‘discriminating search’ of the record to determine whether there exists a ‘genuine issue of material fact requiring disposition at trial’); see Ziembra v. Riverview Medical Center, 275 N.J. Super. 293, 298-303, 645 A.2d 1276 (1994). Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 541 (N.J. 1995)

Evaluating Loury’s SUMFs against Martin’s responses revealed vast material agreement among the parties with 373 full or partial admissions (i.e., direct admissions; documents “speak[ing] for themselves”; clarifications of testimony). Significantly, since Loury’s Counterclaim was document based, MLF’s acknowledgment of the documents “speak[ing] for themselves” represented a large

inventory of proofs defining Martin's negligence while also contradicting his defenses.¹³ (SUMF-KL: ¶268-¶335)

Of Loury's SUMFs giving factual evidence contradicting Martin's testified-to defenses, Martin provided 53 responses with volumes of repeated, multi-page, non-responsive, non-specific excerpts from Martin's deposition. (Exhibit 37 (Pa615) and Exhibit 39 (Pa712): SUMF-KL: 1) ¶65-¶66; 2) ¶124-¶127, ¶133-¶140; 3) ¶142-¶147; 4) ¶224-¶234, ¶237-¶238, ¶243, ¶248-249, ¶277; ¶273-¶274; 5) ¶280-281; 6) ¶283-285; 7) ¶319-324; 8) ¶328, ¶330-331)

Had Judge Belgard fulfilled her obligation under Brill and ruled that these 53 were merely deposition dumps to each SUMF's specific fact, controlling precedent would claim these improper responses as admitted SUMFs for Loury. ("'[C]onclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat meritorious motion for summary judgment. " Hoffman v. Asseenontv.com, 404 N.J. Super. 415, 425-26 (App. Div. 2009))

With nothing in her ruling to suggest otherwise, Judge Belgard did not "sift" or "analyze" the evidence or conduct a "discriminating search" or "searching review" of Martin's "self-serving assertions" to Loury's SUMFs. When counsel, at oral argument, made a substantive claim for granting summary judgment - "there's

¹³ Throughout this litigation, Martin did not enter a single exculpatory document, fact-witness corroboration, rule, or precedent in his defense of the Counterclaim's allegations. At no time in his affirmative defenses (Pa99-102), papers, or deposition testimony did Martin admit a mistake, error in professional judgment, or strategic choice that could absolve or lessen his liability. Martin's ethics expert, Fredric Shenkman, Esq., in his expert report, solely relied on Martin's deposition testimony as the basis for his written conclusion.

no major [i.e., material] dispute on the key facts or documents” (3T 10/12/2023; 26:23-25) – Judge Belgard ignored it.

B. Judge Belgard Acknowledged that Loury’s Two Email and Attachment Sets Fit to a Juror’s Common Knowledge, but She Failed to Rule on the Facts Proving Martin’s In-Court Bargain Negotiated with Argush was the Proximate Cause of Loury’s Damages in Which Martin Failed Loury as His Fiduciary

Judge Belgard read into the record Loury’s numerous examples of Martin’s alleged negligence ascertainable using a juror’s common knowledge ¹⁴ (3T 10/12/2023; 17:22–18:20). Later, in giving her ruling, Judge Belgard highlighted that Martin’s negligence in ignoring Loury’s two email and attachment sets fit the common knowledge doctrine. (3T 10/12/2024; 36:6-11).

Martin’s negligence in totally ignoring Loury flowed in these two email/attachment sets as Loury: 1) sought Martin’s confirmation of Argush’s new testimony and evidence; 2) connected this testimony to his Agreement’s QAUM compensation formula; 3) validated this testimony with Concord’s own documents; 4) provided a detailed cross-examination outline to lock in this testimony; 5) outlined how this new testimony changed what Loury knew previously; 6) stated his objective for a higher damage award four times; 7) defined his damages using Concord’s invoices and his agreement’s formula of “10%” times “any revenue” (Pa3160-3174).

¹⁴ A trial need not be solely expert-based or common knowledge. Our Supreme Court ruled in Chin v. St. Barnabus Med. Ctr., (734 A.2d 778 (1999) 160 N.J. 454)) that had expert testimony for a physician’s negligence and common knowledge for a nursing staff’s negligence.

While Judge Belgard rightly recognized Martin’s negligence in ignoring these emails as common knowledge, her ruling did not go to the next step and assess the offense any juror would easily feel with Martin’s in-court, negotiated bargain with Loury’s adversary, Argush, wherein Martin allowed Concord to pay Loury less than his Agreement’s formula dictated (see Facts: #15-#16). Martin did the opposite of what Loury wanted him to do and failed his fiduciary duty to work for Loury’s best interest. This is pure proximate cause that directly led to Loury’s damages.

In her ruling, Judge Belgard cited to Sommers v. McKinney, a legal malpractice case (3T 10/12/2024; 35:18-25). To this, consider a side-by-side comparison of this court’s Sommers ruling on common knowledge and damages, and Loury’s Count 2 claim.

<u>Sommers v. McKinney</u> 287 N.J. Super. 1, 11-12 (App. Div. 1996)	Instant Case
“Having undertaken to represent her, McKinney owed a duty of absolute good faith and loyalty to Sommers.	<ul style="list-style-type: none"> • Martin, as Loury’s attorney under a signed retainer agreement, owed Loury a “duty of absolute good faith and loyalty”. • Martin, in court and against Loury’s directives, bargained one on one with Argush (Loury’s adversary) and agreed to a lower damage award than Loury’s Agreement’s QAUM formula specified, thus breaching his “duty of absolute good faith and loyalty to” Loury.
“He was obliged to prepare her case for trial.”	<ul style="list-style-type: none"> • Martin was “obliged to prepare” for the Argush cross examination to advocate for Loury’s highest benefit.
“Once settlement discussions commenced, McKinney was obliged to communicate all offers to her.”	<ul style="list-style-type: none"> • As Argush gave his new testimony and revenue formula, Martin was “obliged to communicate” with Loury how to use this for achieving Loury’s stated objective of a higher damage award.

<p>“He was also obliged to give her a full and accurate assessment of the case in support of and in defense of her claims.”</p>	<ul style="list-style-type: none"> • Martin was “obliged to give” Loury, during the two-week recess, “a full and accurate assessment of” his opportunity for a higher damage award “in support” of his “claims”.
<p>“We conclude that Sommers was not required to have an expert opine that McKinney should have briefed an issue and that the failure to do so was a breach of that duty to plaintiff.”</p>	<ul style="list-style-type: none"> • Loury is “not required to have an expert opine that” Martin should have communicated with Loury during the two-week recess. • Loury is “not required to have an expert opine that” Martin breached his diligence “duty” when he ignored Loury and wasted the entire two-week recess.
<p>“Sommers was not obliged to have an expert opine that McKinney was required to report the settlement discussion accurately and recommend a disposition of the case based upon an accurate rendition of each party's positions.”</p>	<ul style="list-style-type: none"> • Loury is “not obliged to have an expert opine that” Martin failed in offering Loury advice and counsel during the two-week recess. • Loury is “not obliged to have an expert opine that” Martin “was required to” pursue a damage award for the higher “D” revenue amount in line with Loury’s Agreement’s compensation formula dictating “10% times “any revenue”.
<p>“Sommers was not required to produce an expert to opine that, if she had been told that the town had no defense to her back pay claim, she would have changed her settlement position.”</p>	<ul style="list-style-type: none"> • Loury is “not required to produce an expert to opine that” Argush’s testimony and revenue formula, using Concord’s own invoices presented at trial, meant Loury had a factual basis to pursue a higher damage award based on his Agreement’s unambiguous compensation formula.

Sommers’s facts show an attorney’s negligence is the proximate cause of injury according to a juror’s common knowledge. Sommers and this instant case’s similarity is a guide for reversing Judge Belgard’s denial of Loury’s summary judgment motion.

C. Judge Belgard Did Not Grant Summary Judgment for Count 2 under Common Knowledge because She Concluded a Damage Expert was Needed, and She had Already Barred Loury as a Damage Expert and Did Not Consider Him as a Lay Witness for this Purpose

Given the substantial implications on Loury's case from Martin ignoring the two email and attachment sets – and Judge Belgard's agreement of this fitting to a juror's common knowledge - why did Judge Belgard deny Loury's summary judgment motion?

Judge Belgard concluded that damages arising from a liability determination could not be defined since she had previously barred Loury's damage testimony.

“The issue becomes, however, how that [common knowledge of Martin ignoring the two email and attachment sets] is related and -- and -- and the proximate cause piece of it to any damages that are alleged here. And the fact is I've already ruled that Mr. Loury serving as an expert on damages is barred. So even though he is the party that's pursuing this malpractice claim *he can't now say, well, even though I couldn't show you as an expert I could show you as a fact witness what these damages are and how I think they're related to not being – not receiving a reply to these e-mails. Expert testimony is most certainly needed here as I've already previously ruled relating to the damages that are sought.*” [Empasis Added] (3T 10/12/2024; 36:12-24)

Significantly, our Supreme Court in Brill, referencing the federal court summary judgment rule, directly contradicted Judge Belgard's conclusion that a damage determination was required concurrent to liability: “A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529 (N.J. 1995)”

Next, in paraphrasing Judge Belgard's rulings, her logic was circular: “I previously ruled that Loury is an expert on his damages and had him submit a report as such” (Pa110); but “I already barred Loury as the damage expert” (3T 10/12/2024 36:14-16); although I agree there is a common knowledge basis for Martin's

negligence (3T 10/12/2023 36:6-11); yet “I say an expert is needed to opine on damages” (3T 10/12/2024; 36:22-24); thus “I’m not going to allow Loury a different path to present his damages” (3T 10/12/2024; 37:19-23).

Nothing in Judge Belgard’s rulings suggested any analysis of Loury’s report nor did she disqualify him to N.J.R.E. 702/703.

In a legal malpractice case, controlling precedent mandates that the “plaintiff”/“client”, which is Loury and not an N.J.R.E. 702 expert, bears the burden of proving damages after a liability determination of the attorney’s negligent representation ¹⁵.

"Plaintiffs must prove by a preponderance of the competent, credible evidence that their alleged damages were proximately caused by defendants' negligence." Long v. Landy, 35 N.J. 44 , 54, 171 A.2d 1 (1961)

"The plaintiff must ‘show what injuries were suffered as a proximate consequence of the attorney's breach of duty, ordinarily measured by the amount [i.e. the ‘quantum’] that a client would have received but for the attorney's negligence." 2175 Lemoine Ave. v. Finco, Inc., 272 N.J. Super. 478, 487-88 (App. Div. 1994);

¹⁵ Martin asserted that this court’s ruling in Morris Properties v. Wheeler concluded that a liability expert must also be a damage expert; this is wrong. The Brill declarative above proves that liability is separate from damages.

This court’s ruling in Morris cited multiple cases specifying that it was the “plaintiff”/“client” who bore the burden “to show what injuries were suffered as a proximate consequence of the attorney’s breach of duty”.

In Morris, this court concluded expert evidence on causation and damages (the latter expert only because the damage issue in Morris was defining a fair settlement value and if a higher amount was warranted; this complexity on damages was not an issue for this instant case) but not requiring one expert to do both jobs as Martin claimed. Wasserman was the expert on liability/negligence determination and proximate cause, including identifying damage categories (Pa540-541), and Loury, as the “plaintiff”/“client”, was the court-ordered expert on damage amounts and the associated proving documents (Pa110).

Morris Props. v. Wheeler, 476 N.J. Super. 448, 460 (App. Div. 2023)

"The client must have sustained actual damage that is real, not merely speculative." Olds v. Donnelly, 150 N.J. 424, 437 (N.J. 1997)"

Brill, above, established that a liability determination and damages need not be linked. Further, controlling precedent gave Judge Belgard the authority to allow Loury's testimony as a lay witness or expert. She chose neither. (E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 26 (App. Div. 2018) (Note: Loury provided the E&H Steel precedent multiple times in his papers.)

Judge Belgard ignored these many precedents and wrongly denied Loury's motion for summary judgment, which, all in, shredded Loury's ability to prosecute his Counterclaim.

D. Instead of MLF Filing Its Own Summary Judgment Motion to Dismiss the Counterclaim, MLF Filed an Improper *In Limine* Motion that Barred Loury's Experts and All Associated Counterclaim Evidence, and the Resulting Order Forced the Trial Judge to Keep Loury from Putting on His Defenses to Martin's Complaint

With Judge Belgard's order barring Wasserman and Loury in hand as of June 21, 2023, MLF sat on this and did not file a motion for summary judgment, nor did MLF do so after Loury's motion for reconsideration was denied. For this argument here, Martin/MLF did not file a cross-motion to Loury's motion for summary judgment.

Instead, MLF filed a motion *in limine* to bar Wasserman and Loury as experts; this approach was expressly prohibited by R. 4:25-8(a)(1). When counsel called this procedural failing to Judge Belgard's attention (3T; 10/12/2023; 16:4–17:5), she shoe-horned Martin's non-compliant *in limine* motion by ruling that her June order

was dispositive itself (3T; 10/12/2023; 21:13-25; 37:19- 38:1). Judge Belgard then issued an *in limine* order (Pa454).

This court has consistently ruled that *in limine* motions are to be granted sparingly:

“Even when a limited issue is presented, ‘[o]ur courts generally disfavor in limine rulings on evidence questions,’ because the trial provides a superior context for the consideration of such issues. State v. Cordero, 438 N.J. Super. 472, 484–85, 105 A. 3d 1129 (App.Div.2014), certif. denied, 221 N.J. 287, 112 A. 3d 594 (2015).”

“Although a trial judge ‘retains the discretion, in appropriate cases, to rule on the admissibility of evidence pre-trial,’ *id.* at 484, 105 A. 3d 1129 we have cautioned that ‘[r]equests for such rulings should be granted only sparingly.’ *Ibid.* (quoting Bellardini v. Krikorian, 222 N.J. Super. 457, 464, 537 A. 2d 700 (App.Div.1988)); see also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 105 (2015).

The issue at hand for this court is that Judge Belgard was not the trial judge; it was Judge Richmond ¹⁶.

The trial was only for Martin’s Complaint (although lacking a true dispositive motion, Judge Belgard had to keep Loury’s Counterclaim active (3T 10/12/2023; 38:1-4)). Judge Belgard’s *in limine* order restricted Judge Richmond from allowing Loury to present his defenses to Martin’s Complaint. Essentially, evidence connected to the Counterclaim was stricken (5T 11/14/2023; 23:13–26:14; *Id.* 27:4–27:25; 6T 11/15/2023 Vol. 1; 163:19–165:4; *Id.*; 200:4 – 7T; 11/15/2023 Vol. 2 203:19; 8T 11/16/2023; 148:3–151:14; *Id.* 155:24–156:6; 9T 11/17/2023; 96:7-11).

¹⁶ See the concurring opinion from Judge Nugent of this court’s ruling in the underlying case (Pa48-52) Loury v. Concord Equity Grp. Advisors, LLC., DOCKET NO. A-3200-13T1, 41-45 (App. Div. Feb. 11, 2016).

The Counterclaim evidence directly applied to Loury's Complaint defenses, and barring it altogether destroyed Loury's ability to defend himself and allow the jury to consider negating all or a portion of MLF's fee claim.

First, Judge Richmond did not allow the jury to consider that Martin breached the engagement letter's section six (Pa575) (8T 11/16/2023; 148:3–151:23; 9T 11/17/2023; 39:6–44:3; Id. 46:10–47:5). (This section six (Pa572) detailed the services MLF would provide, and each service lined up to our conduct standards: RPC: 1.1 (Communication), RPC: 1.2 (Scope of Representation), RPC: 1.3 (Diligence), and RPC: 1.4 (Communication).)

Second, Loury was also prevented from offering evidence that, had Martin pursued a higher damage award from Concord, there was the possibility of potential additional monies for Martin to cure Loury's unpaid balance. And, on this path, Martin had no downside if Loury lost his case ¹⁷; Loury would still owe Martin money (i.e., the Complaint) while Martin would be malpractice-protected because he was following Loury's directive (i.e., RPC 1.2). If Loury won, there would be over \$500,000 of damages beyond what was won in the first trial to pay Martin (5T 11/14/2023; 26:15–27:25).

Before deposition transcripts and Loury's affirmative defenses were given to the jury for consideration (9T 11/17/2023; 102:10-122:11), they were allowed to

¹⁷ See Wasserman's expert report (Pa538)

deliberate to a verdict (9T 11/17/2023; 108:6–109:16; 122:9-123:13 (Pa577)). Thus, there was no possibility for a verdict other than MLF’s full claim.

Judge Belgard’s denial of Loury’s summary judgment motion in full, and simultaneously issuing her *in limine* order barring Loury’s defenses, kept the jury from using its common knowledge that Martin breached MLF’s engagement letter, was negligent in doing so, and thereby liable for Loury’s Claim 2 damages.

III. THROUGHOUT THIS INSTANT CASE, ALL PARTIES EQUATED MARTIN TO MLF, DEFINING A SINGLE “IDENTIFY OF INTEREST”, BUT JUDGE BELGARD DENIED ADDING MARTIN AS A CO-DEFENDANT ALONGSIDE THE FIRM HE FOUNDED, OWNED, AND OPERATED (Raised below: Pa439; Pa448; 1T; 2T)

In various papers filed with the court as well as informal written communications, all parties – Loury; Martin; Slimm; Zacharias; Tenaglia & Hunt (“TH”); counsel – equated Joseph A. Martin Esq., an individual legal practitioner, to Martin Law Firm, LLC, a single member law firm and Plaintiff/Counterclaim Defendant (see Facts #20, herein). This direct, one-and-the-same association had been expressed by the parties from the Counterclaim to discovery to pre-trial motions. **Simply, Martin equals MLF.**

For liability clarity and to formally claim equitable estoppel and laches¹⁸, Loury filed a cross-motion to add Martin as a Counterclaim co-defendant under R. 4:9-1 and R. 4:9-3.

¹⁸ A withheld coverage letter from Travelers (professional liability carrier) disclosed that MLF was covered only for Count 2. Counsel claimed equitable estoppel and laches to extend coverage to Count 1.

In its short opposition brief, MLF's argument centered on Martin being employed by Archer at the time of the *in limine* motion (Count 1), and this supposedly ran the Statute of Limitations ("SoL").

For its SoL argument, MLF got the precedent correct: "It has been held that a legal malpractice action accrues when an attorney's breach of a professional duty proximately causes the plaintiff's damages" Gautam v. DeLuca, 215 N.J. Super. 388, 396 (App. Div. 1987) (Pa580). However, MLF ignored this precedent by arguing that the six-year SoL tolled when Martin executed and billed for the *in limine* motion at Archer (ending with billings as of June 17, 2013 but with no Lorry damages at this time). This supposedly caused the SoL to run as of June 2019 and, as so argued, before the Counterclaim was filed in September 2019 (pa582).

Gautam could not be clearer that damages triggered SoL tolling, which occurred when Lorry suffered new legal costs when this court remanded the second trial in February 2016. Since the Counterclaim was filed in September 2019, these damages were well within the six-year SoL boundary of February 2022.

A. Although SoL Tolling was Well Within Six Years, Judge Belgard Misapplied the Law in Agreeing with MLF that the SoL had Run, and She Entered Her Own Arguments of "Mistaken Identity" and "Extreme Prejudice" as Her Basis for Denying Lorry's Motion

With four motions to be argued the same day, Counsel expected the SoL tolling to be easily addressed as of February 2016 via Lorry's reply paper's citing to the "Discovery Rule" (Pa585-588) and both parties' agreement on the Gautam precedent that tolling began when a plaintiff suffered damages (see above). And,

since MLF only argued the SoL running – and not the application of R. 4:9-1 and R. 4:9-3 or claiming any prejudice should Martin be added – Counsel expected a quick and favorable ruling.

However, Judge Belgard pursued a SoL before February 2016 as she held that tolling would be with “claims relating to when Mr. Martin was at Archer.” (1T 6/21/2023; 13:4-18). Again, and to be precise, this analysis was contrary to our Supreme Court’s ruling in Grunwald that formulated SoL tolling as:

“To summarize our discussion: (1) the discovery rule applies in legal-malpractice actions; (2) the six-year limitations period begins to run when the client suffers damage and discovers, or through reasonable diligence should discover, that that damage is attributable to the attorney's negligent advice;” Grunwald v. Bronkesh, 131 N.J. 483, 499 (N.J. 1993)

Judge Belgard continued her analysis:

“So the argument here in the moving papers is that the relation-back doctrine applies, therefore, tolling the statute of limitations. And in order for the relation-back doctrine to apply, the party seeking the amendment needs to establish that the party against whom the amendment is sought received notice of the institution of the action, that the party will not be prejudiced in maintaining a defense on the merits and also knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment. So when I look at the first part here, I don't think there's any question that Mr. Martin didn't receive notice of this action.” (1T 6/21/2023; 13:19–14:8)

She then ruled:

“So this is not a case where I think Rule 4:9-3 applies, given that it's not a case of mistaken identity. It's quite the opposite. It's a case where *Mr. Loury knew the identity of Mr. Martin, opted not to name him individually [see Facts #20]*, and cannot now be afforded that opportunity *where the statute of limitations has run*. And so for that reason, I'm going to deny the motion to amend.” [Emphasis added](1T 6/21/23 15:24–16:6)

B. Unknown to All Parties During the Oral Argument – Counsel; Slimm; Judge Belgard – Controlling Case Law had been Established via a Ruling that Applied a Single Identity of Interest for Adding a Defendant under R. 4:9-3

After returning from oral argument, counsel researched Judge Belgard’s R. 4:9-3 reasoning of the relation-back doctrine and her claim of prejudice to Martin. Counsel discovered this court’s unpublished opinion, Pantano v. N.Y. Shipping Ass'n. (Pa589) ¹⁹. A core precedent applied was the “identify of interest”; this same application was the basis for filing the reconsideration motion.

C. A Single “Identity of Interest” Analysis Connected Martin to MLF, and Essentially Mandated that He Be Added as a Co-Defendant

The applied precedent in Pantano v. N.Y. Shipping Ass’n that aligns with this instant case cites to Otchy v. City of Elizabeth Bd. of Educ.:

"Relation-back [re: R. 4:9-3] depends upon whether the newly added party has demonstrated a sufficient identity of interest to justify treating it and the originally named party as a single legal entity." Otchy, 325 N.J.Super. 98, 105, 108 (App. Div. 1999).

Otchy defines “Identify of Interest” with particularity; the table below compares it to this instant case.

<u>Otchy v. Elizabeth Bd. of Educ,</u> 325 N.J. Super. 98, 106,108-9 (App. Div. 1999)	Instant Case
“A misnomer occurs where the correct party is already before the court, but the name in the	• Martin was “already before the court” as MLF’s sole representative for all pre-trial proceedings: discovery, depositions, mediation,

¹⁹ Pantano v. N.Y. Shipping Ass'n. was appealed to this court and it affirmed the trial court’s denial of Maritime Transport, Inc.’s (“MT”) “summary judgment motion on statute of limitations grounds based on the court’s reliance on Rule 4:9-3.” Pantano v. N.Y. Shipping Ass'n, No. A-3869-19, 42 (App. Div. Jun. 8, 2022). For this unpublished case, as R. 1:36-3 requires, it is provided at Pa589.

<p>complaint is deficient in some respect.”</p>	<p>and settlement conferences for both Counts 1 and 2.</p> <ul style="list-style-type: none"> • From the initial Counterclaim answer through discovery, all parties understood Martin=MLF (Facts, #20).
<p>“Because the mere correction of the name of a party is more ‘formal’ than ‘substantial,’ it does not affect the rights of the added party . . .”</p>	<ul style="list-style-type: none"> • Martin’s “rights” were “not affect[ed]” because he sourced for discovery: MLF’s documents, Archer’s documents, MLF’s admissions and interrogatory answers. • Martin testified for MLF in both the Counterclaim’s deposition sessions.
<p>"[The C]ontext of relation-back rule means parties must be ‘so closely related’ in their business operations and activities that notice of the action against one serves to provide notice of the action to the other.”</p>	<ul style="list-style-type: none"> • Martin retained TH in 2019 to represent MLF for the Complaint and Counterclaim. • Martin personally signed (i.e., not as MLF’s officer/managing member) MLF’s initial interrogatory submissions (Pa513). • Travelers appointed Slimm/Zacharias in July 2020 to represent Martin as MLF’s “insured Person” (Pa476; 478).
<p>“[What] constitute[s] imputed notice to a party subsequently named by amendment [is] ‘substantial structural and corporate identity such as shared organizers, officers, directors and offices.’”</p>	<ul style="list-style-type: none"> • Martin founded MLF as its officer. • Martin named MLF after himself. • Martin was the named insured person for MLF’s professional liability policy when MLF was formed in 2015. (Pa476) • Martin said in his deposition, “I opened my own firm and I rented office space in Cherry Hill.” (Pa615, SUMF ¶24)

Otchy, itself, cited to Mears, and this court expressed a single identify of interest tightly aligned with this instant case.

“We concluded there [in the Mears ruling] that because the business of the partnership and that of the corporation was the same, and was conducted under the same name, at the same location, and by the same principal whose insurance company and lawyer had undertaken a defense in the case, the amendment should have been allowed to relate back. Id. at 229-31. In such instance, we impliedly determined that a sufficient identity of interest had been established so that the partnership would not be prejudiced by having to defend an action which it ‘knew or should have known’ would have been

brought against it but for the error of identification. R. 4:9-3.” Otchy v. Elizabeth Bd. of Educ, 325 N.J. Super. 108 (App. Div. 1999)

Judge Belgard, in her ruling’s Otchy reference, ignored Loury’s reconsideration papers with these essential Otchy citations herein plus his extensive evidence that all parties understood that Martin=MLF (see also Facts #20 herein). Thus, she erroneously denied Loury’s reconsideration motion that:

“the added defendant [Martin] is a new party, which is what we have here . . . [and he did not have] such notice . . . of the action prior to the running of the statute of limitations” (2T 9/8/2023, 26:25–27:6) . . . “the fact is there’s no indication that he knew or should have known of an error of identification.” (2T 9/8/2023, 28:2-3).

D. With a Single “Identity of Interest” Between Martin and MLF, Pantano Concludes that Adding Martin as a Defendant to the Counterclaim Could Not be Prejudicial to Him but Judge Belgard Held to Her Previous Ruling

Judge Belgard asserted that Martin would be “extremely prejudic[ed]” if he were added as a co-defendant (1T 6/21/2024; 15:18). In Pantano, this court ruled contrary to any prejudice:

“As for prejudice in allowing plaintiffs’ claims to proceed, in the context of its discussion of Rule 4:26-4, MT cites the costs of litigation. However, the prejudice anticipated in Rule 4:9-3 is prejudice ‘in maintaining a defense on the merits,’ for example, through lost evidence, or lost witnesses, or lapsed memories due to the passage of time. MT has cited no such prejudice, and the record contains no indication of such prejudice.” Pantano v. N.Y. Shipping Ass’n, No. A-3869-19, 40-41 (App. Div. Jun. 8, 2022) (Pa606)

As noted, MLF “cited no such prejudice” in its papers or at oral argument (i.e., it was Judge Belgard’s assertion only). Furthermore, Martin was deeply involved at every stage of this instant case from hiring MLF’s counsel to discovery (documents,

interrogatories, and admissions) to being the only deposed witness to settlement negotiations to mediation to trial witness.

This court's precedents settle that: 1) Loury filed the Counterclaim well within the SoL; 2) Martin and MLF had a single "identity of interest" structurally, operationally, and legally; 3) with a single "identity of interest", Martin could not be prejudiced if added as a co-defendant alongside his own firm, MLF.

Tied together, this court in Pantano gave unequivocal support that:

"trial court reasonably relaxed strict application of Rule 4:9-3 and permitted the claims against MT to proceed in the interests of justice" and "the circumstances of this case align with the spirit of Rule 4:9-3". Pantano v. N.Y. Shipping Ass'n, No. A-3869-19, 41 (App. Div. Jun. 8, 2022). (Pa606)

What is this spirit? "The rule should be liberally construed" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 499 (2006). And so it should be for Loury; Martin must be added as a co-defendant to the Counterclaim.

CONCLUSION

Each of the claimed judicial errors raised in this appeal were brought to Judge Belgard's attention in the papers for the two reconsideration motions and the motion for summary judgment. Counsel also argued accordingly at each motion's oral argument.

Judge Belgard, across her many rulings, consistently denied Loury the legal principles defined by our precedents and rules.

"The doctrine of stare decisis . . . 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial

process.'"(citations omitted) Luchejko v. the City of Hoboken, 207 N.J. 191, 208 (N.J. 2011)

To R. 2:10-2, Loury asks this court to right the unjust result he has suffered by: 1) restoring Wasserman and Loury as experts, 2) adding Martin as a Counterclaim co-defendant, 3) reversing the denial of Loury's motion for summary judgment, 5) remanding for a new trial for the Complaint and Counterclaim, and 6) fully restoring Loury's right to present his evidence and argument in support of his Counterclaim and in defense against MLF's Complaint.

Respectfully,

OFFIT KURMAN, P.A.

/s/ Scott B. Piekarsky

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Date: September 6, 2024

20006-00151-JLS
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MARTIN LAW FIRM, LLC	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Respondent,	
vs.	DOCKET NO: A-001452-23T2
KIRK LOURY	On appeal from the Superior court of New Jersey, Law Division, Burlington County, Docket No: BUR-L-1528-19
Defendant/Counterclaimant- Appellant,	
vs.	Sat Below: Honorable Aimee R. Belgard, P.J. Cv. Honorable Patricia M. Patricia Richmond, J.S.C.
MARTIN LAW FIRM, LLC	
Counterclaim defendant- Respondent	Date Submitted: December 18, 2024

BRIEF OF DEFENDANT-RESPONDENT MARTIN LAW FIRM, LLC

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PRELIMINARY STATEMENT

This matter arises out of representation of Kirk Loury by two separate law firms, Archer & Greiner (“Archer”) and Martin Law Firm, LLC in connection with two trials and an appeal related to a claim for damages asserted by Loury against his former employer, Concord Equity Group Advisors, LLC, in the matter of Loury v. Concord, in Monmouth County, under MON-L-5870-09. Joseph Martin, then at Archer, tried the case the first time before Judge Perri, and obtained for Loury the exact amount of damages he claimed, plus interest. Following an appeal by Concord under A-3200-13T1, and a remand, Mr. Martin, then with Martin Law Firm, LLC, tried the case a second time, and again obtained for Loury the exact amount of damages awarded by Judge Perri in the first trial, with interest.

When fees were due and owing related to the second trial, and after waiting years of payment after numerous promises of payment, Martin Law Firm, LLC was forced to file a collection action against Loury in the matter of Martin Law Firm, LLC v. Kirk Loury, in the Superior Court of New Jersey, Law Division, Burlington County, under Docket No: BUR-L-1528-19. Rather than pay the fees due and owing, Loury filed an Answer and Counterclaim for legal malpractice against Martin Law Firm, LLC.

During the underlying matter, the trial court, under Docket No: BUR-L-1528-19, entered an Order barring and striking the inadmissible net opinions of Loury's expert Bennett Wasserman, precluding him from testifying at trial, barring the inadmissible opinion of Kirk Loury, and also barring Loury's attempt to file an Amended Complaint on the eve of trial. On November 27, 2023, the trial court entered an Order dismissing the Counterclaim of Kirk Loury with prejudice.

The case proceeded to trial, and the jury awarded Martin Law Firm, LLC the exact amount of fees claimed, together with interest. The Order for Judgment was entered in favor of Martin Law Firm, LLC on December 18, 2023, in the amount of \$83,596.91, together with pre and post judgment interest. Loury's appeal followed.

For the reasons set forth below, the trial court's rulings in (a) barring the inadmissible net opinions and testimony of Mr. Wasserman; (b) barring the inadmissible opinion of Kirk Loury; (c) barring Loury's attempt to file an Amended Complaint on the eve of trial; (d) dismissing the Counterclaim of Kirk Loury with prejudice; and (e) entering an Order for Judgment in the amount of \$83,596.91, with pre and post judgment interest awarded by the jury should be affirmed.

PROCEDURAL HISTORY

This matter arises out of representation of Kirk Loury by Mr. Martin in connection with two trials and an appeal related to a claim for damages asserted by Loury against his former employer, Concord Equity Group Advisors, LLC (“Concord”), in the matter of Loury v. Concord, in Monmouth County, under MON-L-5870-09. (Da1) Mr. Martin was successful during both trials.

When fees were due and owing related to the second trial, Martin Law Firm, LLC filed a collection action against Loury in the matter of Martin Law Firm, LLC v. Kirk Loury, in the Superior Court of New Jersey, Law Division, Burlington County, under Docket No: BUR-L-1528-19. (Pa2). In response, Loury filed an Answer and Counterclaim for legal malpractice against Martin Law Firm, LLC. (Pa54).

After discovery was completed, on April 18, 2023 Martin Law Firm, LLC filed a series of Motions to Bar the expert report of Loury’s liability expert, Bennett Wasserman, (Pa443) and to Bar the self authored damages report by Loury (Pa443). Loury also previously moved to bar the expert reports authored on behalf of Martin. (Pa433).

On May 2, 2023, on the eve of trial, Loury moved to amend his Complaint to add Joseph Martin as a counterclaim co-defendant. (Pa440).

On June 21, 2023, the trial court entered an order denying Loury's Motions to bar Martin Law Firm's expert reports. (Pa443). Also on June 21, 2023, the trial court granted Martin Law Firm's motion to bar Wasserman and Loury's reports, and also barred Wasserman's testimony at trial. (Pa443).

On September 12, 2023, Martin Law Firm filed a Motion *in Limine* to bar Loury's expert reports and all evidence pertaining to Loury's Counterclaim, which was in line with the trial court's previous Order barring Wasserman and Loury's net opinions. The trial court granted Martin Law Firm's Motion *in Limine* on October 12, 2023. (Pa455).

Between November 14-17, 2023, a jury trial commenced in this matter solely on Martin Law Firm's fee claim. On November 17, 2023, the jury rendered a verdict in Martin Law Firm's favor for \$83,596.91, including pre and post judgment interest. (Pa578).

On December 18, 2023, the trial court entered an Order for Judgment for \$83,596.91, with pre and post judgment interest. (Pa458).

This appeal followed. (Pa460).

STATEMENT OF FACTS

Loury v. Concord (MON-L-5870-09)

On November 23, 2009, Kirk Loury, through prior counsel, filed a lawsuit, alleging four counts against his former employer, Concord, in the

matter of Loury v. Concord, in the Superior Court of New Jersey, Law Division, Monmouth County, under Docket No: MON-L-5870-09. (Da1).

While Loury was working for Concord, Loury discovered that his paycheck was incorrect, and he told Concord that it was in breach of the employment agreement. In response, Concord terminated Loury's employment. Loury claimed in the lawsuit that Concord violated his agreement by shorting him about \$3,000.00 in pay over the course of 14 months. (5T:117:11-22).

Concord filed an Answer and Counterclaim against Loury alleging that Mr. Loury voluntarily terminated his employment effective October 5, 2009. (Da11). Concord's allegations also included a violation of computer laws and stealing clients, as well as intellectual property violations. (5T:118:2-12). Also, Concord accused Loury of being disloyal. (5T:118:13-14).

Throughout this representation in the case under Docket No: MON-L-5870-09, before every motion and court appearance, Mr. Martin would discuss costs with Loury. (6T:22:10-18). Mr. Martin always read Loury's emails, and would respond with a call, meeting, or an email. (6T:29:5-19).

Mr. Martin, then with Archer, filed a Motion for Summary Judgment to dismiss Concord's Counterclaim. (Pa1652).

On July 24, 2012, the trial court granted Loury's Motion for Summary Judgment, and dismissed the Counterclaims. (Pa1692). The trial court dismissed Concord's claims for breach of the employment agreement. (Pa1692).

On December 20, 2012, Archer filed a Motion to bar evidence. (Pa1798). Mr. Martin, as Loury's counsel, argued that, in view of the Summary Judgment Order, certain evidence was not admissible. (Pa1798).

On March 22, 2013, the court, in the underlying employment case, barred the evidence, and denied Concord's Cross-Motion to add affirmative defenses. (Pa1873).

The First Trial Before Judge Perri in Loury v. Concord (MON-L-5870-09)

Throughout the first trial, Mr. Martin defined the objective under RPC 1.2 to get Loury the \$375,000.00 that Loury demanded, and the case was litigated through trial.

On March 10, 2014, Judge Perri entered judgment in favor of Loury, and against Concord, in the amount of \$343,572.00, plus pre-judgment interest (that totaled \$35,362.45), for a total judgment of \$378,934.45. (Pa1481).

Concord's Appeal in Loury v. Concord (A-3200-13T1)

Concord filed an appeal following Judge Perri's decision¹. (Pa1876). In deciding this appeal, the Appellate Division found that Concord did breach the employment agreement by secretly withholding a portion of Loury's additional compensation. (Pa1907). However, the Appellate Division gave Concord the opportunity to assert an Affirmative Defense by remanding the case back to Monmouth County for a new trial. (Pa1907). In so doing, the Appellate Division affirmed the substantive finding of Judge Perri, but found that the trial court erred procedurally by not permitting Concord to present its defense that Loury had breached the employment agreement. (Pa1907).

The Second Trial Before Judge Quinn (MON-L-5870-09)

Following remand from the Appellate Division, Loury was given options by Mr. Martin regarding addressing the scope of the new trial. (6T:118:5-10). The Appellate Division affirmed certain parts of Judge Perri's decision, but remanded the matter back to the trial court on one point requiring a whole new trial. (Pa1907).

¹ Martin Law Firm did not represent Loury on the appeal because the Martin Law Firm did not exist at that time. Mr. Martin was at Archer at that time, where Mr. Loury was represented by various legal professionals including Mr. Martin. (6T:32:17-20). The attorneys of Martin Law Firm, LLC were engaged following the appeal. (6T:33:9-21).

The second trial² was conducted by Judge Quinn. (Pa1602).

On cross-examination, Mr. Martin was able to get Concord's witness, Lee Argush, to admit to Loury's damages value, and the case was won at that point. (6T:146:1-4). However, after Loury's case in chief concluded, and after Loury rested, Loury wanted Mr. Martin to put him back on the stand to change his damages testimony³. (6T:143:6-15). Loury made a convoluted argument that he believed permitted him to change the entirety of all of his testimony through almost 7 years. Mr. Martin refused to do that since this would suborn perjury, and would have been violative of the Rules of Professional Conduct. (6T:144:1-6). Mr. Martin was not okay with that. (6T:144:21-23). The case was won, but now Loury wanted to go back, change testimony, and ask for millions of dollars without any meritorious basis. (6T:145:18-21).

On November 16, 2018, Judge Quinn entered his decision in favor of Loury, and entered judgment for the same amount of damages which were

² Mr. Martin, then with Archer, prepared a Brief on the scope of the re-trial. (Pa1505). Mr. Martin argued that the entire case did not have to be re-tried, and argued that only two issues remained to be re-tried – (1) whether the plaintiff materially breached his employment agreement; and (2) whether the alleged breach forgave Concord's material breaches. (Pa1505). However, the court ruled that the entire case had to be retried.

³ Loury's damages were always the same in discovery, through trial No. 1, on appeal and into trial No. 2.

awarded by Judge Perri in the first trial and which Lorry had demanded throughout the litigation. (Pa1602).

The Fee Claim by Martin Law Firm and Mr. Lorry's Counterclaim for Malpractice (BUR-L-1528-19)

When fees were due and owing related to the second trial, and repeated requests for payment failed, Martin Law Firm, LLC filed a collection action against Lorry in the matter of Martin Law Firm, LLC v. Kirk Lorry, in the Superior Court of New Jersey, Law Division, Burlington County, under Docket No: BUR-L-1528-19. (Pa827). Rather than pay the fees due and owing, Lorry filed an Answer and Counterclaim for legal malpractice against Martin Law Firm, LLC.⁴ (Pa833).

After discovery in this case, Kirk Lorry served a liability report authored by Bennett Wasserman. (Pa3538). Mr. Wasserman was deposed, and conceded that the RPCs prohibit an attorney from bringing or trying to bring in frivolous claims. (Pa3617). Mr. Wasserman gave the incredible opinion that Argush, who was found by Judge Perri and Judge Quinn to lack credibility, opened the door to a new calculation that would have netted Lorry a higher award of damages. (Pa3619).

⁴ Archer was not named as a defendant in this matter. Mr. Martin was not named as an individual defendant in this matter.

Wasserman testified that Loury, if he was put back on in rebuttal, would not be changing testimony, but “he would be clarifying.” (Pa3620-Pa3622). Wasserman had to admit that if Loury did that, he would be subject to cross-examination.

Wasserman admitted that Mr. Martin cross-examined Argush during the second trial to establish that Loury’s calculations were correct, regarding what the parties termed the “CEGA revenue valuations”. (Pa3622). Wasserman had to concede that Judge Quinn rejected Argush’s theory, and accepted the theory of Loury in his decision. (Pa3631). Significantly, Wasserman also testified that his report was not intended to calculate damages. (Pa3633). Mr. Wasserman testified that he was not offered as a calculation of damages expert. He merely restated in his report the category of damages, if Loury could make out the proofs. (Pa3633). Also, Wasserman agreed that, in a legal malpractice case, the plaintiff must show actual damages, as opposed to speculative damages. (Pa3634).

In his deposition, Bennett Wasserman testified:

Q. So why would he testify in response and open himself up to more cross-examination, in your opinion, when he already had solid testimony at his deposition and in the first trial and in the case-in-chief in the second trial. Why would you ever do that.

A. Because there was an opportunity based on Mr. Argush’s testimony to enhance the damage award.

Q. How would that have changed the damage award, unless, he change his theory of damages that he set forth in his deposition in the first trial and in the case-in-chief on the second trial.

A. By simply following through and continuing the line of reasoning that Mr. Argush provided and then you have two different theories for the court to choose from.

(Pa3631).

Then, Wasserman was asked:

Q. But Mr. Wasserman, Judge Quinn did reject the theory of Argush and accepted the theory of Loury in his decision?

A. Okay.

(Pa3632).

Loury also issued a self authored damages expert report. In his damages report, Mr. Loury states that costs were incurred for the *in Limine* Motion, and that fees were paid to Archer for the Motion *in Limine*. (Pa2606) Also, on p. 12, of his report, Loury stated that he was asserting a claim of damages for “lost commercial opportunities.” (Pa2606).

Order Barring Loury’s Experts in Martin Law Firm, LLC v. Loury (BUR-L-1528-19)

On April 18, 2023, Martin Law Firm, LLC filed its Cross-Motion to strike the expert report and opinions of Bennett J. Wasserman, Esq., and to strike and preclude Bennett J. Wasserman from testifying at the time of trial,

and to strike and preclude and bar the damage opinions and report of Loury. (Pa443).

On June 21, 2023, the trial court entered an Order striking the report and opinions of Loury's expert, Bennett Wasserman, and barring Wasserman from testifying as an expert at trial. (Pa443). Also, the trial court barred the opinions of Loury, and barred Loury from testifying as an expert at the trial. (Pa443).

Also on June 21, 2023, Judge Belgard entered an Order denying defendant Loury's Motion to Amend the Counterclaim. (Pa440).

On September 11, 2023, the trial court entered an Order denying defendant-counterclaimant's Motion for Reconsideration. (Pa446).

Judge Belgard ruled that Loury could not establish that the testimony he claimed should have been presented on rebuttal would have bolstered or changed the decision of Judge Quinn. (8T:128:19-25). In addition, Judge Belgard found that there was nothing to establish that this rebuttal testimony would have changed the underlying decision of Judge Quinn, because Judge Quinn had already rejected the theory of Argush/Concord, and accepted the theory of Loury. (8T:129:1-4). Judge Belgard found that the expert reports of Loury did not establish that any damages claimed stemmed from the proposed testimony. (8T:129:5-9). Therefore, Judge Belgard denied Loury's Motion for Reconsideration. (8T:129:11-17).

Order Granting Martin Law Firm LLC's Motion *In Limine* to Bar Evidence of Legal Malpractice (BUR-L-1528-19)

On October 11, 2023, the trial court entered an Order granting Martin Law Firm, LLC's Motion *in Limine*. The trial court also ruled that defendant-counterclaimant Kirk Loury was barred from presenting any evidence of claims of legal malpractice at trial. (Pa455). The Order also provided that the trial was adjourned to November 13, 2023. (Pa455).

Order of October 12, 2023 Denying Defendant-Counterclaimant Loury's Motion For Summary Judgment (BUR-L-1528-19)

On October 12, 2023, Judge Belgard entered an Order denying defendant-counterclaimant Loury's Motion for Summary Judgment. (Pa452).

Order Denying Defendant-Counterclaimant Loury's Motion to Amend the Counterclaim (BUR-L-1528-19)

Judge Belgard denied Loury's Motion to Amend to add direct claims against Joseph Martin, finding that this was not a case of mistaken identity or error in identification. (2T:27:11-13). The court found that, in the collection case, Loury filed an Answer, but did not name Joseph Martin individually in the Counterclaim, nor did he seek to amend the Counterclaim to name Mr. Martin individually throughout the entirety of the litigation. (2T:27:16-20).

Trial in the Matter of Martin Law Firm, LLC v. Kirk Loury (BUR-L-1528-19)

The trial came before the Honorable M. Patricia Richmond, J.S.C. for a jury trial from November 13 through 17, 2023. On November 16, 2023, Martin

Law Firm, LLC moved to dismiss the Counterclaim. (8T:124:24-25; 125:1-25).

Martin Law Firm, LLC moved to dismiss the Counterclaim at trial because it was not supported by competent admissible expert testimony. (8T:129:24-25).

Martin Law Firm, LLC argued that the Counterclaim failed because Loury never established a deviation from the standard of care in connection with his allegations in the Counterclaim. (8T:130:1-6).

The trial court found that there was no expert testimony presented at the trial. The trial court found that Judge Belgard had barred the expert Wasserman from testifying, and had barred Loury from presenting any evidence in that regard. (8T:131:5-16). Therefore, the trial court granted Martin Law Firm, LLC's Motion to Dismiss the Counterclaim, with prejudice. (8T:131:17-21).

The only claim that went to the jury was Martin Law Firm's fee claim. The jury rendered a verdict in favor of Martin Law Firm for \$83,596.91, together with pre-judgment interest and post-judgment interest. (Pa578).

Following the jury verdict, an Order for Judgment was entered by Judge Richmond in favor of Martin Law Firm, LLC on December 18, 2023, in the amount of \$83,596.91, together with pre-judgment interest and post-judgment interest. (Pa458).

Loury's appeal was filed on January 16, 2024. (Pa460).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE REPORT AND OPINION OF LOURY’S EXPERT, BENNETT WASSERMAN, WAS AN INADMISSIBLE NET OPINION (Pa443; Pa446; 1T; 2T)

This Court should affirm the June 21, 2023 trial court Order barring the expert report of Bennett Wasserman as an impermissible net opinion. (Pa443).

Defendant-counterclaimant’s expert, Bennett Wasserman, authored an expert report of June 10, 2022. (Pa517). In his report, Wasserman opined that Mr. Martin failed to effectively cross-examine Lee Argush, and that violated the duty of competent representation. (Pa517). Also, Wasserman argued that a lawyer shall abide by a client’s decision concerning the scope and objectives of representation. (Pa517). According to Wasserman, Loury’s objective was to get adequate compensation by following up on Argush’s testimony with placing Mr. Loury back on the stand on rebuttal to seek more money.

Wasserman opined that Martin refused to do that, and thus deviated from the standard of care. (Pa517).

According to Wasserman, it is not a litigation choice for an attorney to “ignore” a clear opportunity and client directive to enhance damages once “Argush made an admission on the witness stand.” (Pa517). However, Wasserman did not state, within a reasonable degree of probability, what the enhanced damage claim would have amounted to, or that the rebuttal would

have changed Judge Quinn's decision. Wasserman failed to address that in either causation or damages in his report.

Wasserman argued that another measure of damages would be excessive expenses from an error in a pretrial procedure on a Motion *in Limine*. (Pa517). However, neither Mr. Martin nor Archer were named as a defendant. It was not Martin Law Firm, LLC, the party here, that billed Loury for the Motion *in Limine* which was filed in the underlying Monmouth County action under MON-L-5870-09.

With respect to the lost opportunity claim, this was a speculative claim made by Wasserman in connection with an opportunity to sell intellectual property. (Pa520). Wasserman did not opine regarding what such damages were, the quantum of the damages, or how prolonging the time in which to release or convey intellectual property was clouded by the pending litigation. Wasserman admitted that he did not review the deposition of Jenny Villier, general counsel for FolioDynamix. Wasserman did not know what WealthCounsel said about Loury, and why they decided not to do business with him. He did not know whether FolioDynamix ever intended to do business with Loury. Wasserman simply stated that this was a category of damages one could be entitled to.

Loury needed a legal malpractice expert to establish the value of the alleged lost claim. See, Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103-04 (App. Div. 2001); Kelly v. Berlin, 300 N.J. Super. 256 (App. Div. 1997); Morris Properties v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023). Wasserman testified that he was not retained to opine on damages. (Pa520). Wasserman did not opine regarding what the specific amount of lost opportunity damages were. He left that to someone else to do. (Pa517).

Kirk Loury issued his own damages expert report in this matter of December 16, 2022. (Pa2606). Loury stated in his expert report that costs were incurred for the *in Limine* Motion in the underlying Monmouth County action. Loury complained that legal fees were paid to Archer for the Motion *in Limine*. Loury also argued that he was asserting a claim of damages for “lost commercial opportunities.” In his report, Loury asserted damages for “WealthCounsel lost revenue.” However those claims for “lost opportunity” in connection with FolioDynamix and WealthCounsel were, according to Loury’s own expert, Bennett Wasserman, related to and arose out of the *in Limine* Motions that were filed by Mr. Martin at Archer, in the underlying Monmouth County action. (Pa2606).

Loury testified at his deposition, on February 8, 2023, that even though he (a) answered Interrogatories regarding his specific damages and his

calculation of them⁵; (b) testified in depositions in the underlying case regarding his specific damages and his calculation of them; (c) testified before Judge Perri in the first trial regarding his specific damages and his calculation of them; and (d) testified before Judge Quinn in the second trial regarding his specific damages and his calculation of them, he still wanted to get up and testify on rebuttal, based upon what Argush said, to change his damages assessment. (Pa3828).

Wasserman recognized that Judge Perri ruled that Loury was entitled, under the agreement, to receive 10% of the amount collected by Concord on the QAUM accounts, and that Concord breached the contract when it attempted to reduce that amount by deducting expenses from Loury's 10% commission. Judge Perri found that Loury was entitled to judgment in the amount of \$343,572.00 pursuant to the terms of the agreement, which is the amount that Loury had demanded at trial.

Judge Perri entered the Final Order for Judgment in favor of Loury, and against Concord, in the principal amount of \$343,572.00, plus pre-judgment interest of \$35,362.45, for a total judgment of \$378,934.45. (Pa1482).

Wasserman recognized that, in its decision, the Appellate Division noted that

⁵ Loury testified that the correct calculation of any lost revenue would be CEGA fee times 10%. (Pa3828).

Judge Perri found that the CEO's explanation at trial, in which he attempted to backtrack, lacked credibility both to its content, and his demeanor on the witness stand. (Pa517).

The Appellate Division found that Judge Perri's analysis and conclusions were based on sufficient credible evidence in the record. The Appellate Division deferred to Judge Perri's findings, which were influenced by her opportunity to assess witness testimony firsthand. Wasserman recognized that as well. (Pa1908). The Appellate Division reached the same conclusion as to Concord's contention that Judge Perri did, in finding that Loury was entitled to 10% of gross revenue from the QAUM accounts, as opposed to net revenue. The Appellate Division noted that Judge Perri found that, under the agreement, Loury was entitled to 10% of the gross revenue from the QAUM accounts, as opposed to net revenue, as Loury specifically demanded. (Pa1908).

The Appellate Division held, and Mr. Wasserman recognized, that Judge Perri's factual findings were supported by "... substantial credible evidence on the record and are entitled to our deference." (Pa1908).

Also, Wasserman was aware that, before the re-trial, Mr. Martin filed a pretrial Brief, in which he argued that Loury was entitled to severance pay, which Judge Perri awarded to him at the first trial. (Pa517). Severance pay was

due under section 3(b) of the employment agreement. The Brief also noted that Concord agreed to pay Loury additional compensation on the number of clients Loury helped generate for Concord. Specifically, section 3(b)(i) of the agreement provided that Concord was required to pay Loury with respect to any revenue received in any calendar year in connection with the QAUM account (A), 10% of such revenue. (Pa517).

Mr. Wasserman was also aware that Mr. Martin would send Loury Briefs and memos before Martin actually filed them⁶. Wasserman understood that Loury did receive Mr. Martin's pretrial Brief before the second trial.

Wasserman was aware that Judge Quinn found at the second trial that Loury was entitled to damages not in contest as "previously been determined to be the appropriate amount in controversy as identified in the prior court decision and appellate remand, thus the court rules plaintiff Loury is entitled to retain the damages previously paid by defendant Concord." (Pa517).

In his summary of findings attached to the November 16, 2018 Order, Judge Quinn stated that the agreement required Concord to pay Loury a base salary of \$200,000 annually, plus additional compensation. (Pa1603). Judge Quinn ruled that, as set forth in section 3(b)(ii), compensation was "ten percent

⁶ In these Briefs, Loury reiterated his claim for damages, which he received after both trials.

... of such revenue ...” Judge Quinn found that Loury established his damage remedy under the contract. Judge Quinn found that, as to the QAUM accounts, Loury should be paid 10% of such revenue. That meant gross revenue, not revenue minus expenses. (Pa1603).

Wasserman recognized that two judges found that Argush gave testimony which was not credible, and that, in the second trial, Judge Quinn also found that the evidence which Concord was trying to get in was not credible in connection with Concord’s claim that Loury was deleting vital or substantial information from the computer. (Pa517).

At his deposition, Wasserman was asked whether he agreed with Charter Oak v. State Farm, 344 N.J. Super. 408 (App. Div. 2001), which provides that attorneys cannot raise frivolous, meritless, or inappropriate claims for their clients. Wasserman agreed that the Rules of Professional Conduct and the Rules of Court do not permit an attorney to assert frivolous claims. (Pa3580). Wasserman understood that Mr. Martin would not put Loury back on the stand because that would be suborning perjury if Loury changed the testimony he previously gave. (Pa3580). Wasserman argued that Argush “opened the door” in terms of “new calculations that would have netted Loury a higher award of damages”, and that “there is no reason why Mr. Loury should not have clarified the evidence.” (Pa3580). Wasserman agreed that Loury had testified

in depositions in the underlying case as to what his damages were under his own calculations.

Loury testified, on August 11, 2011 that, under the contract, he would receive 10% of the CEGA fee. According to Wasserman, it would be okay to put Loury back on the stand, not to change his testimony, but to “be clarifying”. (Pa2352). Of course, if Mr. Martin had put Loury back on the stand, he would have been subject to cross-examination. Mr. Martin cross-examined Argush, and Argush admitted that Loury’s calculations were correct regarding the CEGA revenue valuations. Yet, Wasserman argued that Argush’s testimony gave additional evidence that needed rebuttal, and which Loury could use to change his damages theory and prior testimony.

When asked to give a yes or no answer, Wasserman stated that he could not do it. Wasserman made the argument that attorneys have a duty to rebut evidence that might be harmful, or to elaborate that evidence that might be helpful, notwithstanding the fact that two Judges found that Argush was not credible, and that it was the Loury theory of damages which was appropriate under the contract, notwithstanding the fact that Argush agreed with the major premise put to him by Mr. Martin on cross-examination. On cross, Argush did admit that Loury’s calculations were correct regarding the CEGA revenue valuations.

In his report, Wasserman did not quote or refer to Mr. Martin’s cross-examination of Argush in the second trial. (Pa3238). Wasserman, notwithstanding the findings of Judge Perri, the Appellate Division, and Judge Quinn, stated there was an opportunity based on the Argush testimony, “... to enhance the damage award.” (Pa517). However, Wasserman had to agree that Judge Quinn rejected the theory of Argush, and accepted the theory of Loury in his decision. (Pa517). Wasserman testified that he was not a damages expert, and simply gave the categories of damages. However, Wasserman agreed that, in New Jersey, the plaintiff must show actual damages, and not speculative damages. (Pa517).

Also, with respect to Loury’s *pro se* opinion, since Loury was a new business in connection with FolioDynamix and WealthCounsel, and since his claims associated with the same did not meet the reasonable certainty standard established by the Supreme Court in their opinion in Schwartz v. Menas, 251 N.J. 556 (2022), the opinions were barred. Loury complained about two new business opportunities, one with FolioDynamix and one with WealthCounsel. He failed to establish, through competent expert testimony, that the claims of lost opportunity/future profits met the standard of reasonable certainty. In Schwartz, the New Jersey Supreme Court held:

In its role as a gatekeeper, trial courts are carefully scrutinized in a new business claim that, but for the

conduct of the defendant, it would have gained a substantial profit in a venture in which it had no experience.

Of course, “[a]nticipated profits that are remote, uncertain or speculative ... are not recoverable.” Passaic Valley Storage Comm’rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 609-10 (2011). Here, Loury, through his expert, was unable to establish that these anticipated profits/lost opportunities were anything other than remote, uncertain, or speculative. Also, no evidence or testimony from FolioDynamix or WealthCounsel was presented by Loury in connection with these Motions. Evidence of past performance was not present with respect to Loury’s claims of lost opportunity with FolioDynamix and WealthCounsel. Loury failed to produce competent expert testimony to establish said claims. Cf., Restatement (Second) of Contracts §352 (“[d]amages are not recoverable for a loss beyond an amount the evidence permits to be established with reasonable certainty”). Ibid.

Accordingly, since Loury was a new business in connection with FolioDynamix and WealthCounsel, and since the claims associated with the same did not meet the certainty standard, the claims were barred.

To establish a *prima facie* case of legal malpractice, plaintiffs must demonstrate: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney to the plaintiff; (2) the breach of that duty by

the attorney; and (3) such breach was a proximate cause of the damages sustained by the plaintiff. Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023).

With respect to the proximate cause element, "[t]he client bears the burden of proving by a preponderance of competent, credible evidence that injuries were suffered as a proximate consequence of the attorney's breach of duty." Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996) (citing, Lieberman v. Employer's Ins. of Wassau, 84 N.J. 325, 342 (1980)). An attorney who breaches his or her duty of care to a client is liable only for losses caused by such a breach. 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 487 (App. Div. 1994); Lamb v. Barbour, 188 N.J. Super. 6, 12 (App. Div. 1982). "To establish the requisite causal connection between the defendant's negligence and plaintiff's harm, plaintiff must present evidence to support a finding that defendant's negligent conduct was a 'substantial factor' in bringing about plaintiff's injury, even though there may be other concurrent causes of the harm." Froom v. Perel, 377 N.J. Super. 298, 313 (App. Div. 2005) (quoting, Conklin, 145 N.J. at 419). "The burden of providing a causal relationship rests with the client, and cannot be 'satisfied by mere conjecture, surmise or suspicion.'" Sommers, 287 N.J. Super. at 10.

“Without expert testimony, a jury simply does not have the knowledge, training, or experience to decide the settlement value of plaintiff’s claim.” In addition, “Damage awards may not be based on mere speculation.” Kelly, citing American Sanitary Sales Co. v. State, 178 N.J. Super. 429, 436 (App. Div.), (“We emphasize that we do not expect nor ask the trial Judge to engage in mere speculation [in assessing damages.]”), certif. denied, 87 N.J. 420 (1981); Lewis v. Read, 80 N.J. Super. 148, 174 (App. Div. 1963)(“The law abhors damages based on mere speculation”). Mere speculation will not bar Summary Judgment. Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005); Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009). See also, Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023).

Only a competent admissible expert opinion can show that the client would have succeeded in obtaining a better result at trial. See, Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003). To establish proximate causation in a legal malpractice action, a plaintiff must “demonstrate that he or she would have prevailed, or would have won materially more ... but for the alleged substandard performance.” See, Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003). In this case, Loury did not present admissible expert testimony to demonstrate that, during the second trial before Judge Quinn, he

would have been awarded a higher verdict than he obtained before Judge Perri, based upon some speculative rebuttal and change of his damages theory and testimony during the second trial.

Loury could not establish the elements of his claim because he lacked competent expert testimony. The analysis is framed by N.J.R.E. 702 and N.J.R.E. 703. Expert testimony is required for legal malpractice cases where the matters are esoteric, and where an average juror cannot form a valid judgment as to whether the conduct of the professional was reasonable. See, Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996). Plaintiff must prove the elements through competent expert testimony. See, Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div. 2006). Here, plaintiff cannot establish the elements of his claim because he lacks competent expert opinion. See, e.g., Townsend v. Pierre, 221 N.J. at 53.

Accordingly, the Trial Court's Order striking plaintiff's expert report, and dismissing the Complaint with prejudice should be affirmed.

II. THE TRIAL COURT'S ORDER DENYING DEFENDANT-COUNTERCLAIMANT KIRK LOURY'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED (Pa452; 3T)

It has been held that "A legal malpractice claim is 'grounded in the tort of negligence,'" Gilbert v. Stewart, 247 N.J. 421, 442 (2021) (quoting, Nieves v. Off. of the Pub. Def., 241 N.J. 567, 579 (2020), and requires that a plaintiff

present competent evidence establishing: “(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.” Morris Properties, Inc. v. Wheeler, et al., 476 N.J. Super. 448, 459 (App. Div. 2023) (quoting, Jerista v. Murray, 185 N.J. 175, 190-91 (2005)).

Ordinarily, expert testimony is required in legal malpractice case “unless the attorney’s ‘duty is so basic that it may be determined by the court as a matter of law[.]’” Kranz v. Tiger, 390 N.J. Super. 135, 147 (App. Div. 2007) (quoting Brizak v. Needle, 239 N.J. Super. 415, 429 (App. Div. 1990)). Where “‘the duties a lawyer owes to his client are not known by the average juror,’ the expert testimony must necessarily set forth that duty and explain the breach.” Buchanan v. Leonard, 428 N.J. Super. 277, 288 (App. Div. 2012) (quoting, Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78 (App. Div. 2007)).

In this case, a jury would not be competent to supply the standard by which to measure the attorney’s conduct. It was necessary for Loury to present expert testimony/opinion establishing the standard of care, and the deviation from that standard. See, Kranz, 390 N.J. Super. at 147; see also, Davis v.

Brickman Landscaping, Ltd., 219 N.J. 395, 407-08 (2014) (quoting, Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961)).

Loury’s malpractice claim was dependent upon expert testimony establishing the standard of care, and in the concomitant duty he alleged was breached during the representation of Loury in the underlying litigation in Monmouth County.

“The Net Opinion Rule is a ‘corollary of [N.J.R.E. 703] ... which forbids the admission into evidence of an expert’s conclusions that are not supported by factual evidence or other data.’” Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)(quoting, Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). The Net Opinion Rule “require[es] that the expert ‘give the why and wherefore’ that supports the opinion, rather than a mere conclusion.” Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014)(quoting, Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011)). The rule prohibits a court from “rely[ing] on expert testimony that lacks an appropriate factual foundation, and fails to establish the existence of any standard about which the expert testified.” Pomerantz Paper Corp., 207 N.J. at 373.

“[O]pinion testimony ‘must relate to generally accepted ... standards, not merely standards personal to the witness.’” Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). Put another way, expert testimony must be

based upon the consensus of the involved profession's recognition of the standard defined by the expert. Ibid. There must be some evidential support offered by the expert to establish the existence of the standard. Buckelew v. Grossbard, 87 N.J. 512, 528-29 (1981).

“[I]f an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is personal, it fails because it is a mere net opinion.” Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 375 (2011). A trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record. See, Townsend v. Pierre, 221 N.J. 36, 55 (2015); see also, Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 330 (App. Div. 2017).

In Taylor v. DeLosso, the court held that a plaintiff in a professional negligence case “must produce expert testimony upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert.” 319 N.J. Super. 174, 180 (App. Div. 1999). An expert in a professional negligence case may not “simply ... file slavishly and ‘accept the practice’ formula” to establish the standard of care. Ibid. Rather, the expert must provide “evidential support ... establishing the existence of the standard.” Ibid. Also, “[a] standard which is personal to the expert is equivalent to a net opinion.” Ibid; see also, Kaplan v. Skoloff &

Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001) (finding an expert offered an inadmissible net opinion where the “expert offered no evidential support establishing the existence of a standard of care, other than standards that were apparently personal to himself”).

Accordingly, there is no basis to find that the trial court abused its discretion in determining that the expert’s opinions and reports were comprised of a series of inadmissible net opinions. Loury’s expert, Wasserman, was unable to establish a standard of care which provided the benchmark for his opinions. Cf., Kaplan, 339 N.J. Super. at 103. In Kaplan, the court explained that the expert’s failure to offer “evidential support establishing the existence of a standard of care, other than standards that were apparently personal to himself” rendered his opinions inadmissible net opinions. Ibid.

Wasserman failed to provide any evidence to establish any of the purported standards to which he vaguely referred. Accordingly, the court should find that the trial court did not abuse its discretion by finding that Loury’s expert offered inadmissible net opinions insufficient to withstand the Motion to bar, and also insufficient to defeat Martin Law Firm’s Summary Judgment Motion.

Accordingly, since Loury lacked competent evidence to show that Martin Law Firm had breached an established standard of care owed to Loury during Mr. Martin Law Firm, LLC's representation, Loury could not sustain his burden of proving the negligence claims. See, Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 244 (App. Div. 2013) (explaining an inadmissible net opinion is "insufficient to satisfy a plaintiff's burden" in proving a cause of action in response to a Summary Judgment Motion).

Therefore, this court should affirm the trial court's Orders denying Loury's Motion for Summary Judgment.

Wasserman admitted in his deposition that actual damages must be real and substantial, as opposed to speculative. See, Cortez v. Gindhart, 435 N.J. Super. 589 (App. Div. 2014). Damages must be supported by more than "conjecture, surmise or suspicion." 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478 (App. Div. 1994).

In his deposition of January 4, 2023, Mr. Wasserman, at p. 52, stated:

Q. But Mr. Wasserman, Judge Quinn did reject the theory of Argush and accepted the theory of Loury in his decision?

A. Okay.

(Pa3579).

Accordingly, that is not only the beginning of the analysis, but, as noted by Judge Belgard, it is the end. There is no room for Loury to argue otherwise in this case. Judge Quinn heard the testimony of Loury on his case-in-chief, and then heard the testimony of Argush, including the cross-examination of Argush.

Defendant Counterclaimant Loury needed a legal malpractice expert to establish (a) the standard of care; (b) deviation of the standard of care; (c) proximate cause; (d) damages, i.e. the value of the lost claim. See, Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103-04 (App. Div. 2001) (finding in a legal malpractice action based on an insufficient settlement theory, an expert's testimony is required to establish the value of the claim); Kelly v. Berlin, 300 N.J. Super. 256, 269 (App. Div. 1997) (finding expert testimony is necessary to enable the jury to determine whether the alleged malpractice "caused plaintiff to settle for a lower amount than he otherwise would have and, if so, the amount of damages plaintiff sustained as a result"). See also, Morris Properties, Inc. v. Jonathan Wheeler, et al., 476 N.J. Super. 448 (App. Div. 2023).

However, what Wasserman did not do, was to state, within a reasonable degree of probability what that enhanced damage claim would have amounted to, or that this testimony by Loury on rebuttal would have made a difference.

Wasserman did not opine on what the number would have been under the circumstances in the Monmouth County venue. So, Wasserman could not attribute any damages referring or related to the *in Limine* Motion to Martin Law Firm, LLC.

Also, with respect to the lost opportunity claim, that was a speculative claim in any event. (Pa517). Wasserman did not state what the damages were, the quantum of those damages, or how prolonging the time in which to lease or convey intellectual property was clouded by pending litigation. (Pa517).

Mr. Wasserman testified that he was not retained to opine on or calculate damages. (Pa3579). He did not even know, based on a review of documents, whether FolioDynamix ever intended to do business with Loury. Wasserman testified that he was not offered as a damages expert, and merely stated that it was a category of damages one could be entitled to if one could make out the proofs.

Loury needed a legal malpractice expert to testify on the value of the lost claim. See, Kaplan, supra. (finding in a legal malpractice action based on an insufficient settlement theory, an expert's testimony is required to establish the value of the claim); see also, Kelly v. Berlin, 300 N.J. Super. 256, 269 (App. Div. 1997) (finding expert testimony is necessary to enable the jury to determine whether the alleged malpractice "caused plaintiff to settle for a

lower amount than he otherwise would have and, if so, the amount of damages plaintiff sustained as a result”).

In this case, as in Morris Properties, Loury’s expert did not properly opine on proximate cause or damages. He admitted he was not retained to opine on damages. In Morris Properties, the plaintiffs’ expert did not opine on what the purported damages were. Of course, merely repeating someone’s estimate is not sufficient.

Wasserman never opined on what the specific amount of lost opportunity damages were. He simply left that to someone else to do. Of course, that was not sufficient, and Wasserman’s opinion was correctly stricken on that issue.

Kirk Loury issued his own damages report, complaining that costs were incurred for the *in Limine* Motion, and legal fees were paid to Archer for the Motion *in Limine*. (Pa2606). He asserted a claim for lost commercial opportunities. (Pa2606). He also asserted a claim for lost revenue from FolioDynamix. (Pa2606).

Also, Loury asserted a claim for damages for “WealthCounsel lost revenue.” However, the claims for lost opportunity were in connection with FolioDynamix and WealthCounsel. According to Wasserman, the rose out of the *in Limine* Motions which were filed by Mr. Martin when he was at Archer.

So, those claims were out of this case since Mr. Martin was not a defendant on the Counterclaim, and Archer was not a defendant on the Counterclaim.

As noted by the trial court at the time of the argument on the Motion to strike and bar, the court stated:

So just on this -- doesn't Wasserman need to take that next step and say something along the lines of, you know, looking at the record, here's what Mr. Loury would have said and, you know, maybe even using Mr. Loury's figures, he could then say, and had he said this, this is what he was deprived of and actually put in there what that deprivation was? Right now, we don't have anything linking the two, right?

(1T:51:1-10).

Then, Judge Belgard stated:

... the question is, how do we then make the jump to the damages that Mr. Loury alleges? There's nothing in the record in either of these -- from either of these experts, no opinion from either of these experts to establish that this clarifying testimony would have resulted in damages A, B, and C.

(1T:60:10-15).

Judge Belgard also found:

Here we have a situation where it can't be established through the record evidence that this testimony would have in any way bolstered or changed -- bolstered the decision in favor of Mr. Loury or changed the decision of Judge Quinn because Judge Quinn had already rejected the theory of Argush and accepted the theory of Loury and these expert reports can't establish that

any damages that are set forth by Mr. Loury are related to this bolstered testimony.

(1T:60:22-25; 1T:61:1-5).

Accordingly, Loury's claim that he should have been put back on the stand is out of this case because Judge Quinn rejected Argush's theory, and accepted the theory of Loury on direct, the same as Judge Perri found in her decision.

Whether the case was presented as a case-within-a-case, or a suit within a suit, or simply based upon expert testimony, the proofs failed, and the court properly struck the expert reports, and barred the testimony at trial. A plaintiff must "show what injuries were suffered as a proximate consequence of the attorney's breach of duty," ordinarily measured by "the amount that a client would have received but for the attorney's negligence." 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 488 (App. Div. 1994). The burden is on the plaintiff to establish proximate causation and damages "by a preponderance of the competent, credible evidence and is not satisfied by mere 'conjecture, surmise or suspicion.'" Finco, 272 N.J. Super. at 488 (quoting, Long v. Landy, 35 N.J. 44, 54 (1961)).

"Actual damages ... are real and substantial as opposed to speculative." Cortez v. Gindhart, 435 N.J. Super. 589 (App. Div. 2014) (quoting, Grunwald v. Bronkesh, 131 N.J. 483, 495 (1993)). Damages must be supported by more

than “conjecture, surmise or suspicion.” 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478 (App. Div. 1994) (quoting, Long v. Landy, 35 N.J. 44, 54 (1961)). The measure of damages is what result the client would have obtained in the absence of attorney negligence. Cortez, 435 N.J. Super. at 604. “... the client must demonstrate that he or she would have prevailed, or would have won materially more ... but for the alleged substandard performance.” Cortez, (quoting, Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003)).

As noted in the transcript of June 21, 2023, the trial court stated:

So on a whole, give that the opinions here are either barred because they related to entities that are not parties to this case or otherwise do not contain the sufficient causal connection, quite frankly that are needed in this case, I do find it appropriate to grant the motion to bar the experts of Wasserman and Loury.

(1T:61-62).

Also, the trial court stated at the time of the argument:

I think it would be inappropriate for any theory relating to the Motion *in Limine* to be argued in this case given that the Motion *in Limine* was filed and addressed before the Martin Law Firm even came into existence and so its appropriate to bar any claims and opinions with regard to the Motion *in Limine*.

(1T:61).

Also, the trial court stated at the time of the motion hearing:

With regard to the theory with regard to the limited motion, the court recognizes that I've already decided that Mr. Martin is not an individual and the complaint where the pleadings cannot be amended here to name Mr. Martin as an individual defendant here at this late stage given the running of the Statute of Limitations.

(1T:61).

Then with respect to the theory of failing to bring Loury back on rebuttal, this trial court stated:

The difficult thing here, though, is we don't have anyone to say exactly how that, how that rebuttal clarification testimony would have in anyway changed the outcome here. And I think the passage that I read from Mr. Wasserman's deposition testimony is particular important here because what he really says in his, I guess his causation argument is that – or his causation opinion is that had Mr. Loury been put back on the stand, it would have provided disservice to the court, to inform the judge after Mr. Argush testified, so that the judge could have either accepted or rejected the testimony between Argush and Mr. Loury.

Then the follow-up question is, but Mr. Wasserman, Judge Quinn did reject the theory of Argush and accepted the theory of Loury and his decision. And the expert's response is ok.

So that really leads to the question of how – if that's the case, how would this testimony have bolstered or added anything? And this expert doesn't say – doesn't provide any information, any why or wherefore in that regard. Instead, his testimony really contradicts his theory.

In addition, even if his testimony could establish that Judge Quinn, perhaps, you know, his decision would have been bolstered by this clarifying rebuttal

testimony, the question is, how do we then make the jump to the damages that Mr. Loury alleges? There is nothing the record in either of these – from either of these experts, no opinion from either of these experts to establish that this clarifying testimony would have resulted in damages A, B & C. Its speculative only. And as recognized even by Mr. Wasserman in his deposition testimony here, he agrees that in a legal malpractice case in New Jersey, you have to show actual damages of a plaintiff and not speculative ones. That’s on pages 54 & 55 of his deposition testimony.

Here we have a situation where it can’t be established through the record evidence that this testimony would have anyway bolstered or changed – bolstered the decision in favor of Mr. Loury or changed the decision of Judge Quinn because Judge Quinn had already rejected the theory of Argush and accepted the theory of Loury and these expert reports can establish that any damages that are set forth by Loury are related to this bolstered testimony.

(1T:59-61).

Accordingly, the trial court properly denied Loury’s Motion for Summary Judgment.

III. THE TRIAL COURT’S ORDER DENYING LOURY’S MOTION TO AMEND THE COUNTERCLAIM SHOULD BE AFFIRMED SINCE ALL CLAIMS AGAINST JOSEPH MARTIN WERE BARRED UNDER THE STATUTE OF LIMITATIONS (Pa440; Pa449; 1T; 2T)

Loury’s Motion to Amend was properly denied since all claims against Mr. Martin as a direct defendant were barred under the Statute of Limitations regarding the *in Limine* Motion practice, which took place in the underlying Monmouth County employment litigation when Mr. Martin works for Archer.

Related to the Motion *in Limine* for which Archer billed appears in the Archer invoices of December 14, 2012, January 16, 2013, February 14, 2013, March 12, 2013, April 12, 2013, May 14, 2013 and June 17, 2013 when the Motion *in Limine* was actually argued on May 14, 2013. (Pa2093). All allegations referring or related to the *in Limine* Motion against Mr. Martin are barred under the 6-year Statute of Limitations and therefore the amendment sought by Loury was futile and was properly denied by the trial court.

At the time of the argument before the trial court on June 21, 2023, with regard to the *in Limine* Motion, Judge Belgard made it clear that the trial court previously decided that Mr. Martin was not named as an individual defendant and the Complaint or the pleadings could not be amended to name Mr. Martin as an individual defendant at this late stage given the running of the Statute of Limitations and the lack of relation back. (1T:61:6-12). Also, this court noted that while Loury was arguing that perhaps Archer could be brought in for indemnification purposes, Archer was not currently a party to the action. (1T:61:13-16). Judge Belgard found it would be inappropriate for any theory relating to the Motion *in Limine* to be argued in this case given that the Motion *in Limine* was filed and addressed before Martin Law Firm LLC even came into existence. Therefore, it was appropriate to bar any claims and opinions with regard to the Motion *in Limine*. (1T:61:13-21). Judge Belgard ruled that

given the opinions were barred because they related to entities that were not parties to this case, or otherwise do not contain a sufficient causal connection, the motion to bar was granted and the experts were barred.

Judge Belgard was concerned that the Statute of Limitations barred these claims in any event. (1T:13:4-6). The Archer firm was retained in 2011⁷. (1T:13:6). The Motion *in Limine*, while Martin was at the Archer firm was in the time frame of December 2012. (1T:13:6-8). The retainer with Martin Law Firm LLC was in February 2016. (1T:13:8-11). This court knew that in connection with claims relating to when Mr. Martin was at Archer, that would be from some time preceding, at the most generous liberal view of it, some time preceding February 2016 when the retainer with Martin Law Firm LLC. (1T:13:12-16). That Statute of Limitations using the February 2016 date would have run as of February 2022. (1T:13:16-18). Also, with respect to the relation back doctrine, this court analyzed the theory of Loury and found that in order for the relation back doctrine to apply, the party seeking the amendment needs to establish that the party against who the amendment is sought had to receive notice and the party would not be prejudice in maintaining a defense on the

⁷ As indicated above, while being represented by both Archer and Martin Law Firm, LLC, there were numerous legal professionals that provided legal services to Mr. Loury, including Jen Dering, Darth Newman and Joseph Martin.

merits and also should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment. (1T:13:19-25; 14:1-5).

The court had a problem with the fact that this was not a case of mistaken identity. No one could say that Loury did not know that Mr. Martin was involved in his representation. No one could say that Mr. Loury did not know that Martin represented him at Archer. Mr. Loury was a party to the proceedings and was very aware. (1T:14:15-25). As the litigation played out, Loury was very involved and an active member of the litigation. (1T:14:25; 15:1-2). In fact, he was serving as his own expert in this case. (1T:15:1-2). So it was not a case where there was someone who was misidentified on a police report and it was later rectified or a case where a junior was substituted for a senior or a middle name was used instead of a first name. (1T:15:3-7). Those are the scenarios the court typically sees under R. 4:9-3. (1T:15:8-9). So the Martin case was not a case of mistaken identity. (1T:15:9). However, significantly, such an event would have been highly prejudicial at that point where a choice was not made to name Martin individually. To allow Loury to name Martin, and allow it to relate back, after the Statute of Limitations had long run, was prejudicial to Martin, especially since the parties were on the eve of trial, and past the trial date at the time of the motion. (1T:15:20). Discovery

was complete, and it was many years past the Statute of Limitations. (1T:15:20-23). Accordingly, the trial court found that Rule 4:9-3 did not apply since this was not a case of mistaken identity. (1T:15:25-25; 16:1). Rather it was the opposite. It was a case where Loury knew the identity of Mr. Martin, opted not to name him individually, and so could not be afforded an opportunity where the Statute of Limitations had run. (1T:16:1-4). Judge Belgard denied the Motion to Amend. (1T:16:5-6). As a result of that ruling, plaintiff's Motion for Summary Judgment was denied. The 6-year Statute of Limitations of N.J.S.A. 2A:14-1 applies to legal malpractice actions. Olds v. Donnelly, 150 N.J. 424, 440 (1997); Fuschetti v. Bierman, 128 N.J. Super. 290 (Law Div. 1994). In McGrogan v. Till, 167 N.J. 414 (2001), the court held that the limitations period for all legal malpractice actions is a 6-year Statute of Limitations contained in N.J.S.A. 2A:14-1 for actions involving tortious injury to the rights of another. Accordingly, amendments would be futile since any claim against Mr. Martin would be barred under the 6-year Statute of Limitations.

Judge Belgard stated:

Ok. My biggest concern on this is really the Statute of Limitations issue. The Archer firm was retained in 2011. The Motion *in Limine* in question when Mr. Martin was at the Archer firm was in the time frame of December 2012, and then Mr. Loury ultimately

retained Mr. Martin as his own firm, the Martin Law Firm. That retainer was in February of 2016.

So if we are talking about claims relating to when Mr. Martin was at Archer, that would be from some time preceding, at the most generous liberal view of it, some time preceding February 2016 when the retainer with Martin Law was signed. That Statute of Limitations, if we use that February 2016 date, would have run as of February 2022.

(1T:13:14-18).

Then, this court stated:

Discovery is completed. And it's now many many years past the Statute of Limitations. So this is not a case where I think Rule 4:9-3 applies, given that its not a case a mistaken identity. It is quite the opposite. It's a case where Mr. Lorry knew the identity of Mr. Martin, opted not to name him individually, and cannot now be afforded that opportunity where the Statute of Limitations has run.

(1T:15:21-25; 16:1-6).

In his Counterclaim, Lorry stated in ¶8 of p. 12 that he retained Mr. Martin as his counsel under a retainer with Archer on February 10, 2011. In the Counterclaim, it was alleged that the Motion *in Limine* was filed at that time. Also, in the Answer to the Counterclaim filed by Mr. Martin's collection counsel, Ms. Hirst, in response to ¶8, stated that Lorry did originally retain Archer pursuant to a written Retainer Agreement. It was only later that Lorry engaged Martin Law Firm LLC. However, it was clear that Lorry retained Mr.

Martin initially when he was at Archer, and it was during that period of time, at Archer, that the work was done, including the *in Limine* Motion.

Loury's expert, Mr. Wasserman, agreed in his report. The engagement letter with Martin Law Firm wasn't entered into until February of 2016. Loury signed that retainer with Martin Law Firm on February 25, 2016. (Pa1377). The testimony is clear in the depositions that the *in Limine* work in Loury v. Concord was all done while Mr. Martin was at Archer, in 2011, more than ten years prior to his Motion. (Pa1799). Accordingly, the trial court properly denied Loury's Summary Judgment Motion.

Discovery revealed that the *in Limine* Motion in the underlying case, of which Loury complained, the filing of the *in Limine* Motion, and the argument on the *in Limine* Motion in the underlying employment matter, as well as the decision on the *in Limine* Motion, all took place while Mr. Martin was employed at Archer. Loury never named and never even tried to join Archer as a party in the present action, and did not join Mr. Martin individually as a party in the present matter in connection with the work Mr. Martin did on the *in Limine* Motion while at Archer.

Loury argued there was an attorney-client relationship. Clearly there was no attorney-client relationship between Martin Law Firm, LLC and Loury in connection with the *in Limine* Motion in the Monmouth County matter because

all of that work took place while Joseph Martin was at Archer and before Martin Law Firm even existed.

In addition, discovery revealed that Martin Law Firm never billed Loury for the *in Limine* Motion, and the *in Limine* Motion was invoiced by the Archer firm, not by the Martin Law Firm, which is the plaintiff in this case.

In fact, Wasserman, Loury's expert, concluded that "Loury retained Martin's former law firm, Archer & Greiner, to represent him. Later in proceedings, Martin left Archer & Greiner to form his own law firm, the Martin Law Firm, LLC. Loury retained the Martin Law Firm to continue with the litigation." (Pa516). Wasserman recognized in his report that Martin was a partner at Archer, and was the attorney responsible for Loury's case.

Wasserman's report referred to the Archer engagement letter of February 10, 2011. (Pa1369). Wasserman's report stated "... In advance of a trial in December, 2012, Martin prepared and filed a Motion *in Limine* as part of his pretrial exchange. The Motion *in Limine* sought to preclude certain evidence related to Loury's alleged breaches of contract. More specifically, Martin sought an evidentiary ruling which would bar Concord from offering that Loury breached his contract as a defense to Loury's claims." (Pa517).

In his report, Wasserman referred to the Archer billing records of December 2012 through March 2013. (Pa517). Wasserman recognized in his

report that Loury was alleging two theories of professional liability, one of which was the Motion *in Limine* from the underlying Concord case. (Pa521). Wasserman alleged that there were damages involving excessive expense flowing from the *in Limine* Motions. Loury knew, and his expert knew, that these fees and expenses flowing from the *in Limine* Motion in the underlying case were all incurred while Mr. Martin was employed at Archer, when the *in Limine* Motion was filed.

The Wasserman report and opinion refer to the Archer attorney billing records with regard to the *in Limine* Motion. Wasserman knew the billings regarding the *in Limine* Motion were invoiced by Archer. Loury knew that because he paid Archer's invoice, which included the *in Limine* Motion. All of the work was done on the *in Limine* Motion and billed for by Archer. None of the work on the *in Limine* Motion was done or billed for by Martin Law Firm, LLC. Martin Law Firm, LLC was not even in existence at the time. The Archer invoices were paid by Loury. Mr. Martin testified that the Motion *in Limine* was done while he was at Archer.

The trial court, in its decision, denied Loury's Motion for Reconsideration, finding that this was not a mistaken identity case; that Loury did not file a Third Party Complaint against Martin individually; that Loury was intimately involved in the case, understood and knew the parties; that

there was nothing in the record submitted by Loury to establish that the “clarifying” testimony which Loury claimed was necessary at the second trial before Judge Quinn would have resulted in specific damages; that the court previously found that Loury could not establish through the record evidence that the testimony would have bolstered or changed the decision of Judge Quinn, which was in favor of Loury; that Loury’s expert conceded that conclusion; that there was no evidence to establish that the testimony would have changed the underlying decision of Judge Quinn because Judge Quinn had already rejected the theory of Argush, and accepted the theory of Loury; that the expert reports of Loury could not establish that any damages claimed by Loury stemmed from the proposed bolstered testimony; and that the court did not find a basis for reconsideration.

Accordingly, the trial court was correct in denying Loury’s Motion to Amend the Counterclaim, and this Order should be affirmed.

CONCLUSION

For the reasons expressed above, it is respectfully submitted that the trial court’s rulings in (a) barring the inadmissible net opinions and testimony of Mr. Wasserman; (b) barring the inadmissible opinion of Kirk Loury; (c) barring Loury’s attempt to file an Amended Complaint on the eve of trial; (d) dismissing the Counterclaim of Kirk Loury with prejudice; and (e) entering an

Order for Judgment in the amount of \$83,596.91, with pre and post judgment interest awarded by the jury should be affirmed.

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Firm, LLC

BY: /s/ John L. Slimm
JOHN L. SLIMM

Dated: December 18, 2024

SUPERIOR COURT OF NEW
JERSEY
Appellate Division
Docket No. A-001452-23T2

MARTIN LAW FIRM, LLC,
Plaintiff

CIVIL ACTION

v.

ON APPEAL FROM

KIRK LOURY,
Defendant/Counterclaim Plaintiff-
Appellant,

SUPERIOR COURT,
CIVIL DIVISION
BURLINGTON COUNTY

v.

Hon. Aimee R. Belgard, P.J.CV.
Hon. M. Patricia Richmond, J.S.C.

MARTIN LAW FIRM, LLC,

Filed: February 10, 2025

Counterclaim Defendant-Respondent.

**APPELLANT KIRK LOURY'S REPLY BRIEF TO
DEFENDANT-RESPONDENT MARTIN LAW FIRM, LLC'S BRIEF**

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* This is an unpublished case; per R. 1:36-3, it is provided here.

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PRELIMINARY STATEMENT

In comparing the briefs from Appellant Loury (“Loury”) and Respondent Martin Law Firm, LLC (“Martin” or “MLF”), this Reply brief identifies three key findings. **First**, Martin did not challenge Loury’s standard of review, factual statements, or supporting record evidence. Thus, both explicitly and via implicit concession, there is agreement with Loury’s material facts that now set the factual foundation for this court’s decision (Pb 7-25). **Second**, Martin either ignored altogether or failed to competently challenge Loury’s legal precedents and principles across Loury’s Arguments (Pb 25-49). Martin similarly must concede these arguments’ validity. **Third** and most troubling, unable to mount a valid defense of Judge Belgard’s rulings, Martin resorted to pushing on this court 30 material false statements, misrepresentations, and omissions.

To this third finding, Martin (et al.) has used these 30 false statements, misrepresentations, and omissions in an attempt to mislead this Court in its legal analysis of Judge Belgard’s rulings under appeal. Rule of Professional Conduct RPC”) 3.3 (Candor Toward the Tribunal) has the following provisions applicable here:

(a) A lawyer shall not knowingly: **(1)** make a false statement of material fact or law to a tribunal; . . . **(4)** offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or **(5)** fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege

or is otherwise prohibited by law. RPC 3.3 - Candor Toward the Tribunal, N.J. Ct.

Our Supreme Court in Brundage considered RPC 3.3 and wrote:

“In particular, we noted that the RPCs forbid ‘misrepresentation as a permissible litigation tactic, even when carried out in the name of zealous representation.’ Id. at 250, 850 A.2d 477. Moreover, we observed that RPC 3.3(a)(5) was intended to codify the notion that a failure to make a disclosure is, in some situations, the equivalent of an affirmative misrepresentation. Brundage v. Carambio, 195 N.J. 575, 597 (N.J. 2008)

While Loury has assembled direct and specific proofs from the record confirming each of these 30 as RPC 3.3 violations (“Violations”), R. 2:6-7 limits this reply brief to fifteen pages. Thus, only fifteen of the 30 Violations are detailed herein for this court’s review (i.e., twelve in tables and three in line).

Notably, as a precursor to these 30 Violations, Martin falsely testified extensively at his two deposition sessions (Pa692; SUMF-KL: ¶273-¶335). Then, during Martin’s cross examination at trial (6T), he testified to the jury falsely – and with amplification – accusing Loury of: 1) being unethical (6T:128:1-10; 6T:142:1-6), 2) stealing (“in fact”) Concord’s documents (6T:142:7-21), 3) wanting to file frivolous lawsuits (6T:143:18-25), 4) wanting to steal money from Concord (6T:144:17-25), 5) wanting “millions of dollars” (6T:145:18-21), and 6) wanting to commit perjury (6T:143:1-15; 6T:144:1-6; 6T:144:17-25).¹

¹ While detailing each of these falsehoods is beyond the four corners of the issues under appeal, Loury can directly and specifically prove each one as false testimony through various assemblies of Martin’s emails, Martin’s court filings, court rulings, Martin’s deposition testimony, and, here, Martin’s subsequent trial testimony (6T:152:14-153:3). Further, at no time has Martin recanted any of his false testimony. Even at trial, after conceding that the trial court’s summary judgment ruling found that “Loury didn’t do anything unlawful” (6T:153:1-3), Martin chose not to recant his prior testimony a short time earlier that Loury “. . . did, in fact, steal 1,700 documents . . .” (6T:142:13-15).

Specific to the respondent's brief, Martin et al carried the last three of these false, at-trial accusations directly into its Statement of Facts. (Db 8)

STATEMENT OF FACTS:

FACTUAL RECORD ANALYSIS

1. Extensive Agreement among the Parties

Notwithstanding what appear to be a few drafting errors by Martin, Loury accepts Martin's statements of fact (Db 4-14) except for those directly refuted as "Material False Statements, Misrepresentations, and Omissions", a portion of which are captured in the table below (pages 5-8).

2. Full Agreement on the Core Issue for Loury's Counterclaim Count 2 Damages

Martin's brief highlights that two trial courts and this court all agreed that Loury's employment Agreement dictated that he was to be paid "10%" on "any revenue" and not "net revenue". (Db 19; 20; 21).

There is no question that in Argush's (i.e., Concord's) revenue formula (Pb 10-12) for Loury's compensation accounts ("C + B + A = D"), the "D", or "total fee" revenue amount, was certainly enveloped in the Agreement's term "any revenue". "D" was also synonymous with the two trial courts' "gross revenue" definition in their respective rulings. (Pb 18 for Judge Quinn's excerpt)

In Martin's brief, he mentions two "theories" for Loury's compensation numerous times but fails this court in defining these theories. (Db 10; 11; 12; 22; 23; 27; 32; 36; 37 39; 40; 49)

The first Martin theory was the “Theory of Argush” and defined here from Argush’s trial testimony as “10%” of “net revenue” or “ $C = D - B - A$ ”. (Pb 12) In Martin’s cross examination of Argush, Martin offered Argush a bargain that Loury be paid on the “C” revenue amount only (Pb 15-16; Pb 36-37), which was exactly the “net revenue” amount that Argush wanted. Thus, the “Theory of Argush” is truly the “Theory of Argush and Martin”.

The “Theory of Loury” was defined as “10%” times “any revenue” or the “D”, “total fee” revenue variable in Argush’s formula. Loury’s two email and attachment sets defined this precisely wherein Loury also connected Argush’s formula to his Agreement’s terms. (Pa 3161–3180)

Martin’s brief emphasizes eleven separate times (Db 10, 11; 12, 23, 32, 36, 37, 39, 40, 42, 49) that “Judge Quinn rejected Argush’s theory [“net revenue”] and accepted the theory of Loury in his decision”. *Judge Quinn’s ruling for Loury’s “gross revenue” (i.e., “D”) application settled the factual foundation for Loury’s Count 2 claim.* (Db 33)

From this foundation, it is a straight line to Martin’s negligence in not putting before Judge Quinn an order for a higher damage award to place in “contest” and “dispute” the damages Loury received in the first trial. (Pb 18-19) That Loury directed Martin four times in writing and once verbally for a higher damage award (Pb 13-15; 19), but Martin ignoring him time and again, is the proximate cause of Loury’s damages; this fact pattern is undisputed.

3. Indicative Material False Statements, Misrepresentations, and Omissions

Martin’s Brief’s Excerpt	Proofs from the Record Evidence
Note: 7 of 10 Violations from This Section are Shown	
<p>1. False: “Mr. Martin always read Loury’s emails, and would respond with a call, meeting, or an email. (6T:29:5-19).” (Db 5)</p>	<ul style="list-style-type: none"> • Martin ignored (verbally and in writing) Loury’s two email and attachment sets sent during the two-week recess. (Pb 13-14)
<p>2. False: “On cross-examination, Mr. Martin was <i>able to get Concord’s witness, Lee Argush, to admit</i> to Loury’s damages value, and the case was won at that point. (6T:146:1-4).” [Emphasis added] (Db 8)</p> <p>See also Db 22 for additional false claims of Argush “admitting”.</p>	<ul style="list-style-type: none"> • <i>Argush “admitted” nothing. The truth is Argush agreed to accept Martin’s bargain</i> that Loury should be paid on the “C” revenue amount only (“net revenue”) and not “D”, “total fee”. (Pb 15-16) • Martin failed Loury in not pushing Argush for the “calculation” Loury wanted – 10% times the “D” total fee amount – as specified in his two email and attachment sets given to Martin during the recess (and before Argush’s cross). (Pa 3163–3164)
<p>3. False: “Loury made a convoluted argument that he believed permitted him to change the entirety of all of his testimony through almost 7 years.” (Db 8)</p>	<ul style="list-style-type: none"> • A comparison of Argush’s trial transcript (Pa 1627 33:1–Pa 1638 54:22) and Loury’s two email and attachment sets (Pa 3161– 3180) proves a coherent, accurate, and tight alignment between the two. • Martin’s trial associate, Jen Dering, took notes and these were consistent with Loury’s understanding of Argush’s new testimony. (Pa 3532–3533)
<p>4. False: “Mr. Martin refused to do that since this would suborn perjury, and would have been violative of the Rules of Professional Conduct. (6T:144:1-6) [sic].” (Db 8)</p>	<ul style="list-style-type: none"> • Martin did not communicate his supposed concern about Loury’s perjurious intent in any written form. (Pa 691-692, #307) • Martin did not communicate his supposed concerns to Loury verbally. (Pa 692, #308)

5. **False:** “Mr. Martin was not okay with that. (6T:144:21-23).” (Db 8)

(Note #1: Martin perpetuated this false testimony multiple times in informal communications and formal court filings (see examples in 3T: 25:24-26:5; Pa767-772; #233; #234; #237; #238). Loury consistently rebutted these claims with the same or similar proofs from the record as provided here in the right column. (see 3T: 27:19-23; Pa426-427; Pa690-693; Pa3402-3406))

(Note #2: Comment [6] to the ABA Model Rule 3.3 states: ***“If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.”*** [Emphasis Added]

Martin, by his own admission, never took such action to inform Loury that “the evidence [for a higher damage award] should not be offered”. Martin had a two-week recess to do so, and he failed (see evidence, right column).

- There were no billing records of any discussions about the two email and attachment sets; nor discussions between Martin and Loury or Martin and Dering of Martin’s concerns. (Pa692, #309; #310)
- Dering, as a fact witness to the trial testimony and recipient of Loury’s first email and attachment set, was not deposed by Martin to corroborate his concerns of Loury’s supposed perjurious intent. (Pa692, #311)
- In email communication between Martin and Loury the evening before the trial resumed, Martin did not express any concerns about Loury’s purpose nor comment on Loury’s email and attachment sets. Martin also did not seek a meeting the following morning with Loury to raise his concerns to Loury. (Pa 692-693, #312)
- When Loury confronted Martin the morning of the trial about Martin ignoring him and Loury’s purpose for a higher damage award, Martin replied “It will hurt our case”. (Pa669, #220) Had Martin’s intensity about Loury wanting to ***“lie” and “steal” been true as Martin testified*** (i.e., see left column (6T:144:21-23)), it is inconceivable for Martin to not have replied to Loury when confronted, “You will perjure yourself if I let you do as you want, and I won’t be a party to that”.
- Martin did not include this perjury accusation as an affirmative

<p>Moreover, had Martin’s concerns been true (which they were not) about Loury’s supposed perjurious intent, Martin had a further affirmative obligation during the trial’s recess to explore with Loury what Martin could exploit (within Martin’s comfort level) during Argush’s cross examination as well as what Loury could amplify during rebuttal. None of this happened (see Pa538-539.)</p>	<p>defense. (Pa99-102; Pa681-682, #268-#272; Pa693, #314)</p> <ul style="list-style-type: none"> • Wasserman testified that a perjury accusation was serious (i.e., a crime) and a competent attorney would document the file. (Pa3618; 39:22–Pa 3619: 40:20; Pa3636 57:2-22) • Wasserman’s expert report also defined this as a serious accusation. (Pa538-539)
<p>6. Omission: “Mr. Wasserman gave the incredible opinion that Argush, who was found by Judge Perri and Judge Quinn to lack credibility, opened the door to a new calculation that would have netted Loury a higher award of damages. (Pa3619).” (Db 9)</p> <p>7. Omission: “Q. [Slimm] So why would he [Loury] testify in response and open himself up to more cross-examination, in your [Wasserman’s] opinion, when he already had solid testimony at his deposition and in the first trial and in the case-in-chief in the second trial. Why would you ever do that.</p> <p>A. [Wasserman] Because there was an opportunity based on Mr. Argush’s testimony to enhance the damage award. . . .</p> <p>Q. But Mr. Wasserman, Judge Quinn did reject the theory of Argush and accepted the theory of Loury in his decision?</p> <p>A. Okay.” (Pa3632) (Db 10-11)</p>	<ul style="list-style-type: none"> • Quite contrary to Martin’s serious omissions here, <i>in order to know the truth</i>, it is essential to read Wasserman’s full testimony on the topic of Loury’s fact basis for pursuing a higher damage award. (Pa 3617; 38:9-53:2; Pa3635; 56:4-16) • Wasserman’s full testimony reveals a well-reasoned legal and factual analysis why <i>Argush’s new revenue testimony and formula provided justification for Loury’s changed understanding of what his Agreement’s QAUM compensation formula dictated.</i> • Against Slimm’s many attempts to steer him to a position favorable to Martin, Wasserman was determined and consistent. (To Martin’s excerpt in the left column, this court will note Slimm’s badgering Wasserman when Slimm did not get the answer he wanted. (e.g., Pa3622 43:17-20; Pa3623 44:3-25)) • Argush’s new testimony and formula were the sole impetus for Loury to pursue a higher damage award based on his Agreement’s terms (i.e., 10% on “any revenue”). (Pa3161-3180)

LEGAL ARGUMENT

I. JUDGE BELGARD IMPROPERLY BARRED WASSERMAN AND HIS EXPERT REPORT WITHOUT DISQUALIFYING HIM UNDER N.J.R.E. 702/703 OR THE NET OPINION RULE (PA442; PA445; 1T; 2T)

1. Martin's Argument Summary

Martin wrote, “. . . the trial court did not abuse its discretion by finding that Loury's [liability] expert offered inadmissible net opinions . . .” (Db 31 second ¶; Db 31 first ¶ used the word “determining”; see also Db 2; 15; 49) *This is false.* Judge Belgard, as Pomerantz specified, never made a net opinion “finding” of Wasserman's care standard, its factual basis, nor Martin's negligence to it. (Pomerantz Paper v. New Comm. Corp., 207 N.J. 344, 373 (N.J. 2011)).

Across thirteen pages ², Martin did not make one legal argument defending why Judge Belgard could be legally correct in: 1) not conducting a net-opinion analysis of Wasserman's report (Pb 26-28), 2) ignoring this court's preference for liberally admitting expert testimony (Pb 25-26), and 3) circumventing the jury's role in judging Loury's evidence and argument for a higher damage award via a suit-within-a-suit that is common in legal malpractice litigation. (Pb 28-31)

² Martin makes assertions attributed to Wasserman, Loury, the trial court rulings, and this court's ruling. But Martin's attributions point only to each Appendix topic's first page (or do not point at all). Without page references, Martin sends this court on a hunting expedition to verify if Martin's assertions attributed to the named parties are true.

While Loury’s argument prominently featured Carbis Sales for both this court’s net-opinion analysis of a Wasserman expert report (Pb 27-28), as well as the suit-within-a-suit trial application (Pb 29), Martin was silent.

Further to this silence, Martin failed to offer any analysis to counter Loury's application of Rubanick v. Witco Chemical Corp., which provided a compelling legal precedent directly parallel to Judge Belgard's errors in striking Wasserman and Loury as experts as well as preventing a trial that would allow a jury to rule on Loury’s factual foundation for a higher damage award. (Pb 31)

Instead, Martin relies on string citations that merely reiterate the basic principles of proximate cause, experts, and damages. (Db 24-27) These boilerplate citations lack the specificity and necessary relevance to rebut Loury's targeted and well-supported legal arguments.

2. Indicative Material False Statements, Misrepresentations, and Omissions

Martin’s Brief’s Excerpt	Proofs from the Record Evidence
Note: 3 of 8 Violations from This Section are Shown	
<p>8. Misrepresentation: “With respect to the lost opportunity claim, this was a speculative claim made by Wasserman in connection with an opportunity to sell intellectual property. (Pa520). Wasserman did not opine regarding what such damages were, the quantum of the damages, or how prolonging the time in which to release or convey intellectual property was clouded by the pending litigation.” (Db 16)</p>	<ul style="list-style-type: none"> • Loury was the court-ordered damage expert (Pa108) (i.e., not Wasserman), and in Loury’s report (Pa110) he provided the entirety of “the quantum”, factual details, timing, contracts, invoices, time sheets, and bank statements (Pa125-127; Pa203-224). • Contrary to Martin’s assertion that Wasserman was somehow required to opine on damages, <i>Kaplan (cited by Martin four times (Db 17; 31;</i>

	<p>33; 35)), <i>specifies a distinction between liability and damage experts.</i> <u>Kaplan v. Skoloff</u>, 339 N.J. Super. 97, 104 (App. Div. 2001))</p> <ul style="list-style-type: none"> • <i>Brill concluded liability was separate from damages.</i> (Pb 38)
<p>9. False: “Also, with respect to Loury’s pro se opinion, since Loury was a new business in connection with FolioDynamix and WealthCounsel, and since his claims associated with the same did not meet the reasonable certainty standard established by the Supreme Court in their opinion in <u>Schwartz v. Menas</u>, 251 N.J. 556 (2022), the opinions were barred. . . . (Db 23-24)</p>	<ul style="list-style-type: none"> • Martin’s excerpt from <u>Schwartz</u>, the other citations, and Martin’s argument have <i>no validity to the record.</i> (Db 23-24) • Contrary to Martin’s false premise, <i>at no time did Loury claim his WealthCounsel and FolioDynamix damages as lost profits.</i> (Pa125-127 + footnotes #8 and #9) • <i>Loury’s lost income was from terminated and existing (i.e., not “new business”) consulting contracts.</i> (Pa123-127; Pa239-277; see Loury's deposition. (Pa3828; 24:2-92-11)
<p>10. Misrepresentation: Wasserman understood that <i>Mr. Martin would not put Loury back on the stand because that would be suborning perjury if Loury changed the testimony he previously gave.</i> (Pa3580).” (Db 21)</p>	<ul style="list-style-type: none"> • Wasserman did not “under[stand]” Martin as in Wasserman <i>agreeing</i> with Martin. Wasserman wrote in his report, “Martin contends that heeding Loury’s wishes would have required him to suborn perjury, that itself is utterly wrong.” (Pa538).

II. IN DENYING LOURY’S MOTION FOR SUMMARY JUDGMENT FOR COUNT 2, JUDGE BELGARD DID NOT RULE ON DISPUTED MATERIAL FACTS AND, WHILE ACKNOWLEDGING THAT CERTAIN OF MARTIN’S NEGLIGENCE FELL UNDER COMMON KNOWLEDGE, SHE DENIED THIS FRAMEWORK BECAUSE SHE CONCLUDED A DAMAGE EXPERT WAS NEEDED (PA451; 3T)

1. Martin's Argument Summary

It was perplexing that Judge Belgard agreed with Loury's common knowledge doctrine application for Loury's two email and attachment sets (see the Sommers³ side by side; (Pb 35-37)) while then denying Loury's summary judgment motion solely because she made an earlier interlocutory ruling to strike Loury as the damage expert. (Pb 38) Her incorrect requirement coupling liability and damages (Pb 38) then kept Loury's evidence from a jury. (Pb 31; Pb 42-43) Martin's citations on expert testimony⁴ (Db 28-29), the net-opinion rule (Db 29-31), and damages (Db 32; 33; 35; 37-38) do not support Judge Belgard's legally unsound rulings.

As this court will undertake a *de novo* review of Loury's summary judgment motion, Martin did not challenge Loury's SUMF analysis for the 373 admissions nor Martin's 53 responses that failed in providing a competent factual dispute to their respective SUMFs. (Pb 33-35)

Last, ***Martin falsely claimed*** that he filed a summary judgment motion that Judge Belgard granted. (Db 31) He did not file such a motion but filed an improper *in limine* motion.

³ Martin was silent on Loury's point-by-point alignment of the Sommers ruling on common knowledge and this instant case (Pb 36-37), yet he did cite Sommers in unrelated strings. (Db 25; 26; 27)

⁴ These citations ignore the common knowledge precedent for both the jury charge (Pb 32) and the Sommers ruling (Pb 35-37).

2. Indicative Material False Statements, Misrepresentations, and Omissions

Martin’s Brief’s Excerpt	Proofs from the Record Evidence
Note: 1 of 8 Violations from This Section are Shown	
<p>11. False⁵: “Loury’s expert, Wasserman, was unable to establish a standard of care which provided the benchmark for his opinions.” (Db 31)</p>	<ul style="list-style-type: none"> • See <u>Carbis Sales</u> analysis (Pb 27-28). • Wasserman specified the standard of care comprised of case law, rules of professional conduct, respected treatises (Pa534-535), and rules of court (Pa536-537). • Wasserman then applied this standard of care and the case’s facts in judging Martin’s negligent practices. (Pa536-540)

III. THROUGHOUT THIS INSTANT CASE, ALL PARTIES EQUATED MARTIN TO MLF, DEFINING A SINGLE “IDENTIFY OF INTEREST”, BUT JUDGE BELGARD DENIED ADDING MARTIN AS A CO-DEFENDANT ALONGSIDE THE FIRM HE FOUNDED, OWNED, AND OPERATED (PA439; PA448; 1T; 2T)

1. Martin’s Argument Summary

Martin’s counterargument to Loury’s Argument III has no legal basis. First, his premise of the Statute of Limitations (SoL) running as of May 14, 2019 (Db 41) is plainly wrong. Gautam v. DeLuca (Pb 44) established that the SoL would run until February 2022 per this Court’s remand of a new trial in February 2016 wherein Loury incurred damages in the form of new legal fees. (Pb 44)

⁵ Martin makes many false claims in his Argument II that Wasserman’s report was an inadmissible net opinion for failing to establish a standard of care with objective proofs. These statements are wrong (as proven in the right column and by Carbis (Pb 27-28) and Pomeranz (see page 8 herein)). They are also misplaced here in Argument II; it is Argument I that addresses Judge Belgard’s error in not undertaking a net-opinion analysis of Wasserman’s report.

Second, by failing to challenge the factual evidence Loury presented (Pb 20-25), Martin concedes that he and MLF have a single identity of interest (i.e., Martin=MLF) for the purposes of this litigation (see Otchy v. Elizabeth Bd. of Educ. compared side by side to this instant case (Pb 46-47)).

Third, Martin further concedes the strength of Loury's Argument III by ignoring: 1) the Mears summary (Pb 47-48) that tightly characterizes the factual foundation for adding Martin as a defendant, and 2) Pantano (Pb 48) that declared Martin could not be prejudiced since Martin=MLF.

2. Judge Belgard Reconsidered Her Prior SoL Ruling

For the motion practice (1T) to add Martin as a defendant to Loury's Counterclaim (including the reconsideration motions (3T)), Loury was precise that the SoL would begin running at the earliest in February 2016. (Pb 44) To this, Judge Belgard said in her reconsideration ruling (3T):

“So, in considering this motion, I do think it's appropriate to reconsider myself on one issue, and that's with regard to the timing of the statute of limitations based on the Grunwald vs. Bronkesh case . . .” (3T: 25:18-26:3)

Determining the SoL is an important judicial consideration for R. 4:9-3 and the relation-back doctrine when adding a new party. (See Martin v. Conifer-Lechase Constr., LLC, DOCKET NO. A-1901-16T2, 3 (App. Div. Nov. 14, 2017) (Per R. 1:36-3 see Pra1) Although Judge Belgard erred in not coming to a definitive SoL ruling (3T: 26:4-14), *Martin misleads this court* (Db 44) by not

disclosing that she now holds to a later SoL running date than stated in her initial ruling (Martin only referenced transcript 1T and ignored 3T). (Pb 45)

Martin also waved Judge Belgard’s erroneous flag claiming Martin did not have notice of Loury’s Counterclaim (Db 42-44). However, the record is indisputable that Martin: 1) knew of Loury’s Counterclaim (filed in September 2019), 2) hired counsel to represent himself and MLF, 3) submitted Loury’s claim to MLF’s professional liability carrier (Pa3480), 4) sourced discovery, and 5) solely testified at two deposition sessions. (Pb 20-25; Pb 46-47)

3. Material False Statements, Misrepresentations, and Omissions

Martin’s Brief’s Excerpt	Proofs from the Record Evidence
Note: All Violations from This Section are Shown	
<p>12. Misrepresentation: “Loury argued there was an attorney-client relationship. Clearly there was no attorney-client relationship between Martin Law Firm, LLC and Loury in connection with the in Limine Motion in the Monmouth County matter because all of that work took place while Joseph Martin was at Archer and before Martin Law Firm even existed.” (Db 46-47)</p>	<ul style="list-style-type: none"> • Martin (i.e., not Archer or MLF) was always personally liable for his malpractice. (Pb 21) • Loury gave this <i>never-contested definition</i> at the start of discovery on March 19, 2020: “<i>Plaintiff refers to the Martin Law Firm, LLC and/or its principal shareholder, Mr. Joseph Martin.</i>” [Emphasis added] (Pb 21) • <i>Martin always adhered to this definition, even confirming that it was, in fact, plaintiff MLF that “filed a motion in limine”.</i> (Pb 22-23; Pb 24)

CONCLUSION

“*[I]f the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful, frivolous, gauzy or merely suspicious,’ he will not be heard to*

complain if the court grants summary judgment, *taking as true the statement of uncontradicted facts in the papers relied upon by the moving party*, such papers themselves *not otherwise showing the existence of an issue of material fact*. [Emphasis added] [Judson, supra, 17 N.J. at 75, 110 A.2d 24 Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529 (N.J. 1995)]

While this Brill excerpt addressed summary judgment motions, its legal foundation exposes Martin's reliance on falsehoods, misrepresentations, and omissions as well as Martin's failure to offer a single counter legal argument justifying Judge Belgard's errors. This cannot stand.

Loury requests that this court: 1) restore Wasserman and Loury as experts, 2) add Martin as a Counterclaim co-defendant, 3) reverse the denial of Loury's motion for summary judgment, 5) remand for a new trial for the Complaint and Counterclaim, and 6) fully restore Loury's right to present his evidence and argument in support of his Counterclaim and in defense against MLF's Complaint.

Respectfully,
OFFIT KURMAN, P.A.
/s/ Scott B. Piekarsky
SCOTT B. PIEKARSKY, ESQ.

Date: February 3, 2025