KOHN & KOHN REALTY, LLC; CAROL L. KRUEGLE TRUST; JENNIFER M. LAWLOR, an individual; JAMES D. HANNAH & LESLEE A. JACKSON, husband and wife NORMA C. COSTA & CLAUDIA COSTA, mother and daughter; Plaintiffs-Appellants, v. MARGARET A. UHRICH; MICHAEL P. UHRICH; WILLIAM D. MARTIN; and WILLIAM D. MARTIN REVOCABLE TRUST, Defendants-Respondents. *(caption continued on next page)*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: Docket No. A-2121-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: OCEAN COUNTY Docket No.: OCN-C-99-22 SAT BELOW: Hon. Mark A. Troncone, P.J.Ch.

BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL

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MICHAEL P. UHRICH; MARGARET A. UHRICH Plaintiffs-Respondents, vs. MARIANO MOLINA; ALI MOLINA; BOB VAN BUREN; ROBYN VAN BUREN; KOHN & KOHN REALTY, LLC; JENNIFER M. LAWLOR AND MATTHEW F. DICZOK; JAMES D. HANNA AND LESLEE A. HANNAH; CAROL L. KRUGLE TRUST; JOE CORBI; DANA CORBI; MANNY GUARDA; JOANNA GUARDA; NORMA C. COSTA AND CLAUDIA COSTA; CHRIS NICOSIA; HILLARY BELL; JOEL HENKIN; AND ELLEN HENKIN, WILLIAM D. MARTIN, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: OCEAN COUNTY Docket No.: OCN-C-101-22 CIVIL ACTION

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PRELIMINARY STATEMENT

This appeal seeks to prevent the injustice that will result from the trial court's order barring Plaintiff's expert reports as out of time even though there is no imminent trial date and Defendants are not prejudiced. The trial court, without providing a written opinion, determined that Plaintiffs' expert reports were served out of time notwithstanding the exceptional circumstances that existed.

Plaintiffs served their expert reports on November 17, 2023. At that time, trial was scheduled for January 9, 2024. Defendants did not serve responsive expert reports within the twenty-day period set forth in the case management schedule. Rather, over one month later, on December 22, 2023, Defendants filed a motion to bar Plaintiffs' expert reports as untimely. The trial court held a conference on January 3, 2024, where the Court adjourned the trial date to January 29, 2024 and scheduled oral argument on Defendants' motion for January 12, 2024.

At oral argument on Defendants' motion, three weeks after Defendants' deadline for responsive expert reports, Defendants' counsel argued that Defendants would be prejudiced if Plaintiffs' expert reports were not barred because they would not have time to respond to Plaintiffs' expert report. During that same argument, Defendants' counsel requested an adjournment of the January 29 trial date because his clients and expert were not available. This alone should have resulted in Defendants' motion being denied. Indeed, the trial judge previously advised the

parties that the court would render a decision from the bench following oral argument. Instead, the trial judge reserved decision on the motion and directed the parties to consult on scheduling a new trial date. The court then scheduled the matter for trial on April 30. The trial court also issued a notice dated January 30 that it would not decide Defendants' motion to bar Plaintiffs' reports until the first day of trial. Only after Plaintiffs requested earlier disposition did the court render its decision and grant Defendants' motion by order dated February 15, 2024.

The trial court abused its discretion by barring Plaintiffs' expert reports without issuing any findings of fact or conclusions of law. *R.* 1:6-2(f). The Trial Court's Order granting Defendants' motion included only a three-line statement of reasons that failed to address the uncontested facts presented by Plaintiffs in opposition to the motion, most notably that the parties had been working cooperatively on open discovery matters beyond the discovery end date. In fact, Defendants had agreed to a proposed amended case management order that extended the deadline for submission of Plaintiffs' expert reports and extended the schedule for depositions to accommodate Defendants' request to depose two Plaintiffs.

The trial court erred by not considering the exceptional circumstances surrounding: (1) Plaintiffs' efforts to cooperate with Defendants; (2) Plaintiffs' expert's health issues; and (3) that there could be no prejudice to Defendants when the trial was not scheduled until April 30, 2024.

Plaintiffs filed this action after Defendants Michael and Margaret Uhrich (collectively "Uhrich") constructed a bulkhead ("Uhrich Bulkhead") knowingly and illegally over its property line and across the easement area that previously afforded Plaintiffs access to the adjoining waters of Barnegat Bay without seeking requisite consent from Plaintiffs. By order dated October 3, 2022, the trial court confirmed Plaintiffs' property rights included access to the waters of Barnegat Bay. Also, the New Jersey Department of Environmental Protection ("DEP") has since terminated the permit for the Uhrich Bulkhead. Barring Plaintiffs' expert reports has effectively granted summary judgment on critical issues of providing Plaintiffs access to the bay and the damage to Plaintiffs if such access is not restored.

For all the reasons set forth herein, Plaintiffs respectfully request that this Court reverse the trial court's February 15, 2024 Order granting Defendants' motion to bar Plaintiffs' expert reports.

PROCEDURAL HISTORY

On May 20, 2022, both Complaints in this consolidated matter were filed. (Pa3-Pa55).[1]

On July 29, 2022, Plaintiffs filed a Motion for Summary Judgment seeking judgment on the issue of Plaintiffs' property rights over the subject easement area. (Pa86-87). The trial court partially granted this motion by Order dated October 3,

[1] Pa = Plaintiffs' appendix.

2022, which determined that the recorded title to Plaintiffs' properties included the rights to the subject easement area for access to both Long Beach Boulevard and the water of Barnegat Bay. (Pa91-92).

Plaintiffs amended their Complaint on April 24, 2023, to add a final count for Interference with Easement against Defendant Martin concerning the construction of a bulkhead on his lot. (Pa102-49).

Uhrich filed a Motion for Leave to Amend its Complaint, seeking to punish Plaintiffs for reporting the admitted inaccuracies in the Uhrich permit application to the New Jersey Department of Environmental Protection ("DEP"). (Pa98-99). The trial court granted the motion, and on April 27, 2023, Uhrich filed its Amended Complaint adding Counts for intentional interference with prospective economic advantage, slander of title, and punitive damages. (Pa100-01; 150-78).

On June 1, 2023, the DEP issued a Notice of Termination, terminating the permit improperly obtained by Uhrich for the construction of the proposed bulkhead and pier. (Pa179-80). This was premised upon: 1) Uhrich's failure to disclose to the DEP that the proposed construction was within an easement area, 2) Uhrich's failure to obtain consent from the easement holders as required by N.J.A.C. 7:7-23.2(g), and 3) Uhrich's attachment of the bulkhead to a neighboring property without depiction of such attainment in the approved plan. (*Ibid.*)

On August 14, 2023, the trial court entered a case management order providing for all discovery including fact witness and party depositions, expert reports and expert depositions to be completed by September 29, 2023. (Pa227-28). The case management order also permitted Plaintiffs to file a responsive expert report within twenty days of receipt of Defendants' expert report. (*Ibid.*) The case management order scheduled a trial readiness conference for December 18, 2023, and scheduled trial proceedings to begin on January 9, 2024. (*Ibid.*)

On November 17, 2023, Plaintiffs filed a Motion for Summary Judgment, which included the engineering expert report at issue in this motion.[2] (Pa184-85). On November 21, 2023, the trial court scheduled oral argument on the Motion for Summary Judgment for December 15, 2023. (Pa200). On December 5, 2023, Defendants filed a Cross-Motion for Summary Judgment. (Pa207).

On December 20, 2023, the trial court scheduled a settlement conference for January 3, 2024. (Pa212).

On December 22, 2023, Defendants filed a Motion to Bar Plaintiffs' Expert Reports, the decision on which is the subject of the instant appeal. (Pa215-16).

On January 3, 2024, the trial court held a settlement conference. (1T).[3] Following that conference, the court indicated the January 9, 2024 trial date would

[2] On that same day, Plaintiffs provided Defendants with an appraisal expert report. (Pa326-327).

[3] 1T = Transcript of January 3, 2024 Settlement Conference

be adjourned to January 29 and January 30, pending the court's decision on the summary judgment motions, which the judge advised would be given from the bench on January 12. (Pa308; 1T12:14-13:10).

On January 10, 2024, the trial court issued a written opinion denying Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment and issued orders denying the motions dated January 12, 2024. (Pa311-17).

On January 12, 2024, the trial court heard oral argument on Defendants' Motion to Bar Plaintiffs' Expert Reports. (2T). During argument, counsel for Defendants advised the trial court for the first time that his clients would be unable to proceed with trial on January 29. (2T). The trial judge requested the parties submit their availability. (2T). After the parties submitted their respective availability, on January 26, 2024, the trial court scheduled the matter for trial on April 30 and May 1, 2024. (Pa320).

On January 30, 2024, the trial court entered a notice advising the parties that Defendants' Motion to Bar Plaintiffs' Expert Reports would be decided on the April 30, 2024 trial date. (Pa323). By letter dated February 6, 2024, Plaintiffs' counsel requested that the court render a decision on Defendants' Motion to Bar Plaintiffs'

2T = Transcript of January 12, 2024 Oral Argument on Defendants' Motion to Bar Plaintiffs' Expert Reports.

Expert Reports earlier given the need for the parties to adequately prepare for trial. (Pa324-25) Plaintiffs also reiterated their willingness to allow for depositions of Plaintiffs' experts and for Defendants' experts to prepare responsive/rebuttal reports and noted that Defendants had previously declined that offer. (*Ibid.*)[4]

On February 15, 2024, the trial court entered an order barring Plaintiffs' expert reports from introduction at trial and barring Plaintiffs' experts from testifying at trial with regard to the reports. (Pa1-2). The order states that the Plaintiffs' expert reports were "out of time at time of trial; and for the reasons set forth in the movant's brief which the court adopts and for the failure of the opposition to establish exceptional circumstances warranting the late admission of the proffered reports." (*Ibid.*)[5]

On February 28, 2024, Plaintiffs filed a motion for leave to appeal the February 15, 2024 Order. (Pa343-46) This Court granted Plaintiffs' motion on March 18, 2024. (Pa346)

In light of this appeal, the April 30, 2024 trial date has been adjourned.

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[4] Should the requested relief be granted, Plaintiffs would consent to a forty-five day period for Defendants to serve responsive expert reports.

[5] Pursuant to *Rule* 2:6-1(a)(2), Plaintiffs have included in their appellate appendix Defendants' brief and reply brief in support of their motion to bar Plaintiffs' expert reports filed with the trial court. (*See* Pa333-42).

STATEMENT OF FACTS

This dispute concerns the egregious actions by Defendants Uhrich and Defendant William Martin ("Martin") in their willful disregard for Plaintiffs' property rights concerning a long-existing easement over Defendants' properties. Defendants Uhrich and Martin own lots fronting on Barnegat Bay on a street called "Friends Way" in North Beach on Long Beach Island. (Pa185). Plaintiffs own other houses on Friends Way. (Pa186). The deed to each of Plaintiffs' lots provides a 20 foot wide easement and bay access to each owner. (*Ibid.*) For the past several decades, Plaintiffs have enjoyed unimpeded access to the bay for recreational activities in accord with their legal rights granted by the easement. (Pa190-91).

In 2018 and 2019, Martin illegally reconstructed a bulkhead over the easement area within their lot without seeking consent from the easement owners. However, Martin did not extend the bulkhead into the 10 ft. area historically used for access by Plaintiffs. In December 2021, Uhrich knowingly and illegally constructed the Uhrich Bulkhead across the easement area and on to the Martin lot without seeking consent from Plaintiffs as required when constructing anything in the easement, or from Martin, and without obtaining the required State and Township permits.[6] (Pa192, 196). The Uhrich Bulkhead construction unreasonably obstructs Plaintiffs'

[6] The construction of the Uhrich Bulkhead was done in violation of the DEP permit Uhrich obtained by fraudulently stating that the construction was not within an easement. (Pa96, 179)

access to the Bay by creating a seven foot drop into the bay that did not previously exist. (*Ibid.*) The construction of these bulkheads have eliminated Plaintiffs' ability to access and use the bay.

Moreover, the application to obtain the DEP Permit required Uhrich to certify, under the Property Owners Certification, whether any work is to be done within an easement, yet Uhrich falsely responded that no such work was being done within an easement. (Pa96). On June 1, 2023, the DEP issued a Notice of Termination terminating the permit improperly obtained by Uhrich because (i) Uhrich failed to disclose to the DEP that the proposed construction was within an easement area, (ii) failed to obtain consent from the easement holders as required by N.J.A.C. 7:7-23.2(g), and (iii) the attachment of the bulkhead to a neighboring property without that being shown in the approved plan. (Pa179-80).

Following a conference on December 18, 2023, the trial court requested via email that the parties advise the court by December 21, 2023, whether they: "1. Have agreed to expert status/submissions[;] 2. Wish to have Judge Troncone work on settlement – in person and with consent of all [; and] 3. Wish to proceed to trial as scheduled." (Pa205).

On December 20, Plaintiffs' counsel responded to the trial court as follows:

> We have contacted [Defendants' counsel] to discuss submission of a rebuttal engineering report, but have not heard back as to proposed dates. [Defendants' counsel]has indicated that he now wishes to depose our engineering

> expert, although he has had our engineer's report since November 17 but has not requested a deposition. During our conference on December 18, the Judge did not indicate further depositions would be permitted. While we do not believe expert depositions are necessary, if [Defendants' counsel] is permitted to depose our expert, we should be afforded the right to depose his expert after the submission of his rebuttal report.
>
> [(Pa201-02).]

POINT I

THE TRIAL COURT ERRED BY FAILING TO MAKE ANY FINDINGS OF FACT UNDER *R.* 1:6-2(F) OR *R.* 1:7-4. (Order: Pa1-2)

The trial court abused its discretion in barring Plaintiffs' expert reports without issuing any findings of fact or conclusions of law. *See R.* 1:6-2(f). A trial court's "failure to perform the fact-finding duty 'constitutes a disservice to the litigants, the attorneys and the appellate court.'" *Salch v. Salch*, 240 N.J. Super. 441, 443 (App. Div. 1990) (quoting *Curtils v. Finneran*, 83 N.J. 563, 571 (1980)).

This Appellate Court recently held: A trial court "must state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s]." *Avelino–Catabran v. Catabran*, 445 *N.J. Super.* 574, 594–95 (App. Div. 2016) (alterations in original) (quoting *Monte v. Monte*, 212 N.J. Super. 557, 565 (App. Div. 1986)). When that is not done, a reviewing court does not know

whether the ultimate decision is based on the facts and law or is the product of arbitrary action resting on an impermissible basis. *Monte*, 212 N.J. Super. at 565.

The trial court's February 15, 2024 Order was unaccompanied by any findings of fact, conclusions of law, or legal reasoning, pursuant to *R.* 1:6-2(f), explaining the court's decisions. While a trial court has discretion to determine when an explanation is necessary or appropriate for interlocutory orders, *see R.* 1:6-2(f), here, an explanation was warranted under these circumstances, not only due the nature of this matter, but also in light of the factual record establishing no prejudice to Defendants. *See Cardell, Inc., v. Piscatelli*, 277 N.J. Super. 149, 155 (App. Div. 1994) (holding the absence of findings to explain a decision unsupported by the record permitted the appellate court to conclude that the decision was a mistaken exercise of discretion). Thus, there was a mistaken exercise of discretion, and reversal and remand is warranted.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANTS' MOTION TO BAR PLAINTIFFS' EXPERT REPORTS. (Order: Pa1-2)

A. Standard of Review.

Appellate courts review trial courts' evidentiary rulings for abuse of discretion. *Primmer v. Harrison*, 472 N.J. Super. 173, 187 (App. Div. 2022). The same standard is applied to review a trial court's decision on an in limine motion regarding the admissibility of evidence, including expert testimony. *Ibid.* (citing

State v. Cordero, 438 N.J. Super. 472, 483-84 (App. Div. 2014)); *Pomerantz Paper Corp. v. New Cmty. Corp.*, 207 N.J. 344, 371 (2011). The same standard is also applied to discovery matters, including discovery extensions. *Pomerantz*, 207 N.J. at 371.

B. The Trial Court Abused Its Discretion in Granting Defendants' Motion.

The trial court failed to explain its decision to grant Defendants' motion to bar Plaintiffs' expert reports. The trial court stated that the court adopted the reasons set forth in Defendants' brief but failed to set forth any analysis of the facts or law. (Pa1-2). This was an abuse of discretion that will result in severe prejudice to Plaintiffs. Despite the trial court's notation in its Order, Plaintiffs clearly demonstrated exceptional circumstances existed, *i.e.*, it efforts to work with Defendants and the severe health issues of their engineering expert, that caused the delay of his preparation of his expert report. Moreover, the trial court failed to explain what prejudice Defendants would face considering the trial date was adjourned four months and there is ample time for Defendants to obtain a rebuttal expert report.[7]

Courts have consistently and routinely exercised their discretion in finding good cause to not barring a late expert's report in the interest of substantial justice especially, when the party seeking the relief has not intentionally delayed disclosure and would suffer extreme prejudice.

[7] Defendants had already submitted an expert engineering report. (Pa217)

In *Tucci v. Tropicana Casino and Resort, Inc.,* 364 N.J. Super. 48, 51, 53-54 (App. Div. 2003), the plaintiff failed to serve expert reports by the discovery deadline and yet the Appellate Court permitted the late report. The Appellate Division held that:

> "[the Court has] been particularly indulgent in not barring a late expert's report where the report was critical to the claim or defense, **the late report was submitted well before trial, the defaulting counsel was not guilty of any willful misconduct or design to mislead, any potential prejudice to the adverse party could be remediated, and the client was entirely innocent**."

See ibid. (emphasis added). *See also O'Connor v. Altus*, 67 N.J. 106, 129-130 (1975); *Mason v. Sportsman's Pub*, 305 N.J. Super. 482, 493-494, (App. Div. 1997); *Glowacki v. Underwood Memorial Hosp.*, 270 N.J. Super. 1, 13-14 (App. Div. 1994); *Gaido v. Weiser*, 227 N.J. Super. 175, 192-193 (App. Div. 1988), *aff'd*, 115 N.J. 310 (1989).

Here, there is no prejudice to Defendants, as the expert reports were submitted prior to the original trial date and Defendants could have served responsive/rebuttal reports within the 20-day deadline set forth in the case management schedule prior to the original trial date and especially the rescheduled trial. Clearly there was no willful misconduct by counsel, and the clients were entirely innocent. Given these facts, there was no basis to bar Plaintiffs' expert reports.

As is typically the case, when there is an issue in meeting a deadline under the case management schedule, Plaintiffs endeavored to resolve same with Defendants before burdening the court. Plaintiffs' counsel continuously communicated with Defendants' counsel to seek a further extension of the expert report deadline due to Plaintiffs' expert engineer's health issues as well as to address other open discovery issues, such as Defendants' request to depose Plaintiffs Claudia Costa and Matthew Diczok on the same day. (Pa240-43).

On September 28, 2023, Defendants' counsel agreed to a modified case management schedule. (Pa230). Shortly thereafter it became apparent the proposed schedule was no longer viable as the parties were unable to schedule the depositions of Plaintiffs, Claudia Costa and Matthew Diczok, sought by Defendants and, as such, the proposed order was not submitted for consideration by the Court. (Pa236).

On October 9, 2023, Plaintiffs' counsel proposed to Defendants' counsel a modified case management schedule to extend the discovery end date as well as to request an adjournment of the trial date. (Pa248-50). Plaintiffs' counsel also offered several dates from November 8 through November 17 for the depositions of Plaintiffs Costa and Diczok to be conducted on the same day, as requested by Defendants' counsel. (Pa252). Defendants' counsel did not respond to the October 9 request or the three follow-up requests from October 10 through 17. (Pa252-57). Defendants' counsel represented to the trial court having not received Plaintiffs'

expert report by October 20 by stating, "we concluded the easement holders were not providing expert reports." (Pa218-19). But three days prior, on October 17, Plaintiffs' counsel had sent Defendants an email asking if he would consent to the modified case management schedule seeking to adjourn the trial date. (Pa272). It soon became apparent that Defendants' counsel abandoned all communication with Plaintiffs' counsel regarding the extension of discovery. The lack of cooperation and communication by Defendants' counsel here is inexplicable. Plaintiffs' counsel emailed with Defendants' counsel regarding the request to extend the discovery schedule numerous times, to which Defendants' counsel refused to respond.

For the first time, in a December 4, 2023 letter to the Court, Defendants suggested that because Plaintiffs had not provided an expert report by October 20, Defendants' counsel "elected not to take a bunch of expensive depositions." (Pa269). But again, only three days prior, Plaintiffs' counsel had written Defendants' counsel with dates for the deposition of Plaintiffs Costa and Diczok. (Pa252.) Defendants' counsel never communicated to Plaintiffs that they no longer wished to depose Plaintiffs Claudia Costa and Matthew Diczok. (*See* Pa268-69). Defendants' December 4 letter was nothing more than an attempt at gamesmanship. Defendants' counsel failed to mention in his letter that the parties had been communicating about a revised discovery and that he abruptly stopped communicating. Defendants should not have been rewarded for their actions.

Making Defendants' motion less persuasive was the course of conduct between the parties where discovery was conducted beyond the September 29, 2023 discovery end date. For example, Plaintiffs accommodated Defendants in scheduling Defendant Martin's deposition on October 10, and in working to produce Plaintiffs Costa and Diczok. (Pa248). In addition, Defendants were still providing discovery to Plaintiffs as recently as October 30 and December 5, well after the discovery end date. (Pa259, 261). No party has objected. This discovery timeline demonstrates that Defendants' asserted rationale for never responding to schedule Plaintiffs' depositions is implausible and unfounded.

Based on the facts set forth above, there was no basis for the trial court to grant Defendants' motion. None of the arguments relied on by Defendants, and inappropriately adopted by the trial court, justified barring Plaintiffs' expert reports. There was no analysis as to why *Tucci*, further discussed *infra*, is not controlling in this case nor could there be such an analysis. In fact, Defendants' brief failed to even address that case. (*See* Pa333-42). Moreover, Defendants' moving brief ignored the health issues faced by Plaintiffs' expert and the impact that had on scheduling. (*See* Pa333-39).

Further, Plaintiffs' engineering expert report is integral to Plaintiffs' request for equitable relief at trial in the form of ordering that Uhrich construct an alternative bulkhead design. The proposed alternative design for the Uhrich Bulkhead is a

plausible and safe remedy that would restore the prior safe condition of the original bulkhead and be consistent with all local and state regulations. Moreover, Plaintiffs' expert's testimony explains in detail the construction of the current Uhrich Bulkhead and how it creates a significant safety risk to Plaintiffs' access to the bay. Without the expert engineering report and Plaintiffs' expert testimony at trial, Plaintiffs will not be able to refute Defendants' claims as to whether the Uhrich Bulkhead denies safe and reasonable access, whether the easement area may be restored or, at to an alternative design that provides reasonable access while addressing Defendants' concerns of protecting their property from storms.

Additionally, the appraisal report and testimony are critical to establishing the diminution in value of Plaintiffs' properties following the construction of the Uhrich Bulkhead, which was asserted as a counterclaim to the Uhrich complaint. The remaining issue for trial is to determine damages Plaintiffs will suffer from the deprivation of reasonable bay access. Such expert appraisal testimony is crucial to establishing the harm caused to Plaintiffs by the Uhrich Bulkhead in the event the trial court rules the bulkhead may remain.

Therefore, barring Plaintiffs' expert reports only prejudices Plaintiffs' ability to prove their only remaining claims left at trial. Defendants were not at all prejudiced because Defendants received Plaintiffs' expert reports nearly two months prior to the original trial date and almost six months prior to the second trial date in

April. Defendants sat on their hands for over a month before seeking to bar Plaintiffs' expert reports. There is simply no prejudice that Defendants could face from permitting the expert reports to be introduced at trial; especially given the fact that Defendants had and have sufficient time to serve a rebuttal report, as Defendants have retained an expert. (*See* Pa224). Thus, the trial court clearly abused its discretion in barring Plaintiffs' expert report.

POINT III

PLAINTIFFS ESTABLISHED EXCEPTIONAL CIRCUMSTANCES. (Order: Pa1-2; 2T8; 2T12-13)

A. Plaintiffs' Expert Engineer's Health Condition Was Beyond the Control of Plaintiffs and Plaintiffs' Counsel.

Rule 4:24-1(c) permits the extension of a discovery deadline after a trial date is fixed where exceptional circumstances are shown. To show exceptional circumstances, a party must explain

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [*Hollywood Café Diner, Inc. v. Jaffee*, 473 N.J. Super. 210, 217 (App. Div. 2022) (quoting *Rivers v. LSC P'ship*, 378 N.J. Super. 68, 79 (App. Div. 2005)).]

Health issues of a key witness is an example of exceptional circumstances explicitly recognized by our courts. *See O'Donnell v. Ahmed*, 363 N.J. Super. 44, 51

(Law Div. 2003) (listing examples of qualifying exceptional circumstances under *Rule* 4:24-1(c), including "death or health problems of a key witness requiring further discovery to develop information caused by the loss of the witness").

In opposition to Defendants' Motion to Bar Plaintiffs' Expert Reports, Plaintiffs produced a certification from their engineering expert Mr. Rioux detailing his multiple orthopedic surgeries that hindered his ability to work. (*See* Pa328-32). Mr. Rioux had neck fusion in January 2023; a knee replacement in March 2023; another knee replacement in June 2023; a hip replacement in August 2023; and cubital tunnel release in September 2023. (Pa329). Mr. Rioux then experienced complications from these surgeries in September 2023 which led to a ten-day hospitalization followed by several nurse visits per week to his home from September to November 2023. (Pa330). Mr. Rioux had an additional surgery scheduled for December 2023. (Pa331). Mr. Rioux certified as to attending doctor appointments on a weekly or biweekly basis, and for months at a time attending physical therapy sessions three times per week. (*Ibid.*) Mr. Rioux also certified as to his limited ability to work while taking medications following these surgeries due to the side effects from the medications. (*Ibid.*)

It is clear that exceptional circumstances are present here given the health issues faced by Plaintiffs' expert over the last year. Plaintiffs identified Timothy Rioux as their expert engineer in discovery in May 2023. (Pa279-80). Plaintiffs'

counsel advised Defendants their expert was suffering from health issues repeatedly since September 27, 2023. (Pa202, 230). While Defendants' counsel agreed to the initial modified schedule he ignored repeated communications regarding further modifications, necessitated in part on his insistence to depose Plaintiffs Costa and Diczok on the same date. Defendants' counsel ignored these communications and failed to address these facts in their motion. The health issues of the expert engineer were beyond the control of Plaintiffs' counsel. This is a clear scenario of exceptional circumstances that warranted the denial of Defendants' motion.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN IGNORING THE INTENT BEHIND THE BEST PRACTICE RULES TO SECURE A JUST DETERMINATION AND FOSTER EFFICIENCY IN LITIGATION. (Order: Pa1-2; 2T4-14; 2T16-21)

A. Plaintiffs' Counsel Was Diligent in Pursuing Discovery and Seeking an Extension of the Discovery Date as Evidenced by Persistent Correspondence To Defendants' Counsel.

It was an abuse of discretion for the trial court to penalize Plaintiffs for Defendants' counsel's initial agreement to a modified schedule and then do an about face and fail to respond to Plaintiffs' counsel's continuous communications regarding the revised schedule. The New Jersey Court Rules amendments entitled Best Practices Rules that were adopted in 2000, including *Rule* 4:24-1(c), "were intended to counteract an unfortunate and increasingly dilatory, casual and desultory

approach by some members of the bar to their litigation responsibilities." *Tucci*, 364 N.J. Super. at 51, 53.

In *Tucci*, the parties had difficulty scheduling the plaintiffs' expert's inspection that eventually occurred two weeks after the case management order provided for expert reports to be served. *Id.* at 51. The expert report was later served thirty-nine days after the expert report deadline, and the trial court granted the defendants' motion to bar the expert's testimony due to the late report. *Ibid.*

This Court in *Tucci* understood that although the "plaintiffs' attorney might well have sought a further extension of the expert-report deadline," the attorney "reasonably relied on the cooperation of his adversaries who made no objection to the expert's inspection of the elevator after the submission deadline." *Id.* at 53. The Court encouraged parties to discuss such relief themselves so as not to "unduly" apply to the courts for what can be resolved between the parties. *Ibid.*

Here, Plaintiffs' counsel reasonably relied on the cooperation of Defendants' counsel. On October 9, 2023, Plaintiffs' counsel proposed a modified case management schedule to extend the discovery end date as well as to request an adjournment of the trial date so as to allow for the completion of party depositions and the service of expert reports. (Pa254). Defendants' counsel did not respond to this request or the two follow-up requests Plaintiffs' counsel sent from October 10 through October 17. (Pa252-55). Defendants' counsel initially indicated he was

amenable to the proposed schedule. (Pa230). But shortly thereafter it became apparent the proposed schedule was no longer viable as the parties were unable to schedule the depositions of Plaintiffs Costa and Diczok sought by Defendants and, as such, the proposed order was not submitted for consideration to the trial court.

On December 20, 2023, Plaintiffs' counsel wrote to the trial judge's secretary indicating that the parties may need the court's assistance in resolving the expert report submission issue. (Pa201-03). Rather than responding to this email and discussing this issue with Plaintiffs' counsel, two days later Defendants simply proceeded to file their Motion to Bar the Reports. (Pa215).

The course of conduct between both parties in this matter had clearly been to accept such late discovery production. Plaintiffs' counsel accommodated Defendants' counsel by scheduling Defendant Martin's deposition on October 10, 2023, after the discovery deadline. (Pa248). Plaintiffs' counsel continued to offer to schedule depositions of Plaintiffs Costa and Diczok into November. Plaintiffs' counsel cooperated with Defendants' counsel by accepting discovery from Defendants through December 5, 2023, well after the discovery deadline. (Pa261).

Plaintiffs here ultimately served their expert reports forty-nine days after the September 29, 2023 deadline to do so, and twenty-seven days after the date to which Defendants had previously agreed. This is not much different than the thirty-nine day delay that was permitted in *Tucci*. *See* 364 N.J. Super. at 53. Moreover, nearly

two months remained until the scheduled January 9, 2024 trial date that Defendants knew Plaintiff was seeking to have adjourned. (*See* Pa257). This Court in *Tucci* reasoned: "If the thirty-nine day delay resulted in an inability of the parties to complete the additional discovery in the more than two months remaining prior to the trial date, then the trial date could have been adjourned. It was still sufficiently far off that the court's own schedule could have made that accommodation." *Tucci*, 364 N.J. Super. at 53.

This was so because another "major concern of the Best Practices rules" was to establish fixed trial dates "by the avoidance of last-minute or 'eve of trial' adjournments by reason of incomplete discovery." *Ibid.* Plaintiffs here did not submit their expert reports on the "eve of trial." Defendants had nearly two months before trial to review the reports and serve rebuttal reports, if necessary, which was due 20 days after the service of the report. Notwithstanding the aforesaid, Plaintiffs continued to offer Defendants the ability to serve rebuttal reports. (*See* Pa201-02).

In sum, the Best Practices Rules were "designed to improve the efficiency and expedition of the civil litigation process and to restore state-wide uniformity in implementing and enforcing discovery and trial practices," not "to do away with substantial justice on the merits or to preclude rule relaxation when necessary to 'secure a just determination.'" *Tucci*, 364 N.J. Super. at 53 (first citing *Vargas v. Camilo*, 354 N.J. Super. 422, 425 (App. Div. 2002), *certif. denied*, 175 N.J. 546

(2003); and then citing *R.* 1:1-2). The trial court here ignored this notion as well as the other purposes behind the enactment of *Rule* 4:24-1 outlined by this Court in *Tucci* and declined to relax the court rules in furtherance of substantial justice on the merits. Goals of judicial efficiency are supported by the parties working together to cooperate. *See ibid.* ("[T]he litigation process cannot effectively take place without some measure of cooperation among adversaries.").

The trial court's decision to grant Defendants' motion was therefore contrary to the intent of the enactment of *Rule* 4:24-1. The trial court's order merely states that the Plaintiffs' expert reports were "out of time at time of trial; and for the reasons set forth in the movant's brief which the court adopts and for the failure of the opposition to establish exceptional circumstances warranting the late admission of the proffered reports." Plaintiffs' counsel diligently set forth to work with Defendants' counsel to ensure discovery exchange by both parties was complete and to communicate their engineering expert's health issues. Moreover, the January 29 trial date was adjourned at Defendants' request and the new trial date of April 30, 2024 provided Defendants ample time to serve responsive reports.

Therefore, Plaintiffs have demonstrated all four requirements to prove exceptional circumstances existed. *See Hollywood Café Diner*, 473 N.J. Super. at 217. Penalizing Plaintiffs in their pursuit of equitable relief against Defendants was

unwarranted. The trial court's order was an abuse of discretion and should be reversed to permit Plaintiffs to introduce expert reports and testimony at trial.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this court reverse the trial court's February 15, 2024 order.

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Attorneys for Plaintiffs, Attorneys for Plaintiffs Kohn & Kohn Realty, LLC; Carol L. Kruegle Trust; Jennifer M. Lawlor, an individual; James D. Hannah & Leslee A. Jackson, husband and wife; Norma C. Costa & Claudia Costa, mother and daughter

Dated: May 3, 2024

By: /s/ Timothy E. Corriston
TIMOTHY E. CORRISTON

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2121-23

KOHN & KOHN REALTY, LLC; CAROL L. KRUEGLE TRUST; JENNIFER M. LAWLOR, an individual; JAMES D. HANNAH & LESLEE A. JACKSON, husband and wife; NORMA C. COSTA & CLAUDIA COSTA, mother and daughter, Plaintiffs-Appellants, vs. MARGARET A. UHRICH; MICHAEL P. UHRICH; WILLIAM D. MARTIN and WILLIAM D. MARTIN REVOCABLE TRUST , Defendants-Respondents. *(caption continued on next page)*	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY - CHANCERY DIV. DOCKET NO. OCN-C-99-22 Sat below: Honorable Mark A. Troncone, P.J.Ch.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS MARGARET A. UHRICH, MICHAEL P. UHRICH, WILLIAM D. MARTIN AND WILLIAM D. MARTIN REVOCABLE TRUST

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MICHAEL P. UHRICH; MARGARET A. UHRICH, Plaintiffs-Appellants, vs. MARIANO D. MOLINA; ALI MOLINA; BOB VAN BUREN; ROBYN VAN BUREN; KOHN & KOHN REALTY, LLC; JENNIFER M. LAWLOR AND MATTHEW F. DICZOK; JAMES D. HANNAH AND LESLEE A. JACKSON; CAROL L. KRUEGLE TRUST; JOE CORBI; DANA CORBI; MANNY GUARDA; JOANNA GUARDA; NORMA C. COSTA AND CLAUDIA COSTA; CHRIS NICOSIA; HILLARY BELL; JOEL HENKIN AND ELLEN S. HENKIN, AND WILLIAM D. MARTIN, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY- CHANCERY DIV. DOCKET NO. OCN-C-101-22

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I. Preliminary Statement

The trial court correctly excluded Plaintiffs' non-essential expert reports served months out of time, and well and after the discovery end date, because Plaintiffs failed to request a timely extension, or even meet the applicable standard for an extension, and Defendants were prejudiced by Plaintiffs' late service.

Plaintiffs and Defendants are neighbors on Friends Way, a 20' wide easement extending from Long Beach Boulevard to Barnegat Bay in Long Beach Island, New Jersey. Defendants Michael and Margaret Uhrich and Willam Martin own the bayfront homes at the end of Friends Way. Mr. Martin has owned his home since 1982. The Uhrichs purchased their home in October 2020. At the time of the Uhrich's purchase, Mr. Martin had recently replaced the portion of the bayfront bulkhead on his property, but he did not alter the portion of the bulkhead crossing the easement. The Uhrichs also had to replace their old bulkhead after they purchased their home, however, due to the dilapidated condition of the bulkhead along the easement, their bulkhead builder recommended connecting to Mr. Martins' newer, more stable bulkhead. The Uhrichs agreed, and the new bulkhead was built across the easement area at the height required by the township. In May 2022, the Uhrich and Mr. Martin's

neighbors filed suit to have the bulkhead in the easement area removed or lowered it to its previous height, which was essentially ground-level.

The Court first ordered the parties to serve expert reports simultaneously by August 19, 2023. Defendants complied and served their expert report on August 14. Defendants requested and received two extensions, but did not serve an expert report within the final, extended deadline of October 20, 2023. When no responsive expert report was served by that date, Defendants stopped pursuing Defendants' depositions and began preparing for trial, which was scheduled for January 9, 2024. Nearly a month later, Defendants served two expert reports, which Plaintiffs moved to bar since the Defendants had not complied with the final deadline or requested another extension, and the Plaintiffs had conducted their litigation strategy accordingly.

Defendants had prepared for trial since mid-October under the assumption Plaintiffs were not producing expert reports. This is exactly the situation contemplated by the Rules and standards applicable to the underlying motion. The trial court agreed there was no "exceptional circumstance," the late reports were not vital to Plaintiffs' case and Defendants were prejudiced by late service. Of course, it is not the Defendant's burden to show prejudice, but rather the Plaintiff's obligation to show "exceptional circumstances." None existed. The Appellate Court should affirm this sound decision.

II. Statement of Facts and Procedural History

This consolidated matter involves a dispute between neighbors arising from the construction of a new bulkhead within an easement in Long Beach Island. Defendants Michael and Margaret Uhrich ("Uhrich") and William D. Martin Revocable Trust ("Martin") own bayfront homes at the west end of an easement known as Friends Way. (Pa4-5, 27-28). Plaintiffs Kohn & Kohn Realty, Carol L. Kruegle Trust, Jennifer Lawlor, James Hannah, Leslee Jackson, Norma Costa and Claudia Costa, are seven of the remaining twenty owners of the homes located along Friends Way. (Pa3-4, 27-28).

Mr. Martin has owned his bayfront home on Friends Way since 1982. (Pa364). The Uhrichs bought their Friends' Way property in October 2020. (Pa348, 385). Prior to Uhrich's ownership, the portion of the bulkhead in the easement area was dilapidated and required ongoing repairs, which were completed by the prior owners' landscaper on a continuous basis. (Pa370-381). The Uhrichs planned to replace the bulkhead on their property, and during construction, the bulkhead builder recommended they connect to the Martin bulkhead because the easement bulkhead would not provide adequate support. (Pa353-354, 418). The new bulkhead was constructed to conform with the Township Code as of November 2021, which required an elevation of six feet above mean sea level. (Pa355-356, 422).

Plaintiffs' Complaint, filed May 20, 2022, requests to remove and lower the newly-constructed, modern bulkhead, built to the height required by the municipality. (Pa12-14). Defendants' Complaint, filed the same day, requests a declaratory judgment as to the persons, activities and structures permitted within the easement area, as well as the relative liabilities of all parties for its maintenance and insurance. (Pa45). Both parties' subsequently amended their pleadings to add punitive damages claims. (Pa102, 150).

Under the trial court's May 8, 2023 Management Order, all expert reports were to be served on or before August 19, 2023. (Pa220). Defendants served their expert report on August 14, 2023, in compliance with the deadline. (Pa223). The same day, Plaintiffs requested an extension to serve their expert reports, and the trial court then extended the expert report and expert deposition deadline to September 29, 2023. (Pa227). On September 27, 2023, just two days before the extended deadline, Plaintiffs requested Defendants' consent to extend their expert deadline to October 20, 2023. (Pa229). Counsel consented, but an Order was never submitted to the trial court or entered, and Plaintiffs did not produce an expert report by October 20, 2023.

Defendants never agreed Plaintiffs' expert reports could be served on November 17, 2024, and when Plaintiffs' expert reports were not served in October, Defendants concluded Plaintiffs were not serving expert reports, and

elected not to take a number of depositions based on the facts and evidence in the record at the time. (Pa219).

III. Legal Argument

A. The Standard of Review Requires Deference to the Trial Court's Decision

Trial court judges "are accorded wide discretion in exercising control over their courtrooms and trial proceedings[,]" Martin v. Newark Public Schools, 461 N.J. Super. 330, 340 (App. Div. 2019), and are "ultimately responsible for the progress of any litigation." D.A. v. R.C., 438 N.J. Super. 431, 452 (App. Div. 2014). Appellate courts "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." State v. Brown, 236 N.J. 497, 521-522 (2019) (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)).

> Although the ordinary "abuse of discretion" standard defies precise definition, it arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." In other words, a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. It may be "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment."

Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002) (internal citations omitted). With regard to extensions of time for discovery, appellate courts have

"generally applied a deferential standard in reviewing the decisions of trial courts." Pomerantz Paper Corp., 207 N.J. at 371.

Rule 4:25-8(a)(1) provides a motion in limine is an application "returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which. . . , if granted, would not have a dispositive impact on a litigant's case." The Appellate Division applies "the same [abuse of discretion] standard of review to in limine motions adjudicating the admissibility of evidence." Primmer v. Harrison, 472 N.J. Super. 173 (App. Div. 2022).

The trial court correctly determined there were no exceptional circumstances, Defendants were prejudiced by the delay and the Plaintiffs' reports were not essential. Applying the deferential standard, on this record, the Appellate Division should affirm the trial court's decision to bar Plaintiffs' untimely expert reports.

B. Plaintiffs Failed to Show Exceptional Circumstances to Extend Discovery

The trial court correctly found there were no exceptional circumstance to support a third extension of Plaintiffs' expert report deadline. Under Rule 4:24-1(c), "no extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." Courts review four factors in determining whether to extend discovery after a trial date is set:

> First. . . , any application should address the reasons why discovery has not been completed within [the] time [allotted] and counsel's diligence in pursuing discovery during that time. Any attorney requesting additional time for discovery should establish that he or she did make effective use of the time permitted under the rules. A failure to pursue discovery promptly, within the time permitted, would normally be fatal to such a request. Second, there should be some showing that the additional discovery or disclosure sought is essential, that is that the matter simply could not proceed without the discovery at issue or that the litigant in question would suffer some truly substantial prejudice. Third, there must be some explanation for counsel's failure to request an extension of the time for discovery within the original discovery period. Finally, there generally must be some showing that the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473 (App. Div. 2005) (citing Vitti v. Brown, 359 N.J. Super. 40, 51 (Law. Div. 2003)). With regard to expert reports, where "the delay rests squarely on. . . counsel's failure to retain an expert and pursue discovery in a timely manner," and where "the Vitti factors are not present, there are no exceptional circumstances to warrant an extension." Huszar, 375 N.J. Super. at 474; Rivers v. LSC Partnership, 378 N.J. Super. 68, 79 (App. Div. 2005). Counsel's "failure to properly prepare a matter in a timely manner" is not an exceptional circumstance, and exceptional circumstances "will not excuse the late request to secure expert reports, or. . . the absence of expert opinion. . . where [a party's] counsel failed to exercise due diligence during the extended discovery period." Id. at 80-82.

Rule 4:24-1(c) incorporates the "Best Practices" initiative, which aims to "provide attorneys, litigants and witnesses with a firm and credible trial date." Leitner v. Toms River Regional School District, 392 N.J. 80, 90 (App. Div. 2007). In the context of expert availability within the Best Practices standards, courts are tasked to balance the "tension between, on the one hand, the salutary principle that the sins of the advocate should not be visited on the blameless litigant, and on the other the court's strong interest that management of litigation. . . must ultimately lie with the trial court and not counsel trying the case." Kosmowski v. Atlantic City Med. Ctr., 175 N.J. 568, 574 (2003) (internal citations omitted).

The trial court's decision comports with both the language and goals of R. 4:24-1(c) and the Best Practices standards. At the time of the order at issue in this appeal, the underlying litigation was nearly two years old, with trial scheduled on January 9, 2024. (Pa1, 228). Plaintiffs did not move for an extension before the September 29, 2023 discovery end date, and did not submit a proposed consent order extending the deadline to the court. (Pa268-269). Instead of indicating they intended to extend the deadline again, or finding another expert to provide a report before the deadline, Plaintiffs let the deadline lapse and served reports weeks later, after Defendants had made a strategic decision not to conduct depositions.

The late reports are not essential to Plaintiffs' case, and it is not clear how they could be, since this is not a professional malpractice action. However, it is evident by the lack of timely production that the reports were not treated as essential. Plaintiffs litigated this matter for years and filed two summary judgment motions without the reports, so they could not possibly be "essential."

Defendants were already prejudiced (and made it known to the trial court) by Plaintiffs' failure to serve expert reports simultaneously, as required by the original Court Order, and the trial court's agreed there was no legitimate reason for them to be prejudiced again. Also, the expert's health issues were certainly foreseeable considering they existed since August. (Pa268-269). Plaintiffs could have made a Motion or sought alternative arrangements before the deadline, but they did not. There is simply no exceptional circumstance here, and the trial court's discretion on this discovery decision should be upheld.

C. The Trial Court Correctly Found Defendants Would Be Prejudiced by the Late Admission of Expert Reports

Defendants made specific litigation decisions based on Plaintiffs' non-service of reports, which would take months of discovery and significant expense to correct. (Pa268-269). The trial court recognized Defendants were prejudiced by having prepared for trial under the impression Plaintiffs were not serving expert reports once the deadline lapsed without an extension request. Aside from preparation for trial, the introduction of an alleged new means of

"reconfiguring" the bulkhead, and the introduction of "economic damages" impacting rentals of several properties, also introduce and compel the retention of a responsive expert and depositions of several witnesses, including the parties themselves (of which there are nearly a dozen).

Defendants explained, and the trial court agreed, it would be highly prejudicial to admit late expert reports where Defendants had proceeded for months, through the close of discovery, under the belief Plaintiffs were not producing expert reports. Discovery decisions were made based on the absence of expert reports. Defendants abandoned depositions based on the facts and reports in the record as discovery ended. (Pa268-269). Dispositive motions were filed on the premise that Plaintiffs would not, and could not, introduce expert reports. Defendants should not be required adjust their discovery strategy after the close of discovery. The trial court correctly agreed with this position. It would be substantially unfair and prejudicial to Defendants if Plaintiffs' expert reports were admitted at trial under these circumstances. This case essentially would start over many years after it started, and months after it was supposed to go to trial.

V. Conclusion

Under the applicable standard and facts in this case, and for the reasons set forth above, this Court should affirm the discretionary ruling of the trial court barring Plaintiffs' late reports.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL

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PRELIMINARY STATEMENT

In granting Defendants' Motion to Bar Plaintiffs' Expert Reports, the trial court ignored the exceptional circumstances leading to the delay in Plaintiffs' service of their reports on November 17, 2023 that, while beyond the deadline set forth in the case management order, were filed seven weeks before the original trial date on January 9, 2024. Nor did the trial court consider that Plaintiffs had been attempting to work with Defendants on a modified schedule and that Defendants had sufficient time to serve responsive expert reports within the twenty-day period set forth in the case management schedule. The trial court abused its discretion in granting Defendants' motion by order dated February 15, 2024 when, by that time, due to Defendants' unavailability, the trial had been adjourned until April 30. Contrary to Defendants' assertions, there was no prejudice as Defendants still had more than enough time to exchange rebuttal reports and prepare for trial. Nor did the trial court find there was prejudice. In fact, the trial court failed to make any findings of facts related to the aforementioned issues. As such, Plaintiffs respectfully submit that this Court should reverse the trial court's February 15, 2024 Order granting Defendants' motion to bar Plaintiffs' expert reports.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANTS' MOTION TO BAR PLAINTIFFS' EXPERTS REPORTS (Order: Pa1-2; 2T7-14)

While Defendants argue the trial court correctly determined there were no exceptional circumstances (Db3), they failed to cite to any specific findings of fact or conclusions of law by the trial court in support. That is because there were no such findings made by the trial court. (Pa1) This, of course, is contrary to the direction given by this Court to the trial courts to clearly set forth factual findings as they relate to their conclusions of law. *See Salch v. Salch*, 240 N.J. Super. 441, 443 (App. Div. 1990) ("Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion.") Here, the trial court offered a single sentence stating that Plaintiffs failed to establish exceptional circumstances for the reasons set forth in Defendants' brief. (Pa1) The court did not address any of the undisputed facts presented by Plaintiffs.

Defendant argues also that the trial court found that Defendants were prejudiced by the delay and that Plaintiffs' reports were not essential. (Db3) But here again, there was no such finding set forth by the trial court. (Pa1) Thus, the trial court's decision cannot be accorded discretion.

The trial court did not address at all the considerable efforts by Plaintiffs to coordinate with Defendants on several open discovery issues – including Defendants' desire to depose Plaintiffs Costa and Diczok up through October 17, 2023. (Pa230; 234-38; 248-50; 252-57). Defendants' counsel represented to the trial court that having not received Plaintiffs' expert report by October, Defendants "concluded the easement holders were not providing expert reports." (Pa218-19). Defendants reiterate that claim in their filing with this Court: "when Plaintiffs' expert reports were not served in October, Defendants concluded Plaintiffs were not serving expert reports, and elected not to take a number of depositions. . . ." (Db4-5) But on October 17, Plaintiffs wrote to Defendants regarding the scheduling of the two depositions sought by Defendants of Plaintiffs Costa and Diczok. Plaintiffs also asked if Defendants would consent to the modified case management schedule seeking to adjourn the trial date. (Pa252). By that time, Plaintiffs had already accommodated Defendants by accepting discovery after the end date (Pa259, 261) and conducting the deposition of Defendant Martin on October 10. (Pa248) But at that time, Defendants did not advise that they did not wish to proceed with the Costa and Diczok depositions which Defendants required to be on the same date. (Pa238) That claim was first asserted by Defendants in letter to the trial court dated December 4, 2022 more than two weeks after Plaintiffs had served their expert reports and

within the twenty-day period set forth in the case management schedule time to serve responsive expert reports. (Pa228; 267)

Nor did the trial court address the exceptional circumstances surrounding the health of Plaintiffs' engineering expert, Timothy Rioux, PE, of which Defendants were well-aware. (Pa240-43; 328-32) During oral argument, the trial court suggested Plaintiffs should have hired a new engineer. (2T12:9-17)[1] But Mr. Rioux had been engaged a year earlier and was intimately familiar with the issues and uniquely qualified to address same. (2T7:7-18; Pa329) But the court did not make any findings of fact related to the delays caused by Mr. Rioux' situation and how it delayed completion of his report. (Pa328)

Moreover, the trial court demonstrated a profound misunderstanding of the issue for which expert engineering testimony is required. The trial judge suggested that the engineer's testimony is not necessary to address the scope of the easement at issue in the case. (2T13:14-17) When it was explained to the court that the court had previously recognized Plaintiffs' easement rights to the water, (2T13:18-22; *see also* Pa91-92), and that the issue before the court was whether the bulkhead should come down and how that may be accomplished, (2T13:24 – 14:4), the trial judge's response was "that testimony could be provided by – by [Plaintiffs]." (2T14:5-6)

[1] 2T = Transcript of January 12, 2024 Oral Argument on Defendants' Motion to Bar Plaintiffs' Expert Reports.

Of course, it would not be appropriate to take the testimony of a layperson on removal and reconstruction of a bulkhead that is subject to the State and local regulation. Plaintiffs seek to offer testimony from a professional engineer with extensive experience in marine structural design who also has experience working in heavy construction as a Diver and engineering experience with marine and underwater construction. (Pa279-80; 329) The court did not address this further in its order. Nor did the court address the extensive and unanticipated medical issues that delayed the engineer's report.

Defendants argue that as of the February 15, 2024 order of the trial court, now on appeal to this Court, the underlying litigation was nearly two years old with a January 9 trial date. (Db8) This litigation commenced May 20, 2022. (Pa3) By the time the trial court heard argument on Defendants' Motion to Bar Plaintiffs' Expert Reports on January 12, 2024, (2T), the January 9 trial date had been adjourned to January 29. (Pa308). The January 29 trial date was also adjourned because Defendants were unable to proceed on that date. (2T10:12 – 11:14; Pa308) On January 26, the court issued a notice re-scheduling the trial for April 30, 2024. (Pa320) By that time the trial court still had not rendered a decision on Defendants' motion to bar Plaintiff expert reports.

On January 30, the trial court issued a subsequent notice advising the parties that the court would render its decision on Defendants Motion to Bar Plaintiffs

Experts on April 30, the first day of trial. (Pa323) By letter dated February 6, 2024, Plaintiffs' counsel requested that the court render a decision on Defendants' motion earlier given the need for the parties to adequately prepare for trial. (Pa324-25) Plaintiffs also reiterated their willingness to allow for depositions of Plaintiffs' experts and for Defendants' experts to prepare responsive/rebuttal reports up to one week prior to the April 30 trial date. (Pa324-325) Yet the trial court still granted Defendants' motion by order dated February 15 with no clearly stated findings of fact or conclusions of law. (Pa1)

There was clearly an abuse of discretion by the trial court that warrants reversal and remand.

POINT II

EXCEPTIONAL CIRCUMSTANCES EXIST TO PERMIT THE LATE EXCHANGE OF PLAINTIFFS' EXPERT REPORTS (Order: Pa1-2; 2T3-5; 2T7-8; 2T11-12; 2T17-20)

Plaintiff have shown exceptional circumstances to extend the time for the exchange of expert reports. *See R.* 4:24-1(c); *Hollywood Café Diner, Inc. v. Jaffee*, 473 N.J. Super. 210, 217 (App. Div. 2022) (*quoting Rivers v. LSC P'ship*, 378 N.J. Super. 68, 79 (App. Div. 2005))

As noted *supra*, the health issues experienced by Plaintiffs' engineer resulted in the delay. *Hollywood Café, supra*, 473 N.J. Super. at 217; *see also O'Donnell v. Ahmed*, 363 N.J. Super. 44, 51 (Law Div. 2003). Also warranting consideration is

the persistent effort of Plaintiffs to keep defendants apprised and seek to work cooperatively on discovery issues.

The expert reports are essential to Plaintiffs' case. The trial court granted partial summary judgment to Plaintiffs by Order dated October 3, 2022, that title to Plaintiffs' properties "include rights to the easement area . . . for access to both Long Beach Boulevard and the water of the Barnegat Bay." (Pa91-92).) Now, the issue that remains is how to provide Plaintiffs safe and reasonable access to the water. And Plaintiffs require expert testimony to address Defendants claims that the bulkhead must remain.

As for the appraisal report, Plaintiffs served both expert reports simultaneously on November 17, 2023, (Pa326) more than seven weeks before the January 9 trial date. Here again, the trial court made no specific findings regarding its exclusion of same. During argument, Defendants' counsel claimed it did not expect to get an appraisal in an easement case. In response to a question by the trial judge, counsel for Defendants stated:

> [T]hey sent the overall appraisal. MAI appraisal. So I have to – which I did not expect to get, you know, in easement case. But it alleges money damages.
>
> [2T17:20-22]

The court then inquired why the appraisal reports should be submitted, to which Plaintiffs' counsel responded that Plaintiffs had asserted a counterclaim (Pa66) in

the consolidated matter for diminution in value of Plaintiffs' properties if the bulkhead remains. (2T19:18-25) Indeed, Defendants sought in discovery all documents related to Plaintiffs' claim that the bulkhead will result in a diminution in value to Plaintiffs' properties. (Pa283) While Plaintiffs had not by their May 2023 discovery responses retained an appraiser, they had reserved their right to do so. Moreover, the parties previously discussed whether the diminution of value claim should be bifurcated from the easement issues. (2T19:18 – 20:7) So there can be no credible reason for Defendants to have been surprised that Plaintiffs obtained an appraisal. More importantly the trial court did not offer any specific findings or rulings on the appraisal.

Here, the reports are critical to Plaintiffs' claims and should not have been barred. *See Tucci v. Tropicana Casino and Resort, Inc.*, 364 N.J. Super. 48, 51, 53-54 (App. Div. 2003). There was no willful misconduct or design to mislead Defendants. More importantly, when exchanged on November 17, 2023, there was certainly no prejudice to Defendants as the trial date was more than seven weeks out, leaving far more time than the twenty-day period set forth in the case management schedule to serve responsive expert reports and Defendants were aware that Plaintiffs were seeking an adjournment (Pa198). An adjournment was ultimately granted, and the trial scheduled for January 29. Defendants knew when arguing their motion on January 12 that they could not proceed on January 29, but still sought to

have the reports barred. Worse still, the trial court granted that motion on February 15, eleven weeks before the newly scheduled trial date. Clearly there was ample time for Defendants to review the reports, obtain rebuttals and prepare for trial. Indeed, despite Plaintiffs permitting Defendants to serve and conduct discovery beyond the deadlines, as a tactical matter, Defendants elected to ignore Plaintiffs outreach to discuss the need to adjust discovery schedule and trial date due to the health issues of the expert, chose not to serve responsive expert reports within the twenty-day period set forth in the case management schedule, and instead, after that period had expired, filed the motion to strike Plaintiffs' expert reports. Unquestionably, the exceptional circumstances here warranted denial of Defendants' motion and the trial court's decision should be overruled. As such, the reports should not have been barred.

POINT III

THE TRIAL COURT MADE NO SPECIFIC FINDING OF PREJUDICE TO DEFENDANTS (Order: Pa1-2; 2T5-6; 2T10-11; 2T18-19)

Defendants argue that "specific litigation decisions [were made] based on Plaintiffs' non-service of reports, which would take months of discovery and significant expense to correct." (Db9) In support, Defendants cite to the December 4, 2023 letter of their counsel to the Court in which it was alleged that Defendants "elected not to take a bunch of expensive depositions…." (Db9 (*citing* Pa268-69))

But Defendants had previously sought the depositions of only two Plaintiffs - Costa and Diczok – and required that those depositions occur on the same date. (Pa240; 248) Defendants allege that the decision to abandon those depositions was made because Plaintiffs had not served reports by October 20, 2023. (Db4-5; Pa267) This argument is belied by the fact that on October 17, Plaintiffs wrote Defendants regarding the scheduling of the Costa and Diczok depositions as well asking if Defendants would consent to the modified case management schedule seeking to adjourn the trial date. (Pa252). Defendants never responded and did not communicate that they no longer wished to depose Costa and Diczok until their December 4, 2023 letter to the trial court. (Pa238; 267)

Clearly the depositions of two fact witnesses will not take months, nor would they result in added costs beyond that to which Defendants had already committed by requesting those depositions. Of course, if the reports are allowed, Defendants may decide to depose those experts as is their prerogative. But here again, that will not take months and even if it did, the parties had months after the trial was adjourned until April 30.

Defendants suggest, without any citation to the record, that "[t]he trial court recognized Defendants were prejudiced by having prepared for trial under the impression Plaintiffs were not serving expert reports once the deadline lapsed

without an extension request." (Db9) But the trial court made no such finding. In fact, the trial court did not make any findings.

Defendants allege that they "proceeded for months, through the close of discovery, under the belief Plaintiffs were not producing expert reports." (Db10) Here again, Defendants are unable to cite to any support in the record for this assertion. In fact, the record here – and before the trial court below – was replete with communications by Plaintiffs to Defendants regarding the request to modify the scheduling order that included the exchange of expert reports. (Pa230; 234-38; 248-50; 252-57) Not once did Plaintiffs suggest they would not produce reports. In fact, the parties had previously been working cooperatively on open discovery items beyond the September 29, 2023 discovery end date. Plaintiffs allowed Defendants to schedule Defendant Martin's deposition on October 10. (Pa248) Defendants were still providing discovery to Plaintiffs as October 30, well after the discovery end date. (Pa259, 261). Yet Plaintiffs have since suggested the record was finalized by October 20 and they were as of that date ready to proceed to trial. (Db5) There was simply no evidence in the record to support this claim that Defendants attribute to the trial court's holding.

Defendants now argue that allowing the reports would require the case to "start over" without any support in the record or the trial court's decision. (Db10) Such hyperbole is not prejudice. The reports were not provided on the eve of trial,

but rather, it was seven weeks before. By the time the court heard Defendants' motion, the trial was then scheduled for January 29, but Defendants were unable to proceed so the trial was then adjourned. By the time the Court granted Defendants motion the trial had been adjourned until April 30 – eleven weeks away in which time any purported prejudice to Plaintiffs could have been remediated. *See Tucci*, *supra*, 364 N.J. Super. at 51, 53-54. Yet, without explanation, the trial court granted Defendants' motion.

There is simply no prejudice that Defendants could face from permitting the expert reports to be introduced at trial. Defendants could have served responsive/rebuttal reports within the 20-day deadline set forth in the case management schedule prior to the original trial date. And, by the time Defendants' motion was decided on February 15 there was another eleven weeks before the April 30 trial date. There was more than sufficient time to serve a rebuttal report, as Defendants have retained an expert. (*See* Pa224). Thus, there was never any prejudice to Defendants and no finding by the trial court of prejudice.

CONCLUSION

The trial court clearly abused its discretion and should be reversed to allow Plaintiffs to introduce expert reports and testimony at trial.

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By: /s/ Timothy E. Corriston
TIMOTHY E. CORRISTON

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