
**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002334-24-T1**

CHRISTOPHER GONZALEZ,

Plaintiff-Appellant,

v.

NICOLE DIBELLO and McELROY,
DEUTSCH, MULVANEY &
CARPENTER, LLP

Respondents-Defendants.

CIVIL ACTION

SUPERIOR COURT, LAW DIVISION
HUDSON COUNTY
DOCKET NO. HUD-L-3518-22

Honorable Joseph A. Turula, J.S.C.
Sat below

**BRIEF FOR APPELLANT
CHRISTOPHER GONZALEZ**

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PRELIMINARY STATEMENT

This appeal arises from a series of procedural and evidentiary errors that culminated in the trial court's erroneous dismissal of Plaintiff-Appellant Christopher Gonzalez's complaint, in which he alleges claims of legal malpractice and breach of fiduciary duty against Defendants. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. The underlying court's procedural and evidentiary errors include: improperly granting summary judgment to Defendants based on an incomplete record and without the findings required under Rule 1:7-4(a); striking Plaintiff's fiduciary duty claim without explanation; excluding expert testimony without a Rule 104 hearing; and denying Plaintiff's timely motion to extend discovery based on the incorrect legal standard. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

This case arises from Defendants' representation of Plaintiff in a business transaction, in which Defendant DiBello, acting as Plaintiff's attorney, failed to advise him of terms and conditions set forth in the applicable contract(s) that expressly prohibited Plaintiff from having any involvement with a specific third-party investor who was expressly disallowed from participating in the transaction. Pa9, Pa906, Pa911, Pa912. Defendant DiBello was aware that said third-party investor introduced Plaintiff to the transaction, thereby constituting an inherent breach of the aforementioned terms and conditions. Pa906, Pa911, Pa912. Moreover,

Defendant DiBello never advised Plaintiff regarding the prohibition against the third-party investor's involvement, despite having knowledge that the investor continued to operate as a silent party to the transaction vis-a-vis the Plaintiff. Pa906, Pa911, Pa912. This deception led to the termination of the transaction, forfeiture of the deposit funds and litigation against several parties, including Plaintiff, for breach of contract, among other allegations. Pa906, Pa911, Pa912.

Notwithstanding the foregoing, which is supported by evidence of Defendants' written engagement, billing entries, and direct involvement in critical document review, the trial court granted summary judgment to Defendants based on incomplete discovery and a misapplication of legal standards. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

These procedural and evidentiary errors materially prejudiced Plaintiff. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. They foreclosed his ability to present critical evidence on damages, prevented completion of expert discovery, and cut off the right to have disputed facts resolved by a jury. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. The exclusion of expert testimony was not based on any reasoned admissibility analysis and contravened both Kemp v. State, 174 N.J. 412, 430–32 (2002) and Kashiwakura v. Beasley Firm, LLC, 2025 WL 337752 (N.J. App. January 30, 2025).

The trial court ignored controlling precedent regarding the appropriate standard for discovery extensions and compounded that error by using it as a basis

for evidentiary exclusion and dispositive relief. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. These errors demand reversal. At minimum, the case should be remanded for trial on a full evidentiary record. Alternatively, if the appellate court concludes that the material facts are undisputed, summary judgment should be entered in Plaintiff's favor.

PROCEDURAL HISTORY

Plaintiff Christopher Gonzalez filed the Complaint on October 21, 2022. Pa9. Defendants answered on November 30, 2022. Pa15.

On June 25, 2024, Defendants moved to bar Plaintiff's expert, Robert McAndrew ("McAndrew"). Pa22. Plaintiff filed a cross motion to extend discovery on June 28, 2024. Pa373-443. The court, after incorrectly applying the "exceptional circumstances" standard, partially granted Defendants' motion to bar McAndrew and denied Plaintiff's motion to extend discovery. Pa1, Pa3.

On July 26, 2024, Defendants moved for summary judgment. Pa468-579. Plaintiff filed a motion for summary judgment on July 31, 2024. Pa580-741. On September 23, 2024, the court denied both motions and dismissed Plaintiff's fiduciary duty claim without findings. Pa5, 2T.

Defendants filed a second motion for summary judgment on November 1, 2024, seeking to dismiss Plaintiff's damages claims. Pa870-958. The court conducted hearings on December 6, 2024, and January 31, 2025. 3T, 4T. The court

granted Defendants' motion for summary judgment orally at the hearing on January 31, 2025. 4T. The court entered a written order on February 20, 2025. Pa7, 3T, 4T.

Plaintiff timely appealed on April 4, 2025. Pa1348.¹

STATEMENT OF FACTS

In 2020, a group of investors coordinated their efforts for purchasing a Kia dealership. Pa906, Pa911, Pa912. This group included financier, Alex Korchmar. Pa232. They engaged in negotiations to acquire the dealership and retained Defendant-Respondent, Nicole DiBello, then an attorney at the law firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP, to provide counsel and document review services. Pa906, Pa911, Pa912. The investors selected an initial representative buyer for the transaction, who was later rejected by Kia. Pa906, Pa911, Pa912. Due to circumstances arising during the course of the initial phase of the transaction, the sellers permitted the investors to propose an alternative representative buyer, but amended the purchase agreement to include terms prohibiting any further involvement by Mr. Korchmar, indicating that breach of this condition would result

¹ Footnote 1: Transcript volumes:
- 1T: Oral Decision (August 30, 2024)
- 2T: Oral Decision (September 23, 2024)
- 3T: Oral Decision (December 6, 2024)
- 4T: Oral Decision (January 31, 2025)

in termination of the agreement and forfeiture of the deposit funds. Pa906, Pa911, Pa912.

Unaware of the details of the initial phase of the transaction, as described above, Mr. Korchmar and others approached Plaintiff-Appellant Christopher Gonzalez to step in as their representative buyer to continue the transaction. Pa906, Pa911, Pa912. DiBello failed to disclose the material terms of the agreement that prohibited third-party financier Korchmar from having any involvement in the transaction. Pa906, Pa911, Pa912. The sellers eventually learned of Korchmar's continued involvement in the transaction and terminated the agreement, retaining the entire security deposit totaling \$650,000.00. Pa906, Pa911, Pa912.

A faction of the group of investors initiated litigation against Mr. Gonzalez, Ms. DiBello, Mr. Korchmar and others in federal court for recovery of the forfeited security deposit alleging, among other things, that their failure to abide by the terms of the agreement, specifically with regard to the prohibition against Korchmar's involvement, resulted in termination of the agreement and forfeiture of the security deposit ("Zemel Litigation"). Pa906, Pa911, Pa912. Mr. Gonzalez retained separate counsel to defend him in the federal action, which was dismissed, and initiated the subject professional liability action against Defendants for their ineffective assistance of counsel in state court. Pa906, Pa911, Pa912. Plaintiff-Appellant Gonzalez presented sworn deposition testimony and expert analysis establishing

Defendants' professional negligence. Pa906-908, Pa911, Pa912. Mr. Gonzalez' defense of the federal action and pursuit of recovery from Defendants in the subject litigation caused him to suffer financial losses exceeding \$300,000.00. Pa 907-908, Pa911.

STATEMENT OF ISSUES PRESENTED

1. Did the trial court err by denying Plaintiff's timely motion to extend discovery under the incorrect "exceptional circumstances" standard instead of the "good cause" standard mandated by Rule 4:24-1(c)? Pa1, 1T.
2. Did the court improperly exclude Plaintiff's expert testimony without conducting a Rule 104 hearing, in violation of Kemp v. State, 174 N.J. 412, 430-32 (2002) and Townsend v. Pierre, 221 N.J. 36 (2015)? Pa3, 1T.
3. Did the court err in granting summary judgment to Defendants based solely on the exclusion of Plaintiff's expert, after previously finding genuine factual disputes? Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.
4. Was Plaintiff entitled to summary judgment where the facts of duty, breach, and causation were undisputed and the trial court failed to issue findings as required by Rule 1:7-4(a)? Pa5, 2T.
5. Did the court improperly strike the fiduciary duty claim without issuing findings, where the claim was factually and legally distinct from legal malpractice? Pa5, 2T.

6. Do the trial court's repeated failures to comply with Rule 1:7-4(a) mandate reversal? Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.
7. Was Plaintiff deprived of his right to a jury trial on disputed factual issues and damages causally linked to Defendants' breach of duty? Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo, applying the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). Summary judgment is inappropriate where there lies a genuine issue of material fact or when the moving party is not entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Interpretation of an attorney's engagement letter, the scope of legal representation, and written communications between a lawyer and client present legal questions for de novo review. See Katchen v. Government Employees Ins. Co., 457 N.J. Super. 600, 606–07 (App. Div. 2019); Atlantic N. Airlines v. Schwimmer, 12 N.J. 293, 301 (1953) (stating that plain meaning controls interpretation of written contracts).

All factual inferences must be drawn in favor of the non-moving party. Legal conclusions are reviewed without deference. Estate of Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 301 (App. Div. 2018). Striking of claims and evidentiary rulings are

reviewed for abuse of discretion. See Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 471 (App. Div. 2005).

A trial court's failure to comply with Rule 1:7-4(a) by issuing findings of fact and conclusions of law constitutes reversible error. See Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300–01 (App. Div. 2009).

LEGAL ARGUMENT

I. The Trial Court Erred in Denying Plaintiff's Motion to Extend Discovery Under the Wrong Legal Standard. Pa1.

Plaintiff filed a motion on June 28, 2024, seeking to extend discovery prior to the August 31, 2024, deadline. Pa373. Rule 4:24-1(c) governs such pre-deadline motions and sets forth a “good cause” standard. Nevertheless, the trial court erroneously applied a heightened “exceptional circumstances” standard, which is only appropriate after the discovery end date has passed. Pa1, Pa380.

The July 19, 2024, order denying the motion relied entirely on this misapplication of law. Pa1. The court made no finding on whether good cause existed. Pa1. Instead, it applied a legal threshold that had no basis in the record or rule. Pa1. The Appellate Division has previously reversed a similar ruling from the lower court for identical reasoning. See Estate of McClenton v. Carbone, A-2118-18T2 (App. Div. Dec. 26, 2019). There, as here, the court failed to apply the correct standard under Rule 4:24-1(c) and improperly truncated discovery. Pa1.

Defendants filed their motion to bar Mr. McAndrew’s expert opinion on June 25, 2024—just three (3) days before the June 28, 2024 discovery end date—despite having long been on notice of Mr. McAndrew’s opinions. Pa22. This gamesmanship unfairly prejudiced Plaintiff’s ability to respond and necessitated the Cross-Motion. Pa373. The trial court’s refusal to grant a short, justified extension of the discovery period under these circumstances only compounded the procedural harm. Pa1. Further, the court’s erroneous denial of Plaintiff’s discovery motion directly led to the exclusion of expert evidence and dismissal of Plaintiff’s claims, tainting all subsequent rulings. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. Reversal is required to restore the procedural integrity of the case and allow Plaintiff to develop a full evidentiary record.

II. The Trial Court Improperly Excluded Plaintiff’s Expert Without Conducting a Rule 104 Hearing. Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

The trial court excluded testimony from Plaintiff’s expert, Robert McAndrew, without conducting a Rule 104 hearing, despite previously suggesting such a hearing would occur. Pa3, Pa5, Pa7, 2T, 3T, 4T. At the September 23, 2024, hearing, the court stated that disputes regarding McAndrew’s testimony would be resolved with a Rule 104 hearing before trial.² 2T 20:20–21:10. No such hearing occurred. At the

² “There will be a need for a 104 hearing to discern what are his opinions or what are someone else’s and that may not be — you know, maybe you can resolve all of that amongst yourselves.” 2T 20:22-25.

January 31, 2025, proceeding, the trial court openly acknowledged, that the Rule 104 hearing never occurred. 4T. This procedural omission was critical.

Under Rule 104, a trial court must evaluate the admissibility of expert evidence outside the presence of a jury, particularly where foundational reliability is contested. See Kemp v. State, 174 N.J. 412, 430–32 (2002). The court’s failure to hold a hearing deprived Plaintiff of the opportunity to substantiate McAndrew’s methodology and respond to allegations of inadmissibility. Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

McAndrew’s opinion was based on litigation documents, transactional correspondence, billing records, bank statements, deposition testimony, and industry norms. Pa907-908. These materials formed a reliable basis for his causation and damages analysis under Townsend v. Pierre, 221 N.J. 36 (2015). Pa907-908. McAndrew’s supplemental June 18, 2024, report was informed by deposition transcripts of DiBello, Gonzalez, and Mr. Elliot Zemel (plaintiff in the Zemel Litigation), as well as the expert report of Defendants’ own expert, Mr. Stuart Reiser. Pa907-910. These materials formed an updated factual foundation for McAndrew’s conclusions, reinforcing that his analysis was methodologically sound and case-specific. Pa907-910. McAndrew's opinions were grounded in a review of case-specific documents, including deposition transcripts, the amended sales agreement, prohibiting the involvement of Mr. Korchmar (“Amendment”) and related emails,

billing records, and opposing expert materials. Pa907-908. He also cited legal authorities such as Ziegelheim v. Apollo, 128 N.J. 250 (1992), Procanik v. Cillo, 226 N.J. Super. 132 (App. Div. 1988), and In re Palmieri, 76 N.J. 51 (1978), which support his conclusions that DiBello breached her duty of care and caused measurable harm. Nothing in his report suggested it was a “net opinion.” Pa907-908. The trial court had already found, in its July 19, 2024 ruling, that McAndrew’s reports did not constitute a net opinion. Pa1, Pa3, Pa5, 1T, 2T. Thus, there was no legal basis to exclude them wholesale. Pa7, 3T, 4T. To the extent Defendants claim McAndrew improperly relied on Plaintiff’s first expert report authored by Gary Falkin (“Falkin”) (who was replaced with Robert McAndrew), that argument fails. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. McAndrew did not adopt Falkin’s conclusions but formed independent opinions grounded in primary source materials. Pa907-908. The trial court already found his report admissible and not a net opinion, rendering the hearsay argument irrelevant. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.³

The trial court’s exclusion referred to Morris Properties, Inc. v. Wheeler, 476 N.J. Super. 448 (App. Div. 2023), which addressed an expert’s failure to link litigation conduct to an adverse verdict. Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. That case has no bearing here. This is a transactional malpractice claim, and McAndrew expressly

³ Notably, Defendants failed to provide any expert report rebutting the reasonableness or necessity of Plaintiff’s legal fees or other damages. Their challenge to Plaintiff’s damages was unsupported by competent evidence.

traced the attorney's omissions to the client's unrecovered financial outlay. Pa907-908.

In addition, the lower court's agreement with Defendants' arguments that McAndrew was required to perform an RPC 1.5 fee audit and opine as to the reasonableness of the damages claimed by Plaintiff in his claim of malpractice against Defendants misconstrues the nature of the damages claimed. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. Plaintiff is not seeking fee-shifting or recovery of attorney's fees under RPC 1.5 or R. 4:42-9. Pa907-908. Rather, Plaintiff claims those fees as consequential damages caused by Defendants' malpractice, for which a full RPC 1.5 breakdown is not required. Pa907-908. See Ziegelheim, 128 N.J. at 263 (allowing recovery of attorney's fees as direct damages in malpractice case without application of RPC 1.5). McAndrew grounded his opinion in the facts of the transaction, causation chain, and industry-standard evaluations—not in speculative or conclusory assertions. Pa907-908. Accordingly, his analysis and resulting expert opinion regarding Defendants' ineffective assistance of counsel suffices under Townsend v. Pierre, 221 N.J. 36 (2015) and distinguishes this case from Morris Properties. Pa907-908.

Defendants' fixation on RPC 1.5 is a red herring. McAndrew did not offer an opinion on the reasonableness of attorneys' fees for fee-shifting purposes, nor was such an opinion required. Pa907-908. He assessed causation and loss based on case-

specific transactional materials, communications, billing records, and financial documents. Pa907-908. Whether a fee is ‘reasonable’ under RPC 1.5 is not dispositive in a malpractice case seeking actual damages. Moreover, Defendants’ own submissions confirm that they did not produce an expert to rebut McAndrew’s causation analysis or his quantification of Plaintiff’s financial loss. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. Any argument that Plaintiff’s expert was required to conduct an audit of every time entry is unsupported by law and improperly elevates form over substance.

Indeed, the trial court’s own July 19, 2024, order only partially excluded McAndrew’s testimony, specifically allowing standard of care opinions to proceed. Pa3. The order explicitly reserved disputes over whether McAndrew’s references to Falkin were “facts” or “opinions” for a future Rule 104 hearing—yet the court declined to hold this hearing. Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. Additionally, by February 2025, the court effectively disregarded its own prior ruling. Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. The exclusion of expert testimony without a Rule 104 hearing, and in contradiction to the court’s earlier findings, constituted reversible error and materially prejudiced Plaintiff’s ability to prove proximate cause and damages. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

III. The Court Erroneously Granted Summary Judgment to Defendants Based Solely on its Flawed Expert Exclusion. Pa5, Pa7, 2T, 3T, 4T.

The trial court initially denied Defendants’ motion for summary judgment on September 23, 2024, correctly concluding that material issues of fact precluded dispositive relief. Pa5, 2T. That denial was based on an evidentiary record that included DiBello’s deposition testimony, her billing records, and Defendants’ own concessions regarding her review and commentary on the transactional documents. Pa906, Pa911, Pa912.

However, without any intervening discovery, evidentiary hearing, or substantive change in the facts—the court reversed its own ruling and granted Defendants’ second summary judgment motion (Pa870-958) verbally at the January 31, 2025 hearing (4T) – and thereafter memorialized its decision by the February 20, 2025 order (Pa7).

The sole reason provided for this reversal was the exclusion of Plaintiff’s expert testimony—a ruling that itself was procedurally defective due to, *inter alia*, the court’s failure to hold a Rule 104 hearing. Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. The court offered no explanation for why the same factual disputes it had previously acknowledged were no longer material. Pa1, Pa3, Pa5, 1T, 2T, 3T. Such a reversal, based purely on an improperly excluded expert opinion and without new facts or legal analysis, constitutes reversible error. See Sommers v. McKinney, 373 N.J. Super. 9, 16–17 (App. Div. 2004) (finding that a trial court abuses its discretion when it revises earlier orders without changed circumstances or proper justification).

The court's abrupt change in course deprived Plaintiff of the opportunity to have his claims heard on the merits and improperly resolved factual disputes that belonged to the jury. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. Defendants' November 1 2024, summary judgment motion (Pa870-958) relied entirely on the assumption that McAndrew's opinions would be excluded. Pa932. Once that exclusion is reversed, the motion fails on its own terms.

IV. Plaintiff Was Entitled to Summary Judgment on the Legal Malpractice Claim. Pa5, 2T.

Plaintiff's motion for summary judgment, filed on July 31, 2024, was supported by a robust factual record. Pa580-741. The motion included documentary proof of DiBello's representation, including an executed engagement letter, itemized billing entries for her legal work on the transaction, and DiBello's deposition admissions that she reviewed the transactional documents and decided whether and when to provide legal feedback. Pa656-658.

Defendants admitted that DiBello reviewed the cap table, operating agreement, and side letters—all of which governed the deal's legal structure. Pa906, Pa911, Pa912. These are binding admissions that render the underlying factual framework undisputed. The language of the documents DiBello reviewed and commented on is unambiguous, and their interpretation—as with any written instrument—is a legal question. See Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953) (interpretation of documents governed by plain meaning).

Despite these uncontested facts, the trial court denied Plaintiff's motion and failed to issue any findings of fact or conclusions of law, in direct violation of Rule 1:7-4(a). Pa5. That omission frustrates appellate review and independently requires reversal. See Estate of Doerfler, 454 N.J. Super. at 308–09. Because the legal duty and scope of DiBello's representation are established by documentary evidence, and breach and causation were unrebutted by Defendants, Plaintiff was entitled to judgment as a matter of law. See Brill, 142 N.J. at 540.

In breaching her professional duties, DiBello violated multiple provisions of the Rules of Professional Conduct. She failed to communicate material risks (RPC 1.4), disregarded express seller prohibitions on third-party participation (RPC 1.1(a)), and placed her loyalty to non-clients above her duty to Gonzalez (RPC 1.7). These breaches reflect gross negligence and conflicted representation, as established by her deposition admissions and the uncontroverted record. Pa906, Pa911, Pa912. These undisputed facts and legal duties were presented in Plaintiff's summary judgment briefing filed on July 31, 2024, and remain unrebutted in any competent opposition. Pa906, Pa911, Pa912.

V. The Trial Court Erred in Dismissing the Fiduciary Duty Claim Without Findings or Legal Analysis. Pa5 (not raised below).

The trial court dismissed Plaintiff's fiduciary duty claim (Count II) in its September 23, 2024 order without issuing any oral or written findings. Pa5, 2T. The

dismissal was unexplained, unsupported by any legal reasoning, and made without reference to the pleadings or evidentiary record. Pa5, 2T. This violated Rule 1:7-4(a), which mandates findings of fact and conclusions of law for every dispositive decision.

As the motion for summary judgment briefing documented, DiBello knew that seller agreements prohibited any involvement by Alex Korchmar. Pa906, Pa911, Pa912. However, she failed to investigate or disclose that Plaintiff's ties with Korchmar, were a disqualifying association that had significant legal and financial consequences. Pa906, Pa911, Pa912. That omission violated her duty of loyalty and deprived Plaintiff of the ability to make informed decisions. Pa906, Pa911, Pa912. The fiduciary breach was distinct from mere negligence because it involved knowing nondisclosure of a disqualifying conflict by a third-party financier. Pa906, Pa911, Pa912.

The fiduciary duty claim was not duplicative of legal malpractice. It alleged an intentional breach of loyalty, which arises under longstanding principles of fiduciary law. By dismissing this claim without explanation, the court deprived Plaintiff of an opportunity to seek adjudication on a legally distinct and factually supported theory of liability. Pa5. Plaintiff's Statement of Material Facts, certified by counsel on August 1, 2024 (Pa597), and deposition testimony of Plaintiff and Defendants (Pa906, Pa911, Pa912), included transactional communications

confirming DiBello knew of Korchmar's role as financier, reviewed agreements barring his participation, and instructed Plaintiff to sign documents while leaving dates blank. Pa 597, Pa906, Pa911-12. These are direct evidence of a fiduciary breach that could not be dismissed without findings. Moreover, because the dismissal occurred before Plaintiff's summary judgment motion was filed, he was denied the opportunity to seek judgment in his favor on the fiduciary duty claim. Pa5. The trial court's failure to issue findings warrants reversal and remand for proper adjudication. Pa5. Defendants' opposition failed to dispute the material facts underlying this claim, nor did they produce a factual certification or expert opinion contesting DiBello's knowledge of Korchmar's funding or the seller's express prohibition. Pa906, Pa911, Pa912.

VI. The Trial Court's Failure to Issue Findings Violated Rule 1:7-4(a). Pa1, Pa3, Pa5, Pa7, 2T, 4T (issue preserved below; see Pa1344-1345)

Throughout this litigation, the trial court resolved all dispositive motions—including the orders denying Plaintiff's cross-motion to extend discovery (Pa1), barring expert testimony (Pa3), denying Plaintiff's motion for summary judgment (Pa5), and granting summary judgment to Defendants (Pa7)—without issuing findings of fact or conclusions of law as required by Rule 1:7-4(a). At no point did the court provide any substantive explanation for its rulings, either in a written opinion or orally on the record.

The summary judgment order of February 20, 2025 (Pa7) illustrates this failure: it states that “the record will reflect additional reasons for this decision,” referring to the prior hearing transcripts. However, a review of those transcripts confirms that the court did not articulate any findings of fact or conclusions of law regarding the evidence, expert opinions, or legal standards applied. See, e.g., 2T at 8–14 (no findings or conclusions stated at or after ruling); 4T at conclusion (no oral findings; written order issued later without explanation).

The written orders themselves either contain no reasoning or, as with the order denying Plaintiff ‘s motion for summary judgment (Pa5), recite that it “denied for the reasons stated on the record on September 23, 2024 at approximately 2:30 p.m.” Pa5.

The September 23, 2024 (2T) and January 31, 2025 (4T) transcripts, however, reveal that no such reasons were actually articulated during those hearings. 2T (no findings or conclusions of law at or after ruling); 4T (no oral findings; order issued weeks later without explanation).

With respect to the February 20, 2025 summary judgment order (Pa7) that dismissed the complaint in its entirety following the January 31, 2025 hearing (4T), Plaintiff specifically objected to the form and content of the February 20, 2025 order pursuant to the five-day rule, and preserved this issue for appellate review. Pa1344–1345.

Rule 1:7-4(a) “requires trial judges to make findings of fact and to state conclusions of law” on all appealable motions decided by written order. Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000); Estate of Doerfler, 454 N.J. Super. 298, 308–09 (App. Div. 2018). The trial court’s failure to comply with Rule 1:7-4(a) mandates reversal. Checchio, 335 N.J. Super. at 502–03.

VII. Plaintiff Was Improperly Denied the Opportunity to Proceed to a Jury on Disputed Damages. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T (not raised below)

Summary judgment is improper where genuine factual disputes exist, particularly regarding causation and damages, which must be resolved by a jury. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (summary judgment improper where factual disputes remain); Butler v. Acme Mkts., 89 N.J. 270, 283 (1982) (“summary judgment improper where reasonable minds could differ”).

Even assuming *arguendo* that disputed issues remained regarding causation or damages, Plaintiff was entitled to present those issues to a jury. The court’s exclusion of McAndrew’s expert opinion, without a Rule 104 hearing and in contravention of its own earlier ruling, effectively denied Plaintiff a chance to substantiate his claim through admissible and professionally grounded testimony. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

McAndrew’s report concluded that Plaintiff incurred in excess of \$300,000.00 in out-of-pocket losses directly tied to the failed transaction. Pa907-908. His

damages model was supported by bank transfers, written communications, and analysis of the legal risks overlooked by DiBello. Pa907-908. These are precisely the types of disputed factual determinations that require jury resolution. See Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (summary judgment improper when credibility or intent is disputed); Butler v. Acme Mkts., 89 N.J. 270, 283 (1982) (summary judgment not appropriate where “reasonable minds could differ”).

The exclusion of key expert testimony, followed by summary judgment in favor of Defendants, stripped Plaintiff of his right to a jury trial. Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T. Even apart from McAndrew, Plaintiff presented admissible testimony and documentary evidence of actual damages, including: (1) legal fees paid to DiBello for the failed transaction; (2) legal fees incurred defending the Zemel litigation; (3) litigation expenses in this malpractice case; and (4) opportunity costs and reputational harm. Pa907-908. These were supported by bank records, invoices, and Plaintiff’s own testimony. Pa907-908. Such damages are independently recoverable under Saffer v. Willoughby, 143 N.J. 256 (1996). These damages are precisely the type recoverable in malpractice actions grounded in transactional failure. See Ziegelheim v. Apollo, 128 N.J. at 262–63 (affirming recovery of legal fees, reputational harm, and litigation costs following conflicted transactional counsel).

Defendants moved to dismiss Plaintiff's damages claims on November 1, 2024, arguing that any damages beyond legal fees were speculative or unsupported. Pa907-908. The trial court never ruled on that motion, but the record—including bank statements, invoices, and Plaintiff's testimony—confirms that non-fee damages were properly substantiated and not subject to dismissal as a matter of law. Pa907-908.

The Appellate Division should reverse and remand for a jury to resolve these contested factual issues.

CONCLUSION

Plaintiff respectfully requests that the Appellate Division:

1. Reverse the February 20, 2025 order granting summary judgment to Defendants; (Pa7)
2. Reverse the September 23, 2024 order denying Plaintiff's summary judgment motion and direct entry of judgment in Plaintiff's favor on the legal malpractice claim; (Pa 5)
3. Vacate the July 19, 2024 orders excluding expert evidence and denying discovery, and remand for further proceedings including a Rule 104 hearing, if necessary; (Pa1, Pa3)

4. Reinstate the fiduciary duty claim or remand for adjudication on that claim, including consideration of Plaintiff's right to move for summary judgment on that theory; (Pa5) and
5. Reassign the matter to a different trial judge pursuant to Rule 1:12-1(d) based on prior reversals for similar procedural and evidentiary errors, including, Estate of McClenton v. Carbone, A-2118-18T2 (App. Div. Dec. 26, 2019); and
6. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

Jamie Burke

Jamie N. Burke, Esq.

Date: June 25, 2025

13016-00342-JLS

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CHRISTOPHER GONZALEZ

Plaintiff-Appellant,

vs.

NICOLE DIBELLO and
MCELROY, DEUTSCH,
MULVANEY & CARPENTER,
LLP

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO: A-002334-24-T1

On appeal from the Superior Court of
New Jersey, Law Division, Hudson
County, Docket No: HUD-L-3518-22

Sat Below:

Honorable Joseph A. Turula, P.J.Cv.

Date Submitted: July 22, 2025

**BRIEF OF DEFENDANTS-RESPONDENTS NICOLE DIBELLO AND
MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP**

On the Brief:

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PRELIMINARY STATEMENT

Plaintiff has appealed from the trial court's orders of February 20, 2025, and also reference the trial court's orders of July 19, 2024 and September 23, 2024.

This lawsuit arises from the underlying complex, multi-party case of Elliot Zemel and Koze Investments, LLC v. Alex Korchmar, Sam Asman, Chris Gonzalez, Nicole DiBello, Steve LaBonte, Edward Bussinger, Joseph Aboyoun, in the United States District Court for the District of New Jersey, C.A. No. 2:20-cv-009972-SRC-CLW (“the Zemel litigation”).

In the underlying Zemel litigation, following discovery, stipulations and orders of dismissal were entered in favor of Christopher Gonzalez and Nicole DiBello. Following those dismissals, on November 2, 2022, Gonzalez filed a complaint in the present action, in the matter of Christopher Gonzalez v. Nicole DiBello and McElroy, Deutsch, Mulvaney & Carpenter, LLP, in the Superior Court of New Jersey, Law Division, Hudson County, Docket No: HUD-L-3518-22, alleging that the attorneys were responsible for the legal fees incurred for Gonzalez's defense of the Zemel action in the United States District Court. Neither DiBello nor Gonzalez were ever found liable in the Zemel litigation. Rather, they were dismissed from the federal litigation.

The plaintiffs never entered into a retainer agreement with Nicole DiBello for legal services. The plaintiff never communicated with Nicole DiBello stating that he [Zemel] was providing funds for the underlying transaction, out of which the federal action arose. In addition, in the federal action, Zemel testified that when he provided the funds for the transaction, he notified another attorney, LaBonte, but did not notify DiBello. Also, the funds from Zemel for the transaction were wired into the escrow account of defendant Aboyoun. They were not wired into any escrow account of Nicole DiBello.

For the reasons expressed below, it is respectfully submitted that the trial court's orders of July 19, 2024, September 23, 2024, and February 20, 2025, should be affirmed. In addition, the order dismissing the breach of fiduciary duty claim as duplicative should also be affirmed.

PROCEDURAL HISTORY

A. The Federal Action under No. 2:20-cv-009972-SRC-CLW

On August 30, 2020, a complaint was filed in the matter of Elliot Zemel and Koze Investments, LLC v. Alex Korchmar, Sam Asman, Chris Gonzalez, Nicole DiBello, Steven LaBonte, Edward Bussinger, Joseph Aboyoun, in the United States District Court for the District of New Jersey, C.A. No. 2:20-cv-009972-SRC-CLW. (Pa56).

On October 20, 2022, Gonzalez filed a motion for summary judgment in the federal action, together with a statement of material facts. (Pa133).

On November 10, 2022, a stipulation and order of dismissal was entered in the federal action in favor of Christopher Gonzalez in the action under C.A. No. 2:20-cv-009972-SRC-CLW. (Pa127).

On December 1, 2022, Judge Chesler entered an order denying Gonzalez's motion for summary judgment as moot since plaintiffs had stipulated to a dismissal of their claims against Gonzalez. (Pa140).

On December 19, 2022, Judge Chesler signed and filed the stipulation and order dismissing the crossclaims of LaBonte against Gonzalez, with prejudice. (Pa142).

On March 13, 2023, Judge Chesler signed and filed the stipulation and order of dismissal regarding the claims against Nicole DiBello, dismissing those claims, with prejudice. (Pa145). All claims of plaintiff Zemel against Nicole DiBello were dismissed, with prejudice, in the federal action by order and stipulation entered by the court on March 13, 2023. (Pa145).

On April 4, 2023, Judge Chesler entered and filed the stipulation and order of dismissal of the crossclaims of defendants Edward Bussinger, Denville Partners, LLC, and Joseph Aboyoun against Gonzalez, with prejudice. (Pa150).

On July 11, 2023, Judge Chesler entered and filed the stipulation and order of dismissal with regard to the claims against defendants Edward Bussinger and Denville Partners. (Pa160).

Once LaBonte resolved his differences with plaintiffs, on November 2, 2023, a stipulation of dismissal was entered in the federal action dismissing plaintiffs' claims against LaBonte. (Pa162). The stipulation of dismissal regarding the claims against LaBonte was filed on November 3, 2023.

Then, Joseph Aboyoun resolved plaintiffs' claims against him, and Judge Chesler signed a stipulation and order dismissing plaintiffs' claims against Aboyoun on January 11, 2024. (Pa166). On January 16, 2024, Judge Chesler signed the stipulation and order of dismissal of the Zemel action. (Pa166).

B. The State Court Action under HUD-L-3518-22

On October 20, 2022, Gonzalez filed an action in Hudson County, in the matter of Christopher Gonzalez v. Nicole DiBello and McElroy, Deutsch, Mulvaney & Carpenter, LLP, under Docket No: HUD-L-3518-22. (Pa9).

On December 8, 2022, Nicole DiBello and McElroy, Deutsch, Mulvaney & Carpenter, LLP filed their Answer. (Pa15).

On July 19, 2024, the Honorable Joseph A. Turula, P.J. Cv. entered an order which (a) precluded plaintiff's expert, Gary Falkin, from testifying at

trial due to a conflict; (b) precluded plaintiff's counsel from questioning lay or expert witnesses or referring to the report and opinions of Gary Falkin; (c) ordered that any reference in the expert report of Robert McAndrew to Gary Falkin's opinions of July 24, 2023 were stricken; and (d) ordered that Robert McAndrew¹ was precluded from offering any opinions at trial referring or related to the opinions of Gary Falkin of July 24, 2023. (Pa3).

On July 19, 2024, Judge Turula entered an order denying plaintiff's cross-motion to extend discovery since no exceptional circumstances were found. (Pa1). At that point, the trial remained scheduled for September 23, 2024.

At the time of the motion hearing on August 30, 2024, Judge Turula noted that this "... mystery man sues for all this money he put in allegedly that nobody seems to know ... plaintiff's counsels' client gets dragged in and has to spend huge amounts of money." (1T, 8:25-9:1-3).

Judge Turula noted that this investor from California gave the money to someone so they could buy the Kia dealership. (1T, 10:21-23). It was not in dispute that the money came directly from Zemel in California to Joseph

¹ Mr. McAndrew entered a report on September 21, 2023. Then, on June 18, 2024, McAndrew issued a second and supplemental report.

Aboyoun's trust account. Aboyoun then disbursed those funds, and was sued by Zemel. Then, Aboyoun settled with Zemel. (1T, 12:19-25).

The defense noted that Gonzalez got into the deal without putting up anything, and got an interest of "sweat equity". (1T, 22:20-25). The defense also noted that Gonzalez told Judge Chesler, in the underlying matter on summary judgment, that he signed the amendment without legal advice. (1T, 24:1-10). Gonzalez admitted that he never told DiBello that Korchmar was involved in the transaction. (1T, 24:9-13). Gonzalez testified, in the Hudson County action, that he did not want DiBello to "undo something he signed without legal advice." (1T, 24:19-24).

On September 23, 2024, the trial court entered an order denying plaintiff Gonzalez's motion for summary judgment against defendants DiBello and McElroy for the reasons stated on the record on September 23, 2024. (Pa5).

On September 23, 2024, the trial court entered an order denying Plaintiff's motion for summary judgment for the reasons stated on the record on September 23, 2024. (Pa5). The order also provided that the court was excluding the opinion of McAndrew that an attorney had a duty to investigate the source of funds to close a transaction under Meisels v. Fox, 240 N.J. 286, 300 (2020). (Pa5).

On September 23, 2024, the trial court held argument. At that time, counsel for plaintiff requested an adjournment of the trial until at least January 2025 to give lead counsel time to come back to the office. (2T, 3:17-21). The court noted that the matter was a Track III professional malpractice matter which had a trial date of September 2024 which was adjourned. (2T, 4:4-7). After reviewing the facts of the underlying Zemel litigation, the court noted that, following the conclusion of the federal action, Gonzalez, in October of 2022, filed the Hudson County action. (2T, 4:12-25-5:1-13).

The trial court noted that in McAndrew's expert report, plaintiff's expert opined that there was an "ineffective assistance of counsel causing Mr. Gonzalez to incur substantial money damages related to the cost of his legal defense in the Zemel matter." (2T, 14:8-17).

The court then referred to the reported matter of Meisels v. Fox Rothschild, 240 N.J. 286 (2020). (2T, 15:7-25). Quoting from Justice LaVecchia's opinion, Judge Turula noted that there is no duty on lawyers involved in a real estate transaction to inquire into the origins of possible third-party interests of every source of funds that flows into a trust account for the purposes of closing on a transaction. (2T, 15:14-22 and 16:22-25).

In addition, Judge Turula noted that, pursuant to Meisels, a lawyer does not have a duty to determine if a person who comes into a deal has the financial capacity to make the payments. (2T, 16:22-25-17:1-25).

At that point, Judge Turula did strike the McAndrew opinion in which McAndrew opined that an attorney has a duty to investigate the financial capacity of the client in consummating a transaction. (2T, 17:14-20 and 18:2-6). At that point, the court denied the remainder of the defense motion, and indicating there would be a need for a 104 hearing to determine which opinions were McAndrews, and which opinions were those of Falkin. (2T, 20:20-25). However, Judge Turula held:

... I'm not going to allow him to testify that there's a duty to find out where the money comes from essentially which I think that is clearly a Meisels fact pattern ...

(2T, 21:1-4).

At that point, because of the medical issue affecting plaintiff's counsel's ability to appear for trial, Judge Turula, with the consent of all counsel, set the trial down for January 27, 2025. (2T, 22:14-17).

On November 1, 2024, defendants filed their motion for summary judgment to dismiss plaintiff's damages claims, which was based on plaintiff's failure to provide a competent expert opinion on damages, and since plaintiff could not establish actual damages.

On December 6, 2024, the trial court conducted oral argument in connection with defendants' motion for summary judgment. (3T). Defendants' motion for summary judgment was based on the fact that plaintiff's expert, McAndrew, authored a net opinion on damages, failed to apply the eight factors in RPC 1.5 in connection with claims for legal fees, and failed to establish the quantum of the damages (legal fees). (3T, 3:22-25-4:13).

McAndrew simply argued in his report that to the extent to which fees were fair, reasonable, and necessary, they qualify as damages. McAndrew failed to offer an opinion under RPC 1.5 that the fees were fair, reasonable, and necessary in his opinion. McAndrew never even looked at the invoices which formed the basis of plaintiff's claim for reimbursement! Accordingly, the defendants moved to strike the net opinion and for summary judgment. (3T, 4:12-22).

The trial court noted that, in this legal malpractice claim, it was necessary for plaintiff to establish the four elements, including duty, breach of duty, proximate cause, and damages. Citing, Cortez, 435 N.J. Super. 589, 598 (App. Div. 2014). (3T, 20:14-23). In addition, the trial court noted that damages must be real and substantial, as opposed to speculative. Citing, Grunwald, 131 N.J. 483, 495 (1993). (3T, 20:21-25).

The court found that RPC 1.5 is the “guidepost”. However, McAndrew did nothing at all with respect to analyzing the legal bills to see whether they were fair, reasonable, and necessary. (3T, 22:1-4). The trial judge then found that an expert was required for damages, under Morris, 476 N.J. Super. at 448. (3T, 22:5-12). In addition, the trial court held:

So the report of Mr. McAndrew really doesn't even -- it seems to me it's a liability expert report with a line or two thrown in about if there were fees that's the result of the malpractice. That opinion is barred ... it's a net opinion and it will not be permitted.

(3T, 22:13-18).

The court noted that it previously allowed for a 104 hearing, but that parts of the McAndrew report were barred. (3T, 22:19-21).

With respect to damages, the court did not know whether there were other experts or another way for plaintiff to establish that the bills were fair and reasonable. The court was reluctant to grant summary judgment at that point. (3T, 22:22-25-23:1-10). The trial court inquired if there was another way for plaintiff to establish damages without a legal expert. (3T, 23:10).

The defense relied on Morris Properties, in which the Appellate Division decided this issue. (3T, 23:11-16). The defense noted that plaintiff failed to produce a billing expert report. (3T, 24:15-25). Accordingly, the defense would be prejudiced if the case were permitted to go forward without plaintiff

having served an expert report on damages – the fairness, reasonableness, and necessity of the legal bills, pursuant to RPC 1.5. (3T, 24:15-25).

The court, after hearing further argument, stated:

My original statement that his one or two lines about the bills is a net opinion and that opinion is struck and that -- I don't find Sommers is applicable that this is so simple of an issue that you don't need an expert. I think that's what Sommers says in that malpractice case. I will reread it though and I will reread Morris, and so the only remaining issue is will summary judgment be granted on the rest of the case. I'll take a look at that.

(3T, 26:5-15).

The court noted the trial date of January 27, 2025, and advised an opinion would be issued in connection with the matter. (3T, 26:21-26-27:1-3).

On February 20, 2025, Judge Turula entered an order for summary judgment dismissing the legal malpractice action. The opinion notes:

The motion was originally returnable December 6, 2024. There was oral argument on December 6, 2024, at which time the court barred the portion of plaintiff's expert Robert McAndrew's opinion on damages. In a status conference on December 23, 2024, the court asked for additional briefing as to whether plaintiff could still establish damages, so as to determine if the court would grant summary judgment. On January 31, 2025, the court heard additional argument and determined that plaintiff could not establish damages and orally dismissed the matter via this summary judgment motion. The record will reflect additional reasons for this decision. The order was submitted under the five-day rule which was objected by plaintiff. The court finds nothing objectionable with this order. Motion is granted.

(Pa7).

STATEMENT OF FACTS

A. Zemel Litigation

This lawsuit arises from the underlying lawsuit of Elliot Zemel and Koze Investments, LLC v. Alex Korchmar, et al., in the United States District Court for the District of New Jersey, C.A. No. 2:20-cv-009972-SRC-CLW. (Pa56).

On October 30, 2020, Judge Chesler entered an order and opinion finding that Counts II and III of the Zemel complaint did not meet the pleadings standard set by Twombly and Iqbal, nor under R. 9(b) in connection with the claims against Nicole DiBello. Accordingly, Judge Chesler dismissed, without prejudice, Counts II and III. (Pa92). However, Zemel never filed an amended complaint against Nicole DiBello.

On November 9, 2020, defendant DiBello filed her answer to the Zemel complaint, together with crossclaims. (Pa99).

On January 29, 2021, defendant Gonzalez filed his answer to the Zemel complaint. (Pa112).

On October 20, 2022, Gonzalez filed a motion for summary judgment in the Zemel litigation. It was supported by a statement of material facts. (Pa130).

There was no opposition to Gonzalez's Motion for Summary Judgment.

On November 10, 2022, a stipulation and order of dismissal of Gonzalez with prejudice was entered by Judge Chesler. (Pa127). Judge Chesler could not understand why counsel for Gonzalez (the attorneys who were representing Gonzalez in this case) filed the motion for summary judgment when it appeared to be moot. (Pa138).

On December 1, 2022, Judge Chesler entered an order denying Gonzalez's motion for summary judgment as moot since plaintiffs and defendants stipulated to the dismissal of Zemel's claims against Gonzalez. (Pa140).

On December 19, 2022 Judge Chesler signed and filed a stipulation and order of dismissal dismissing the crossclaims of LaBonte against Gonzalez with prejudice. (Pa142).

On March 13, 2023, Judge Chesler signed and filed a stipulation and order of dismissal in favor of Nicole DiBello dismissing all claims against DiBello with prejudice. (Pa145).

On April 3, 2023, the Zemel plaintiffs provided Gonzalez with a stipulation and order of dismissal with prejudice. (Pa150).

On April 4, 2023, Judge Chesler entered and filed a stipulation and order of dismissal of crossclaims of defendants Edward Bussinger, Denville Partners, and Joseph Aboyoun against Gonzalez with prejudice. (Pa157).

Once plaintiffs resolved their difference with Bussinger and Denville Partners, LLC, on July 11, 2023, Judge Chesler entered and filed a stipulation and order of dismissal of defendants Bussinger and Denville Partners.

Once LaBonte resolved his differences with Zemel, on November 2, 2023, a stipulation of dismissal was entered dismissing plaintiffs' claims against LaBonte. (Pa162). Judge Chesler signed the order and stipulation of dismissal regarding plaintiffs' claims against LaBonte on November 3, 2023, at which time it was filed. (Pa164).

Joseph Aboyoun resolved plaintiffs' claims against him, and Judge Chesler signed the stipulation and order of dismissal of plaintiffs' claims against Aboyoun on January 11, 2024. (Pa166).

On January 16, 2024, Judge Chesler signed the stipulation and order of dismissal of the Zemel action. (Pa153).

B. The Gonzalez Litigation

On October 20, 2022, plaintiff Gonzalez filed an action in the matter of Christopher Gonzalez v. Nicole DiBello and McElroy, Deutsch, Mulvaney & Carpenter, LLP, in the Superior Court of New Jersey, Law Division, Hudson County, under Docket No: HUD-L-3518-22. (Pa9).

On December 8, 2022, defendants Nicole DiBello and McElroy, Deutsch, Mulvaney & Carpenter, LLP filed their Answer. (Pa15).

On July 19, 2024, the Honorable Joseph A. Turula, P.J. Cv. entered an order which (a) precluded plaintiff's expert, Gary Falkin, from testifying at trial due to a conflict; (b) precluded plaintiff's counsel from questioning lay or expert witnesses or referring to the report and opinions of Gary Falkin; (c) ordered that any reference in the expert report of Robert McAndrew to Gary Falkin's opinions of July 24, 2023 were stricken; and (d) ordered that Robert McAndrew was precluded from offering any opinions at trial referring or related to the opinions of Gary Falkin of July 24, 2023. (Pa3).

On July 19, 2024, Judge Turula entered an order denying plaintiff's cross-motion to extend discovery. (Pa1).

Then, on September 23, 2024, the trial court entered an order denying Gonzalez's motion for summary judgment. (Pa5).

During discovery in the Zemel litigation, DiBello provided certified answers to interrogatories. (Pa168). The answer to interrogatory number 8 confirmed that Zemel and his company, Koze Investments, never entered into a retainer agreement with DiBello for legal services. (Pa168). In addition, Zemel testified that he did not know of any communication or writing from Neil Fink to Nicole DiBello, stating that he was providing funds for the wiring. Zemel testified that at the time provided the funds he notified LaBonte. When Zemel provided the funds, he notified LaBonte, but did not notify DiBello. (Pa171).

Zemel understood that the funds were wired into the escrow account of Joe Aboyoun, and understood that the funds were not wired to any escrow account of Nicole DiBello. (Pa173).

Zemel testified that DiBello never gave him any legal advice. (Pa173). Zemel testified that he sued Joe Aboyoun because Zemel believed that Aboyoun violated his duties as escrow agent. Zemel testified that he wired the funds to Joe Aboyoun. (Pa173). Zemel testified that Neil Fink represented him and Koze Investments in the Kia transaction. (Pa173). Zemel testified that LaBonte represented Alex Korchmar as it related to the Kia transaction. (Pa173).

Ms. DiBello prepared documentation to reflect a transfer of the interest in the purchasing entities from Sam Asman to Chris Gonzalez. That was testified to by Ms. DiBello in her deposition of February 13, 2022. (Pa173). Ms. DiBello explained that once a transfer occurred from Sam Asman to Chris Gonzalez, and Chris executed a retainer agreement, then Chris became her client. (Pa173).

Gonzalez stated in his motion for summary judgment in the Zemel litigation that he signed the amendment to the agreement as a “transferring member” after it was forwarded to him by defendant Korchmar. (Pa131).

Gonzalez stated that in October 2019, his application was rejected by Kia, and he was then replaced in the purchase by Joseph Collado in November 2019.

Also, Gonzalez stated in his summary judgment motion that he was not involved with the negotiations for the amendment, and he was not represented by DiBello when it was negotiated. (Pa136).

In addition, Gonzalez confirmed that he never provided any funds to anyone involved in the subject transaction. (Pa136).

Gonzalez confirmed that his only involvement was signing the amendment to the agreement after it was already negotiated without his input or legal counsel. (Pa136). Gonzalez confirmed that he was unaware of Zemel's involvement in the deal, and was led to believe that Korchmar was funding the deal with his own money. (Pa136). Gonzalez was not informed of the involvement of any investors. (Pa136).

Gonzalez stated in his statement of material facts in support of his motion for summary judgment in the Zemel litigation that, in August 2019, Korchmar contacted him regarding the purchase, and asked that Gonzalez replace Asman as the proposed buyer due to Asman's lack of previous experience when he acquired the dealership. (Pa136).

Gonzalez admitted in his statement of material facts that Ms. DiBello made it clear that Gonzalez was not her client, stating that the amendment to

the agreement, “has not yet been fully reviewed by my client or Mr. Gonzalez.” (Pa136). Gonzalez never provided any funds to the sellers for the transaction. It was only on September 3, 2019, after the amendment was negotiated and executed, that Gonzalez retained DiBello to represent him in the purchase. (Pa137).

On July 19, 2024, Judge Turula entered the order which precluded Falkin from testifying at trial because he was conflicted out. The court’s opinion of July 19, 2024 properly provided that plaintiff’s new expert, McAndrew, could not rely on the opinions of Falkin. However, on July 19, 2024, Judge Turula entered an order denying plaintiff’s cross-motion to extend discovery. (Pa1). The order of July 19, 2024 denied plaintiff’s motion since no exceptional circumstances were found. (Pa1).

In his first report of September 21, 2023, McAndrew offered a conclusion that defendant DiBello was negligent, and her negligence was a “substantial factor in causing actual monetary damages to plaintiff.” (Pa309). On p. 12 of his report of September 21, 2023, McAndrew stated that Gonzalez was named in the lawsuit, that he had to expend legal fees to defend himself, and those legal fees are monetary damages. (Pa319).

In his second report of June 18, 2024, McAndrew made a cryptic comment at the end of his report stating that “... Mr. Gonzalez testified he

believes the total fees incurred are an estimated \$330,000. To the extent that the legal fees incurred were reasonable and necessary for his defense, they qualify as damages directly flowing from defendant DiBello's failure to zealously advocate for Mr. Gonzalez as her client. These damages are legally recoverable in the instant legal malpractice action." (Pa326).

However, what McAndrew did not do in either of his reports was author an opinion that the legal fees incurred, or any of the entries, were (a) reasonable; (b) fair; and/or (c) necessary. That was his obligation as plaintiff's expert, and he failed to comply with that obligation. At that point, with trial looming, plaintiff was in a situation where McAndrew, despite the fact that he wrote two reports, never opined that he reviewed the bills, that he reviewed the entries, that he audited the bills, and/or found that any of the bills, or any of the entries, were fair, reasonable, and/or necessary. He completely failed to do that, and failed to opine on that, or the amount, in either of his expert reports.

In addition, contrary to standard practice, McAndrew did not do the requisite analysis of the legal bills pursuant to RPC 1.5. RPC 1.5 presents the list of factors which must be considered in determining the reasonableness and necessity of the bills.

In his deposition, Gonzalez testified that he obtained a release in the Zemel litigation without paying anything to Zemel. (Pa282) Notwithstanding, he paid his attorneys \$300,000 to defend the Zemel case. (Pa282).

In his deposition, Gonzalez stated that he signed the amendment before he retained DiBello to represent him. (Pa294) When asked whether he signed the amendment without a lawyer's advice, Gonzalez stated, "I don't remember." (Pa294). However, in his motion for summary judgment, he confirmed, in his memorandum and the statement of material facts filed by his counsel, that he did sign the amendment without a lawyer's advice.

In his deposition, Gonzalez testified that he could not foresee that there was a risk of some person or entity bringing a lawsuit if the deal did not go through in the future, at some unknown time, by some unknown person or entity. (Pa297).

According to plaintiff, he met Alex Korchmar while he worked at Five Towns Nissan. (Pa269). In 2019, Gonzalez received a call from Korchmar, who indicated that he had an opportunity to buy a dealership, but needed someone like "myself with dealership experience." (Pa272). According to Gonzalez, the pitch of Korchmar was that "... he would make me a sweat equity owner ... Basically I would work for my percentage of the company." (Pa273). According to Gonzalez, Korchmar was buying the dealership and the

real estate, and it was “All his money.” (Pa274). Gonzalez was not asked to put up any money. (Pa274).

Gonzalez knew, based upon his knowledge of the business, that Kia would have to approve him. (Pa275). He knew that Kia would look at his industry credentials. (Pa275).

According to Gonzalez, Korchmar put him in touch with Rich Durgin, who he knew from Five Towns Nissan. (Pa276). The concept was that Gonzalez would handle sales, and Durgin would handle service. (Pa277).

Also, Gonzalez testified that Korchmar was putting up the money for the purchase of the assets and the property of the Denville dealership. (Pa278).

Gonzalez recalled that he entered into the retainer agreement with Ms. DiBello on September 3, 2019. (Pa285). He gave the McElroy firm a \$5,000 retainer, but never paid anything else during the period of time DiBello represented him. (Pa290).

Eventually, Gonzalez received a letter from the McElroy firm terminating representation for non-payment of fees. (Pa292). Gonzalez understood that the letter terminated legal services. (Pa292).

Gonzalez testified that he signed the amendment before he retained DiBello to represent him. (Pa294). Gonzalez confirmed that he did not put up

any of the \$600,500 deposit. (Pa295). It was his understanding that the deposit came from Korchmar. (Pa296).

Also, the agreement provided that “In the event that KMA (as defined in the ASA) rejects Christopher Gonzalez as the dealer principal (or Kia's equivalent thereof) of the buyer, then, within 30 days next succeeding said rejection by KMA, Christopher Gonzalez shall be permitted to transfer his ownership interest in the buyer and the re-purchaser to one other individual of his choosing (other than Alex Korchmar or any person(s) or entities affiliated with him, who shall be prohibited from any involvement, whatsoever with the buyer and/or the re purchaser) (the "Subsequent transferee.”)” Mr. Gonzalez understood that is what actually happened and, when he was rejected, it was transferred to Collado. (Pa306).

Gonzalez testified that if he had read the agreement, he would have known that Korchmar was prohibited from being involved in the transaction. (Pa307). Korchmar was prohibited from being involved in the deal, as set forth in the transactional document marked Gonzalez-14. (Pa308).

Gonzalez admitted that he never told DiBello that Korchmar was involved in the transaction, and that he should not be. (Pa311). Also, Gonzalez never told DiBello that he was negotiating with Korchmar, and that Korchmar brought him in to serve as the operator. (Pa311). According to Gonzalez, he

never knew the monies came from Zemel's company to fund the deal. (Pa311). Korchmar never told Gonzalez that the money was going to come from Zemel. (Pa311).

Also, Gonzalez recalled that he did receive an email from DiBello on September 9, 2019, noting that she had not been paid, and that had to be rectified. (Pa315).

Ms. DiBello reminded Gonzalez and Asman that they needed to complete the Kia application. Gonzalez testified that he understood that. (Pa316). Eventually, the application was sent into Kia on September 13, 2019. (Pa317). Gonzalez wanted the transaction to go through because it was an opportunity for him. (Pa319).

In addition, Gonzalez admitted that the email from Durgin of September 26, 2019, at 7:29 a.m., to Alex Korchmar and Chris Gonzalez, was not copied to DiBello. (Pa319). DiBello was not copied. (Pa320). That email had Korchmar's email on it, and he was not supposed to be involved in the deal. (Pa320). Gonzalez did not pick up the phone to call Ms. DiBello and tell her that he received an email from Durgin with a copy to Korchmar, and that she was not copied on it. (Pa320).

As it turned out, Kia did not approve Gonzalez. (Pa321).

Also, Gonzalez never disclosed to DiBello that he knew Korchmar from his Nissan days. (Pa322). He never told DiBello that the deposit monies came from Zemel's company, Koze. (Pa322). Gonzalez testified that he did not want DiBello to undo something that he signed without legal advice. (Pa326).

Ms. DiBello did not speak to Gonzalez at any time prior to Gonzalez signing the amendment to the agreement. (Pa697).

ARGUMENT

I. SINCE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, THE ORDERS OF THE TRIAL COURT SHOULD BE AFFIRMED (Pa1)

“An appellate court applies ‘an abuse of discretion standard to decisions made by [the] trial courts relating to matters of discovery.’” C.A. by Applegrad v. Bentolila, 219 N.J. 449, 459 (2014)(quoting, Pomerantz paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). The same standard applies to a trial court’s dismissal of a complaint for discovery violations, Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995); Woodward-Clyde Consultants v. Chem. & Pollution Sciences, Inc., 105 N.J. 464, 475 (1987), and the denial of a motion for reconsideration, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

It has been held that an abuse of discretion “arises when the decision is ‘made without a rational explanation, inexplicably departed from established

policies, or rested on an impermissible basis.” Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)(quoting, Achacoso-Sanchez v. INS, 779 F. 2d 1260, 1265 (7th Cir. 1985)). Thus, “appellate Courts are not to intervene ... absent an abuse of discretion or a judge’s misunderstanding or misapplication of the law.” Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)(citing, Pomerantz, 207 N.J. at 371).

Plaintiff was never precluded from serving expert reports in this matter. In fact, plaintiff served three expert reports. The first report was authored by Gary Falkin of July 24, 2023. (Pa410). However, Falkin was conflicted out. Then, plaintiff obtained two expert report from his next expert, Robert McAndrew, of September 21, 2023 (Pa421) and June 18, 2024 (Pa433). So, plaintiff was never precluded from serving expert reports.

Next, plaintiff was never precluded from taking depositions. Plaintiff did take the depositions of DiBello on February 13, 2022 (Pa178), January 31, 2024 (Pa458), and March 20, 2024 (Pa460). These were comprehensive depositions involving 351 pages (without exhibits), which took hours to complete. So, plaintiff was never prejudiced in connection with the discovery he needed.

In addition, plaintiff was never prejudiced in connection with paper discovery. Defendants complied, and provided answers to interrogatories,

document productions, and supplemental document productions as a result of plaintiff's requests following depositions.

The order denying the motion to extend discovery did not result in any harm or prejudice to plaintiff in this case. In fact, plaintiff does not allege any in his brief. Nowhere does plaintiff argue that, as a result of the order denying the extension of discovery, he was somehow prejudiced, and unable to prosecute his action.

In addition the trial court entered an order on May 24, 2024, extending discovery until June 28, 2024, in order to complete expert discovery. (Pa430). The motion was unopposed. The court granted the motion, pursuant to R. 4:4-1(c), and stated "... the court finds good cause exists to permit the listed discovery to be completed by the corresponding dates. The discovery end date is extended to July 15, 2024 at which point this track 3, Professional Malpractice case will have 570 days of discovery. Trial is scheduled for September 23, 2024." (Pa430).

In addition, the order noted that "The holding in Hollywood Café Diner, Inc. v. Jaffe, 473 N.J. Super. 410 (App. Div. 2022) is not applicable in this case because an Arbitration/Trial Date is being fixed by this Court after the parties received the benefit of previously granted days of discovery and multiple discovery extensions. The Court has not set the arbitration/trial date

in the early stages of litigation, or by way of automated notice to potentially cause any confusion to the parties. The dates set forth herein and the scheduling of Arbitration/Trial is so that the Court may appropriately manage discovery, set forth the terms and conditions of the within extension Order, and provide a realistic arbitration and trial date pursuant to the spirit of the 2000 Rule Amendments.” (Pa430).

The trial court ruled that any further applications for an extension of discovery would be governed by the exceptional circumstances standard if an arbitration/trial date had been fixed by the court. (Pa430).

On the eve of the deposition of plaintiff’s expert, Robert McAndrew, on June 18, 2024, plaintiff’s counsel served another supplemental expert report of McAndrew. This was served via email of Nathalie C. Hackett, Esq. and Jalessa Almonacy, Esq. of June 18, 2024 enclosing the supplemental report of Robert McAndrew, Esq. of June 18, 2024. (Pa433). Defense counsel advised plaintiff’s counsel that in view of the late service of McAndrew’s supplemental report of June 18, 2024, the deposition was canceled. (Pa444).

On July 19, 2024, Judge Turula entered an order denying plaintiff’s cross-motion to extend discovery since no exceptional circumstances were found. (Pa1). At that point, the trial had been scheduled for September 23, 2024. The order also denied plaintiff’s request to supplement or amend the

June 18, 2024 supplemental report of Robert McAndrew, and to serve another report on or before July 29, 2024.

Also, on July 19, 2024, the trial court entered an order precluding Gary Falkin from testifying at trial since he was conflicted out. (Pa3). The order also provided that plaintiff's counsel was precluded from questioning lay or expert witness, or referring to the report and opinions of Falkin; that any reference in the reports of McAndrew to the Falkin opinions of July 24, 2023 were stricken; and that McAndrew was precluded from offering any opinions at trial referring or related to the opinions of Falkin of July 24, 2023. (Pa3). The court's opinion noted that McAndrew could not rely on the opinions of Falkin, nor refer to Falkin's opinions. Facts, however, could be utilized. If the parties disagreed as to what a fact or opinion was in the Falkin report, then the trial judge would determine by decision or whether a Rule 104 hearing was required. (Pa3).

Pursuant to R. 4:46-1, "... a party against whom a claim for such affirmative relief is asserted may move at any time for a summary judgment or order as to all or any part thereof ..." At that point, in order to avoid the cost and expense of trial, the motion was properly heard and decided in advance of trial. That fosters the summary judgment rule, and the basis of the same.

The claim for damages in this case were the legal fees incurred by Gonzalez to defend the Zemel action in federal court. The damages asserted by plaintiff related to the fees incurred to defend the meritless action in federal court. However, the damages claims in the legal malpractice action failed because they were not supported by competent expert opinion that the legal fees incurred were fair, reasonable, and necessary. That opinion was glaringly absent from the expert reports of plaintiff's expert McAndrew. Therefore, the trial court properly granted the defendants' motion for summary judgment.

II. SINCE A RULE 104 HEARING WAS NOT NECESSARY IN CONNECTION WITH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, THE ORDER SHOULD BE AFFIRMED (Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T)

In Point II, plaintiff argues that the trial court improperly excluded plaintiff's expert without conducting a Rule 104 hearing. However, the court's earlier comments regarding a Rule 104 hearing had to do solely with standard of care issues. That ruling had absolutely nothing to do with damages. The eventual summary judgment motion that was granted was a summary judgment order that was issued as a result of plaintiff's failure, through his expert, to establish damages.

More specifically, at the end of the day, plaintiff was unable, despite being given a second bite at the apple, to establish damages through a competent expert opinion. That issue did not require a Rule 104 hearing.

Accordingly, this court should reject plaintiff's argument that a Rule 104 hearing was needed before Judge Turula granted the motion for summary judgment dismissing plaintiff's complaint for failure to establish damages.

Plaintiff argues that the McAndrew opinion was based on litigation, documents, correspondence, etc. However, although there is a reference to billing records in the brief, McAndrew never reviewed the bills as part of his opinion! In fact, plaintiff's counsel confirmed on the record, before Judge Turula, that plaintiff's expert McAndrew never reviewed the billing invoices.

In Point II, plaintiff argues that there was a foundation for the McAndrew opinion. However, there is absolutely no foundation for the issue on which summary judgment was eventually granted because McAndrew simply argued in his opinion that "To the extent that the legal fees incurred were reasonable and necessary for his defense, they qualify as damages ..." Of course, that is not an opinion setting forth the fairness, reasonableness, and necessity of the invoices after going through the eight elements of RPC 1.5. That is simply a conclusion without a foundation.

The issue of what McAndrew relied upon from the report of Gary Falkin (the expert who was conflicted out) had nothing to do with the damages issue on which the summary judgment motion was eventually granted.

In addition, plaintiff's argument that Morris Properties v. Wheeler, 476 N.J. Super. 448 (App. Div. 2023) does not apply should be rejected by this court. That case is absolutely controlling in connection with granting a motion for summary judgment based on a plaintiff's failure to establish damages through expert testimony. In fact, Morris Properties is the most current reported opinion in this jurisdiction on that issue, and the trial court was required to follow the same.

The plaintiff admits in his brief that McAndrew did not offer an opinion on the reasonableness of the fees. Plaintiff tries to get around the failure of his expert, by arguing that his opinion had nothing to do with fee-shifting. However, plaintiff missed the point that the opinion was in connection with the compensatory damages in this case that a jury would hear – and not a judge. So, plaintiff does not understand the law of malpractice in New Jersey, that compensatory damages must be proven. Plaintiff missed the point that they claim he was asserting for legal fees in this legal malpractice indemnification claim were the legal fees actually incurred for the defense of that frivolous federal action in Zemel. It was absolutely necessary for the expert to opine, and to go through the eight factors under RPC 1.5.

In this case, the expert never even reviewed the invoices. Accordingly, the trial court's order should be affirmed.

III. SINCE THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, THE ORDER OF THE TRIAL COURT DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED (Pa5, Pa7, 2T, 3T, 4T)

Defendants' initial motion for summary judgment was filed on July 26, 2024. (Pa468). In response to defendants' motion, plaintiff filed a motion for summary judgment on July 31, 2024. (Pa580). The plaintiff's motion for summary judgment lacked merit, and was properly denied by the trial court. It is axiomatic that a plaintiff cannot overcome a defense motion for summary judgment by simply filing his own motion for summary judgment.

A. Nicole DiBello Did Not Breach Any Duty Of Care Owed To Plaintiff; Therefore, Plaintiff's Motion For Summary Judgment Was Properly Denied (Pa5, 2T)

The record revealed that the transaction documents were negotiated, prepared, executed, and in place prior to Gonzalez's involvement in the transaction. At the time he signed, he was not represented by counsel. In fact, Gonzalez certified that to the federal court in his motion for summary judgment in the Zemel litigation. (Pa543).

Also, discovery revealed that DiBello was not involved in the effort to have Gonzalez step into the transaction. DiBello was not privy to any discussions in connection with Gonzalez coming into the transaction. She was simply presented with an individual who would step in, and who would agree

to be the principal dealer and member of the buying entities. At that time, she was representing Sam Asman. (Pa1031).

The discovery revealed that Gonzalez was, unbeknownst to DiBello, taking advice and direction from Korchmar. DiBello had no knowledge that Korchmar was at all involved in the transaction until late October 2019, several months after Gonzalez agreed to become involved in the transaction. The record showed that Gonzalez, Durgin, and Asman were very careful to exclude DiBello from their clandestine communications with Korchmar. (Pa1017). Discovery revealed that there was not one email communication on which Korchmar and DiBello were both included. DiBello had no knowledge of Korchmar's involvement. She testified that she was not aware of his involvement until much later in the transaction. (Pa458). In fact, she was assured on numerous occasions by Durgin and Asman that Korchmar was not involved. So, the suggestion by plaintiff that DiBello knew of Korchmar's involvement was not borne out by the evidence. In addition, there was no evidence in the record that Gonzalez ever disclosed his dealings with Korchmar to DiBello. That was clear from the Gonzalez deposition. (Pa462).

Plaintiff made the meritless claim that DiBello was somehow aware that the deposit monies were made by a third-party that did not have a known interest in the transaction. DiBello had no knowledge of the separate

arrangement allegedly made between Korchmar and Zemel for Zemel's company to become the ultimate owner of the Denville property. In Zemel, the court dismissed similar allegations against DiBello on the ground that they lacked plausibility, and were not supported by the facts. (Pa146).

Significantly, notwithstanding his knowledge that DiBello was stepping in as counsel in the transaction, LaBonte continued to negotiate with attorney Fink about this arrangement between Korchmar and Zemel, and none of those communications included DiBello. (Pa173). Zemel testified that he never spoke with DiBello, Fink never spoke with DiBello, and Zemel never spoke with DiBello's clients (Asman or Gonzalez) about his alleged arrangement. (Pa173).

In addition, it was clear that the monies were paid directly from Koze to Aboyou's attorney trust account. That money did not come through DiBello's attorney trust account. (Pa173). Clearly, DiBello had no reason to know, and was not advised that deposit monies were paid by anyone other than Asman, Durgin, or one of their entities. DiBello had no cause for concern.

Also, DiBello had no duty to investigate the source of the funds. She had no inclination of any wrongdoing, or of Korchmar's involvement or some side arrangement between Korchmar and Zemel. Accordingly, plaintiff's complaint lacked merit because plaintiff was seeking to hold that an attorney in a

transactional setting had limitless responsibilities. See, e.g., Meisels v. Fox Rothschild, LLP, 240 N.J. 286, 299 (2020). In fact, in Meisels, an entity wired funds for plaintiff, a non-client to the fox trust account in connection with the real estate transaction in which the firm's client was engaged. Those wire transfers themselves did not identify plaintiff as the owner of the funds, nor did they include any instructions regarding limitations or conditions. Fox distributed the funds to its client directly. Plaintiff later sued Fox for conversion and breach of fiduciary responsibility, complaining the funds belonged to it, not Fox's client. The issue was whether Fox was liable to plaintiff, who was unknown to the firm, and had not before asserted an interest in the funds. The Supreme Court found that a transactional attorney's duty is not limitless. Also, there was no formal escrow relationship between Fox and plaintiff. In addition, the court stated:

It should not be taken out of context to now support imposing a duty on lawyers involved in their client's real estate transactions to inquire into the origins and possible third-party interest of every source of funds that flows into a trust account for the purpose of closing on a transaction.

Id. at 301-302.

The Meisels court stated, “[i]mposition of such an impractical burden would frustrate closings that potentially permit malpractice action due to the delay, such as investigatory obligations would require.” Id. at 302.

In the present action, the funds went into Aboyou'n's trust account, and not into the McElroy/DiBello trust account. Put another way, if a heightened duty of investigation was not imposed by the New Jersey Supreme Court in Meisels upon an attorney who had funds in his trust account, there is no rational basis to extend or impose a heightened burden of investigation on an attorney such as DiBello, in the course of her representation of a buyer in a real estate transaction, to investigate the source of the deposit made to another attorney's trust account. Accordingly, plaintiff's claims, and the opinions of his experts, were worthless.

In addition, plaintiff did not have any evidence that DiBello knew the deposit monies did not come from an entity affiliated with Durgin or Asman, or that she was aware of the arrangement between Korchmar and Zemel. Accordingly, there was no basis for imposing a duty on DiBello to advise Gonzalez of some speculative future danger of a lawsuit, after he already signed the amendment. In fact, Gonzalez testified that he did not want DiBello to undo what he had already signed without getting the advice of counsel. (Pa462).

The deposit monies were unknowingly paid by a third-party that did not have a known interest in the transaction, and the deposit monies were paid well before the first mention of Gonzalez's name to DiBello, and well before his

formal involvement in the transaction. There was no reasonable basis for DiBello to assume that Gonzalez stood to suffer a loss or damage upon the breach. This was all the height of speculation. There was no suggestion that the deposit monies belonged to Gonzalez, and he testified they were not his. (Pa462). The potential for a loss in the nature of a forfeiture of the deposit was never in play.

The execution of the amendment without advice, and before the retention of DiBello, was of no material detriment to Gonzalez – the deposit monies were not his, and he stood to suffer no loss thereof. The money was that of Koze and Zemel. Ms. DiBello did not know that. There was no rational basis or ability for DiBello to even warn Gonzalez that he may have liability for repayment of the deposit monies sometime in the future in connection with a claim filed by a third-party who made the deposit of monies which never came into DiBello's trust account. Of course, foreseeability was not present in this case in connection with the federal lawsuit filed months later seeking repayment of deposit monies from Gonzalez. The Zemel plaintiffs eventually dismissed the federal case, and for good reason. It was meritless in connection with the claims against Gonzalez and DiBello.

With regard to plaintiff's claim that he was advised to sign a document that was undated, Gonzalez had no authority to support his allegations of legal

malpractice. Plaintiff argued that somehow signing and not dating became a factor in Gonzalez being named in the Zemel lawsuit. That claim made no sense because Gonzalez was sent the documents on September 3, 2019 (not by DiBello). (Pa775). The documents were eventually dated September 4, 2019 – one day after they were sent to Gonzalez, and after he was involved in the transaction. (Pa724). However, Gonzalez was unequivocally involved in the transaction from late August to October 9, 2019, when he was rejected by Kia, and then through November, when he formally assigned his membership interest in the buying entities to Collado. So, that allegation was also meritless.

In addition, all claims of dishonesty, fraud, deceit, or misrepresentation also failed to state a claim because they were rejected by the court in the Zemel lawsuit as lacking plausibility. This was not a case where DiBello communicated with Korchmar. This was not a case where Korchmar called DiBello. In this case, DiBello did not take any direction from Korchmar. She did not take any direction from Zemel. She complied with the RPCs by having entered into separate retainer agreement with her successive clients – Asman and Gonzalez.

Causation was lacking in this case. That was so because DiBello did not have any knowledge that the source of the funds was a party that had an unknown and undisclosed interest in the transaction. The funds were wired

into Aboyou'n's trust account, not DiBello's trust account. DiBello could not have foreseen that she herself or any of her clients would be sued for the recovery of deposit monies. Certainly, DiBello could not be held responsible for not being able to prevent or avoid Gonzalez being named as a defendant in a baseless lawsuit as related to the claim made against Gonzalez and DiBello by Zemel/Koze. Significantly, Gonzalez represented to the federal court that he signed the amendment before he retained DiBello, which really was the end of the case.

Attention is called to the reply certification of Nicole DiBello which was submitted to the trial court on August 19, 2024, along with defendants' brief in opposition to plaintiff's motion for summary judgment, and in further support of defendants' motion for summary judgment. (Pa766).

IV. PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT; THEREFORE THE ORDER OF THE TRIAL COURT SHOULD BE AFFIRMED (Pa5, 2T)

In Point IV of his brief, plaintiff argues that defendant DiBello violated the Rules of Professional Conduct (RPC 1.4, RPC 1.1(a), RPC 1.7). However, in New Jersey, a violation of the Rules of Professional Conduct does not establish a cause of action for legal malpractice. See, Camden Iron v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 384 N.J. Super. 172 (App. Div.),

certif. denied, 187 N.J. 83 (2006); see also, Baxt v. Liloia, 155 N.J. 190 (1998).

Accordingly, this reliance upon the RPCs was not appropriate, and Judge Turula correctly rejected it. (2T).

V. THE CLAIMS FOR BREACH OF FIDUCIARY DUTY WERE DUPLICATIVE AND, THEREFORE, WERE SUBJECT TO DISMISSAL (Pa5)

In Point V of his Brief, plaintiff argues that the breach of fiduciary duty claims should not have been dismissed. However, they were duplicative. In New Jersey, duplicative claims for fiduciary duty are properly dismissed. See, Cortez v. Gindhart, 435 N.J. Super. 589 (App. Div. 2014).

In Cortez, the Appellate Division, in affirming the trial court's dismissal of the breach of fiduciary duty claims, held that in alleging a breach of fiduciary duty cause of action, the only fiduciary relationship identified is that of attorney and client and the breach of fiduciary duty is only identified as "the aforementioned conduct." Cortez, similar to the instant case, failed to distinguish the breach of fiduciary duty claim from his legal malpractice claim before the trial court or on appeal. Therefore, the Appellate Division properly dismissed the breach of fiduciary duty claim as duplicative.

VI. THE COURT SHOULD REJECT PLAINTIFF'S CLAIM THAT GONZALEZ ESTABLISHED FACTUAL DISPUTES AND DAMAGES (Pa1, Pa3, Pa5, Pa7, 2T, 4T)

In this case, it is clear that there were no fact disputes in connection with the failure of the plaintiff's expert to properly opine on and establish compensatory damages (the fees incurred in the Zemel litigation). Plaintiff missed that point. The motion for summary judgment that was eventually granted was filed in connection with the failure of the plaintiff's expert to opine and to establish damages under Morris Properties v. Wheeler, 476 N.J. Super. 448 (App. Div. 2023).

The mere fact that McAndrew put a conclusion in his report that plaintiff incurred in excess of \$300,000 for the Zemel litigation is not sufficient. See, Townsend v. Pierre, 221 N.J. 36 (2015). All the expert did was simply put a number in. There was no basis for the number. The expert never reviewed the invoices, never did an RPC 1.5 analysis, and the eight factors under RPC 1.8, etc. So, no fact issue was presented for the trial court since the trial court properly granted the motion based upon the failure of the expert to establish damages pursuant to Morris Properties, *supra*.

Gonzalez was required to present expert testimony to proof "proximate cause and damages." Morris Properties, 476 N.J. Super. at 461. It is fundamental that a plaintiff must "prove damages with such certainty as the

nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate.” Kelly v. Berlin, 300 N.J. Super. at 268 (quoting, Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420 (App. Div. 1987)). “Damage awards may not be based on mere speculation.” Ibid.

In addition, “[a]n opinion lacking in foundation is worthless.” Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996). Therefore, “[w]hen an expert’s opinion is merely bare conclusion ... i.e., a ‘net opinion’, it is inadmissible.” Ibid. It has been held that the net opinion rule requires the expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion. Ibid. Also, “Where ... an expert offers an opinion without providing specific underlying reasons ... he [or she] ceases to be an aid to the trier of fact and becomes nothing more than an additional juror.” Ibid.

In this case, Judge Turula did not misuse his discretion in barring the testimony of McAndrew on damages. See, Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (an abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis).

Here, in the absence of the “why and wherefore” dealing with the compensatory damage claims for legal fees incurred in the underlying Zemel

case, McAndrew simply offered a “mere conclusion”. See, Jimenez, 286 N.J. Super. at 540. Therefore, Judge Turula did not misapply his discretion in barring the McAndrew opinion on damages, and in granting summary judgment.

VII. PLAINTIFF COULD NOT ESTABLISH ACTUAL DAMAGES; THEREFORE, THE ORDER WAS PROPERLY ENTERED BARRING THE DAMAGES CLAIMS, AND GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT (Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T)

To present a *prima facie* legal malpractice claim, the claimant must establish: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) that the attorney breached the duty owed; (3) that the breach was the proximate cause of any damages sustained; and (4) that actual damages were incurred. Cortez v. Gindhart, 435 N.J. Super. 589, 598 (App. Div. 2014). The actual damages are damages that are “real and substantial as opposed to speculative.” 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, 488 (App. Div. 1994). See also, Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97 (App. Div. 2001).

In this case, plaintiff could not establish actual damages (the fees) because the expert report he submitted was a net opinion on damages. It was

not disputed that plaintiff's expert, McAndrew, failed in two expert reports, to offer an opinion, within a reasonable degree of legal probability, that the fee bills for which the claim was made were fair, reasonable, and necessary, or any amount of them. In this case, McAndrew did not perform the requisite analysis of the fee bills in connection with whether the fee bills or whether any of the bills or invoices, or any of the entries on the invoices, were fair, reasonable, and necessary, pursuant to RPC 1.5. Therefore, it would have been an error for the trial court to admit McAndrew's opinion on damages into evidence.

The case was controlled by Morris Properties v. Wheeler, 476 N.J. Super. 448 (App. Div. 2023). It has been held that "actual damages ... are real and substantial as opposed to speculative." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014). Damages must be supported by more than mere "conjecture, surmise or suspicion." 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 488 (App. Div. 1994).

In this case, as in Morris Properties, the plaintiff's expert failed to offer a confident admissible expert opinion on damages. See, Morris Properties, 476 N.J. Super. 448 (App. Div. 2023).

As noted in Kelly v. Berlin, 300 N.J. Super. 256 (App. Div. 1997), "It is fundamental that a plaintiff must prove damages with such certainty that the nature of the case may permit, laying a foundation which will enable the trier

of fact to make a fair and reasonable estimate.” Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420 (App. Div. 1987).

In New Jersey, the law abhors damages based on mere speculation. Lewis v. Read, 80 N.J. Super. 148, 174 (App. Div. 1983). In addition, the Appellate Division does not expect trial judges to engage in mere speculation in assessing damages. See, American Sanitary Sales Co. v. State, 178 N.J. Super. 429, 436 (App. Div.), certif. denied, 87 N.J. 420 (1981). Thus, in general, “[a] jury should not be allowed to speculate without expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience.” Biunno, Current N.J. Rules of Evidence, Comment 2 on N.J.R.E. 702 (1996-1997)(cited in Kelly v. Berlin).

In this case, expert testimony was necessary regarding the invoices to determine whether they were fair, reasonable, and necessary, or whether any of the entries were fair, reasonable, and necessary under an RPC 1.5 analysis. That is the standard, and McAndrew completely failed to perform the same in his reports. Of course, juries do not have the knowledge, training, or experience to decide the fairness, reasonableness, and assessing of legal bills without expert testimony under RPC 1.5. See, Kelly, supra.

In this case, McAndrew skated around offering an opinion on the fairness, reasonableness, and necessity of the legal bills, or any of them.

McAndrew did not do that analysis, but rather avoided doing the analysis in his report. He failed to comply with his obligation to properly opine on damages as required under Morris Properties. This was a classic net opinion regarding damages. McAndrew skirted right around his obligation to offer an opinion that the bills were fair, reasonable, and necessary under an RPC, which was his obligation as an expert. He only stated, “To the extent that the legal fees incurred were reasonable and necessary for his defense ...” (Pa909). That net opinion/conclusion was not sufficient to establish damages as required under Morris Properties, 476 N.J. Super. 448 (App. Div. 2023). The average juror has no idea of the requirements of the Rules of Professional Conduct which experts must consider in connection with opining on whether fees or the entries are fair, reasonable, or necessary.

“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. at 53-54 (quoting, Polzo v. Cmty. of Essex, 196 N.J. 569, 583 (2008)). The net opinion rule “require[es] that the expert ‘gives the why and wherefore’ that supports the opinion, rather than a mere conclusion.” Davis v. Brickman Landscaping, 219 N.J. at 410 (quoting, Pomerantz Paper Corp., 207 N.J. at 372). 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.

An expert’s opinion “testimony must be based upon a consensus of the involved profession’s recognition of the standard defined by the expert” and must be supported by evidence “offered by the expert to establish the existence of the standard.” Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 330 (App. Div. 2017)(quoting, Townsend, 221 N.J. at 53). An expert must offer “objective support for his or her opinions,” and may not testify “only to a view about a standard that is ‘personal’.” Pomerantz Paper Corp., 207 N.J. at 373.

An expert must opine regarding the fairness, reasonableness, and necessity of the bills, or any of them, pursuant to RPC 1.5, after reviewing, auditing, examining, and discussing in his report those bills and invoices in the Zemel litigation. None of that was done. McAndrew simply offered a cryptic reference to the bills which, of course, was not sufficient. McAndrew never gave the whys and wherefores in connection with the legal fees incurred, any of the bills, or any of the entries on the bills. He never opined that the legal fees were reasonable, fair, and necessary. He wrote two reports, and failed to perform that analysis in either of those reports. (Pa908 and Pa909). To simply state that the legal fees are monetary damages was not enough.

CONCLUSION

For the reasons expressed above, it is respectfully submitted that the trial court's orders of July 19, 2024, September 23, 2024, and February 20, 2025, should be affirmed. In addition, the order dismissing the breach of fiduciary duty claim as duplicative should also be affirmed.

Oral argument is requested.

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

Dated: July 22, 2025

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002334-24-T1**

CHRISTOPHER GONZALEZ,

Plaintiff-Appellant,

v.

NICOLE DIBELLO and McELROY,
DEUTSCH, MULVANEY &
CARPENTER, LLP

Respondents-Defendants.

CIVIL ACTION

SUPERIOR COURT, LAW DIVISION
HUDSON COUNTY
DOCKET NO. HUD-L-3518-22

Honorable Joseph A. Turula, J.S.C.
Sat below

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PRELIMINARY STATEMENT

Defendants' brief attempts to rehabilitate a record devoid of required judicial findings by manufacturing post-hoc justifications that are legally unsupported, factually inaccurate, and contradicted by the trial transcripts and orders. This appeal turns not on rhetoric, but on what the trial court actually did and said—and more importantly, what it failed to do.

Defendants ignore the core procedural and substantive errors identified in Plaintiff's appeal, including the trial court's failure to make findings under Rule 1:7-4(a) and its improper exclusion of expert testimony without a hearing or analysis. Instead, Defendants seek to defend summary judgment by injecting confusion, mischaracterizing the record, and omitting key procedural steps.

For example, Defendants never acknowledge that the trial court's orders and transcripts contain no findings on causation or damages. Nor do they reconcile the trial court's conflicting rulings on Plaintiff's expert or the fact that the trial court acknowledged difficulty determining whether expert analysis was necessary. (3T at 4:23–25).

Even further, Defendants mischaracterize McAndrew's expert report as facially inadmissible without addressing its detailed discussion of proximate cause and actual damages, supported by his analysis of Plaintiff's financial records,

including invoices and payment documentation. (Pa308, Pa325–Pa328, Pa1284–Pa1286). These defects, which strike at the core of procedural fairness, cannot be cured through appellate argument. Reversal and remand are required to ensure that disputed facts are resolved by a jury—not assumed by the court.

ARGUMENT

I. The Trial Court’s Failure to Issue Findings of Fact and Conclusions of Law Violated Rule 1:7-4(a) and Requires Reversal.

Defendants incorrectly assert that the trial court “clearly explained its reasoning” on the record. This is belied by the transcripts and orders themselves.

The February 20, 2025 summary judgment order (Pa7) states as follows:

For the reasons stated on the record on January 31, 2025,
and the record will reflect additional reasons for this
decision...

Yet no such “additional reasons” appear in the January 31, 2025 transcript (4T). The trial court referenced its prior exclusion of McAndrew’s expert report but did not articulate findings under the net opinion doctrine, Rule 703, or causation. The trial court made no findings as to Plaintiff’s causation theories, out-of-pocket losses, or admissibility of other components of McAndrew’s report.

Similarly, the September 23, 2024 transcript (2T) documents the trial court’s denial of Plaintiff’s summary judgment motion without analysis. The corresponding order (Pa5) states: “for the reasons stated on the record,” yet the record contains no

findings of fact or conclusions of law, and merely references defense counsel's argument.

Rule 1:7-4(a) requires the trial court to “find the facts and state its conclusions of law” on all motions decided by written order. See Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502–03 (App. Div. 2000). Defendants cite no authority that excuses this mandatory obligation or permits adoption of a party's argument as a substitute.

The absence of findings precludes meaningful appellate review of the trial court's exclusion of expert testimony, treatment of disputed causation and damages evidence, and application of the summary judgment standard. See Estate of Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 308–09 (App. Div. 2018) (reversing summary judgment where trial court failed to explain basis for decision and did not make findings under Rule 1:7-4(a)).

This was not harmless error. The record lacks any basis to determine whether the trial court made findings on material fact disputes or whether it properly exercised discretion under Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (finding summary judgment is inappropriate where “the competent evidential materials . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party”). As in Doerfler reversal is required.

II. The Trial Court Improperly Excluded McAndrew's Expert Opinion Without a Rule 104 Hearing or Findings.

Defendants argue that the trial court “clearly ruled” McAndrew’s opinion inadmissible as a net opinion. This overstates the record and ignores critical procedural defects.

Initially, the trial court denied Defendants’ motion to exclude McAndrew’s testimony in full and explicitly invited supplemental briefing on whether Plaintiff could establish damages without expert testimony. Plaintiff submitted detailed briefing with evidentiary documentation. (Pa1325-Pa1341). Yet the trial court ultimately excluded McAndrew’s report in its entirety, without holding a hearing or issuing findings as to which portions, if any, remained admissible.¹

The trial court excluded McAndrew’s damages opinion because he did not opine on whether the \$300,000 in attorney fees was “reasonable and customary.” (4T at 22:6–19) (court stated, “you need an expert to determine what these bills were and were they reasonably, reasonable and customary for the 300,000 . . . A jury will not be able to determine that reasonableness without an expert such as a Mr. McAndrew who did not opine that.”). The trial court rejected Plaintiff’s argument that damages were within the common knowledge exception. (4T at 22:15–19) (court stated, “I don’t find that the common knowledge exception is there”). Plaintiff submitted

¹ Respondents cite “discussion on record” as justification (Resp Br. at 12), but fail to quote a single transcript line articulating the ruling’s factual or legal basis.

direct evidence of out-of-pocket losses, including a \$5,000 deposit to DiBello and additional fees incurred in the Zemel litigation. (4T at 6:19–24) (Plaintiff’s counsel stated, “There was also the additional attorney’s fees that DiBello has charged to plaintiff... included a \$10,000 retainer and then substantial legal fees in addition to that”); (4T at 13:9–11) (Defendants’ counsel confirmed, “He paid a retainer of 5,000 to my client to sign a retainer agreement to handle the Zemel litigation”). Plaintiff also argued that expert testimony was not required to prove these losses. (4T at 5:10–7:23) (Plaintiff’s counsel stated, “our expert opinion didn’t need to specifically quantify the damages because all you need was the expert report to show proximate cause. . .the damages are common knowledge to the jury”). The trial court excluded McAndrew’s opinions without holding a Rule 104 hearing or issuing findings under Rule 104(a). Plaintiff’s expert report linked these losses to DiBello’s breach. (Pa1339–Pa1340).

Defendants’ assertion that the trial court “properly exercised discretion” is disingenuous, particularly where the trial court failed to comply with Rule 1:7-4(a). The trial court made no findings with respect to McAndrew’s liability or causation opinions, and did not consider whether any part of his damages opinion could be admitted under the common knowledge doctrine or otherwise.

This error was compounded by the trial court's failure to consider whether any part of McAndrew's opinion remained admissible, despite having received supplemental briefing. (Pa1284.) Excluding expert testimony without conducting the required inquiry or issuing findings violates the standards set forth in Townsend v. Pierre, 221 N.J. 36, 54–55 (2015) and merits reversal.

Had the trial court evaluated the substance of McAndrew's report, it would have seen that the report included a damages model supported by concrete documentation including bank transfers, legal invoices, and contemporaneous correspondence. (Pa1339–Pa1340)

The trial court's failure to assess whether any portion of that opinion met the admissibility threshold is reversible error under Townsend. Id. at 54 (“The net opinion rule . . . mandates that experts give the why and wherefore of their opinions, not just ‘a mere conclusion.’”) (internal citation omitted).

As set forth above, the trial court's failure to assess whether any portion of McAndrew's opinion and report met the admissibility threshold constitutes reversible error. Id. at 54–55.

III. Material Fact Disputes Required Jury Determination on Causation and Damages.

Even if McAndrew's report were excluded entirely—which Plaintiff disputes—other admissible evidence of compensable harm remained, including:

1. legal fees paid to DiBello,
2. out-of-pocket litigation expenses from the Zemel action,
and
3. ongoing fees and retainer invoices supported by bank records and sworn declarations.

These categories of loss are recognized and recoverable under well-established New Jersey law. See Saffer v. Willoughby, 143 N.J. 256, 271–72 (1996) (plaintiff may recover attorneys' fees incurred in correcting or defending against consequences of former counsel's negligence); Ziegelheim v. Apollo, 128 N.J. 250, 262–63 (1992) (legal malpractice plaintiff entitled to recover losses proximately caused by breach of duty).

Defendants cite no authority justifying dismissal of malpractice claims at summary judgment where competent evidence of both breach and damages is present. Their argument seeks to convert factual disputes into dispositive findings, improperly removing credibility and causation determinations from the jury.

Whether Plaintiff would have succeeded in completing the underlying real estate transaction, and whether DiBello's failures—including the undisputed lack of client communication and due diligence—caused the transaction's collapse, are classic jury questions. See Bhagat v. Bhagat, 217 N.J. 22 (2014) (finding that summary judgment is inappropriate where material issues of intent or credibility are implicated.); Butler v. Acme Mkts., 89 N.J. 270 (1982) (proximate cause is a question of fact for the jury unless only one conclusion may be drawn).

Defendants cite no authority holding that proximate cause in a legal malpractice case may be resolved on summary judgment where, as here, the transactional record is contested and factual questions of intent, reliance, and foreseeability remain. On this record, summary judgment was improper.

CONCLUSION

Defendants' arguments cannot rehabilitate the trial court's failure to adhere to clear procedural mandates or justify the premature dismissal of a case supported by competent expert and documentary proof. For these reasons and those in Plaintiff's opening brief, this Court should reverse, vacate the dismissal, and remand for trial to ensure factual disputes are resolved by a jury, not unsupported assumptions.

Appellant's opening brief, set forth seven (7) questions presented, all of which can be answered in the affirmative as follows:

1. Did the trial court err by denying Plaintiff's timely motion to extend discovery under the incorrect "exceptional circumstances" standard instead of the "good cause" standard mandated by Rule 4:24-1(c)? Pa1, 1T.

Yes; as set forth at Argument I.

2. Did the trial court improperly exclude Plaintiff's expert testimony without conducting a Rule 104 hearing, in violation of Kemp v. State, 174 N.J. 412, 430-32 (2002) and Townsend v. Pierre, 221 N.J. 36 (2015)? Pa3, 1T.

Yes; as set forth at Argument II.

3. Did the trial court err in granting summary judgment to Defendants based solely on the exclusion of Plaintiff's expert, after previously finding genuine factual disputes? Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

Yes; as set forth at Arguments II and III.

4. Was Plaintiff entitled to summary judgment where the facts of duty, breach, and causation were undisputed and the trial court failed to issue findings as required by Rule 1:7-4(a)? Pa5, 2T.

Yes; as set forth at Argument I.

5. Did the trial court improperly strike the fiduciary duty claim without issuing findings, where the claim was factually and legally distinct from legal malpractice? Pa5, 2T.

Yes; as set forth at Argument I.

6. Do the trial court's repeated failures to comply with Rule 1:7-4(a) mandate reversal? Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

Yes; as set forth at Argument I.

7. Was Plaintiff deprived of his right to a jury trial on disputed factual issues and damages causally linked to Defendants' breach of duty? Pa1, Pa3, Pa5, Pa7, 1T, 2T, 3T, 4T.

Yes; as set forth at Arguments I and III.

Plaintiff therefore respectfully requests that the Appellate Division grant the following relief:

1. Reverse the February 20, 2025 order granting summary judgment to Defendants; (Pa7)
2. Reverse the September 23, 2024 order denying Plaintiff's summary judgment motion and direct entry of judgment in Plaintiff's favor on the legal malpractice claim; (Pa5)
3. Vacate the July 19, 2024 orders excluding expert evidence and denying discovery, and remand for further proceedings including a Rule 104 hearing, if necessary; (Pa1, Pa3)
4. Reinstate the fiduciary duty claim or remand for adjudication on that claim, including consideration of Plaintiff's right to move for summary judgment on that theory; (Pa5) and

5. Reassign the matter to a different trial judge pursuant to Rule 1:12-1(d) based on prior reversals for similar procedural and evidentiary errors, including, Estate of McClenton v. Carbone, A-2118-18T2 (App. Div. Dec. 26, 2019); and
6. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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Date: August 5, 2025